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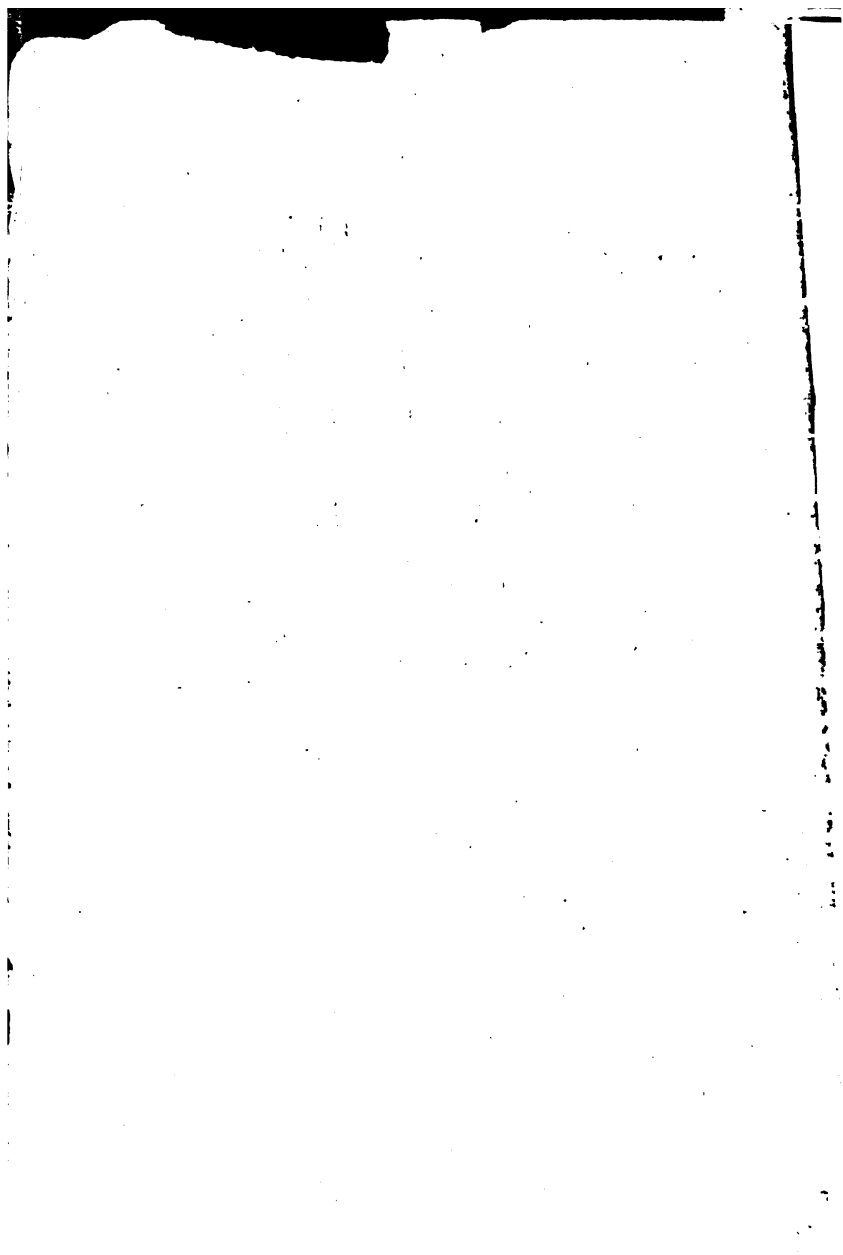
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EDITIONS
OF THE
NEW YORK CODE OF CIVIL PROCEDURE

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THE STATE CONSTITUTION, GENERAL CONSTRUCTION LAW,
RULES OF THE COURT OF APPEALS, GENERAL RULES
OF PRACTICE AND MUNICIPAL COURT ACT
OF NEW YORK CITY**

WITH A COMPLETE TOPICAL INDEX

**PREPARED
BY JOHN C. THOMSON
OF THE NEW YORK BAR**

THIRTY-EIGHTH EDITION.

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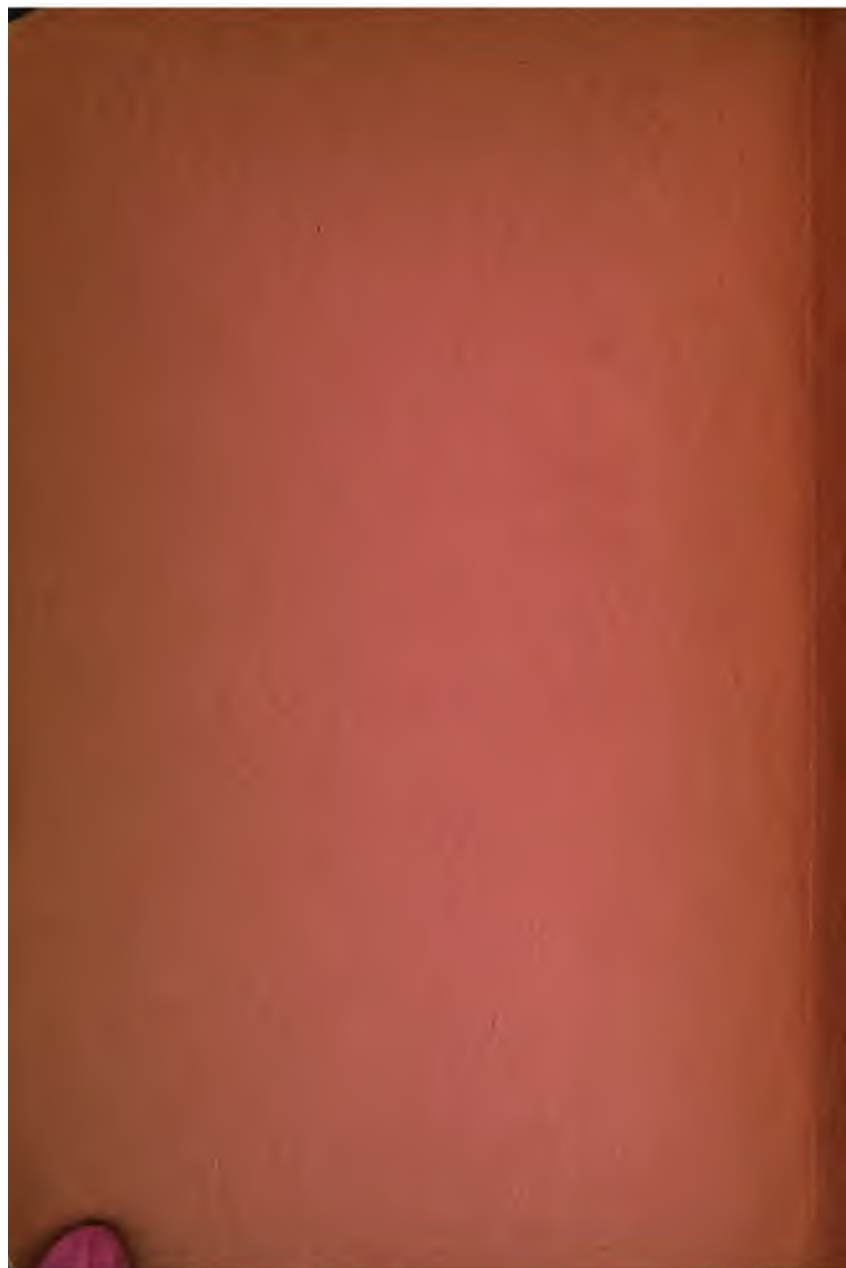


SECTIONS OF THE CIVIL CODE AMENDED BY THE LAWS OF 1913.

§ 65.....ch. 741	§ 1904.....ch. 756
319-a (new).....ch. 210	1905.....ch. 756
319-b (new).....ch. 211	2043.....ch. 544
426, subd. 1.....ch. 279	2067.....ch. 574
427.....ch. 279	2087.....ch. 574
435.....ch. 230	2088.....ch. 574
436.....ch. 230	2091.....ch. 573
438, subd. 1.....ch. 179	2101.....ch. 573
606.....ch. 112	2231, subd. 5.....ch. 448
803.....ch. 86	2235.....ch. 448
813-a (new).....ch. 85	2237.....ch. 448
841-b (new).....ch. 228	2240.....ch. 277
841-b (new).....ch. 395	2325-a (new).....ch. 69
872, subd. 7.....ch. 278	2387.....ch. 486
982-a (new).....ch. 76	2471.....ch. 480
990.....ch. 446	2510.....ch. 439
1237.....ch. 545	2520.....ch. 535
1260.....ch. 30	2558, subd. 3.....ch. 447
1356.....ch. 572	2618.....ch. 412
1509.....ch. 450	2624.....ch. 337
1598.....ch. 773	2660.....ch. 403
1672.....ch. 69	2746.....ch. 10
1688-f.....ch. 140	2842.....ch. 533
1688-g.....ch. 140	3047.....ch. 445
1688-i.....ch. 140	3048.....ch. 445
1745.....ch. 444	3312.....ch. 257
1761 (new).....ch. 536	3314.....ch. 257
1780.....ch. 60	3347, subds. 3, 4.....ch. 485
	3370.....ch. 232

MUNICIPAL COURT ACT.

§ 231-b (new).....ch. 690	§ 351-a (new).....ch. 692
310.....ch. 386	



AN ACT TO PRESCRIBE THE RULES FOR THE CONSTRUCTION OF THE CONSOLIDATED LAWS AND CODE AMENDMENTS.

Reported to the Legislature under and in pursuance to the provisions of chapter six hundred and sixty-four of the laws of nineteen hundred and four. (Laws of 1909, chap. 596. In effect May 29, 1909.)

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. In construing the consolidated laws and the amendments to the code of civil procedure and the code of criminal procedure reported to the legislature by the board of statutory consolidation constituted under the provisions of chapter six hundred and sixty-four, of the laws of nineteen hundred and four, entitled "An act to provide for the consolidation of the statutes of the state," and enacted by the legislature of nineteen hundred and nine, and in construing the act amendatory thereof, known as chapter two hundred and forty of the laws of nineteen hundred and nine, for the purpose of determining the effect of any of the provisions or sections thereof on any other provision or section thereof, or on any special law theretofore enacted, the several provisions and sections of such laws and code amendments and said act amendatory thereof shall not be considered as having been enacted or re-enacted by the legislature at the time of the passage of the consolidated laws or such code amendments or said act amendatory thereof but as having been enacted as of the various times when such provisions and sections first became laws by any earlier statutes, provided, however, that when any provision of law after its first enactment by the legislature has been amended or re-enacted, then for the purpose of its construction for the determination of its effect on other sections or provisions of the consolidated laws, it shall be considered as having been enacted at the date of such amendment or re-enactment. If in any such consolidated law and such amendments to the code of civil procedure and the code of criminal procedure as enacted by the legislature of nineteen hundred and nine or said act amendatory thereof there shall have been incorporated any provisions of law that have heretofore been superseded or impliedly repealed, the incorporation of any such provisions shall

AN ACT TO PRESCRIBE RULES

not be construed as a legislative intent to revive such superseded or repealed provisions, nor shall such incorporation in such consolidated laws be construed to indicate any legislative determination that such provisions had not been theretofore so superseded or repealed. The true purpose and intent of this act is to prescribe that the statute law of the state, so far as it has been reproduced in such consolidated laws and in such amendments to the code of civil procedure and the code of criminal procedure, and in said chapter two hundred and forty of the laws of nineteen hundred and nine, and all special laws in force at the time of the enactment of such consolidated laws, shall be of the same force and effect as they were before the enactment of such consolidated laws or code amendments or said act amendatory thereof.

NOTE SUBMITTED BY BOARD OF STATUTORY CONSOLIDATION IN ITS REPORT RELATIVE TO CODE OF CIVIL PROCEDURE AMENDMENTS.

The board was authorized by the statute creating it to report for enactment such amendments as it might deem proper and necessary to condense and simplify the existing practice and to adapt the procedure in the courts to existing conditions. An exhaustive study was made of the Code of Civil Procedure by the board pursuant to the statute and an elaborate tentative rearrangement of the Code provisions was made. This preliminary study grouped related practice provisions together according to the steps in the progress of litigation from its commencement to its termination and is embraced in three large printed volumes not submitted with the report of the board to the Legislature. It will be available however when the actual revision of the civil practice in the courts is undertaken and will serve as a basis for subsequent work on this important subject.

The preparation of the consolidated laws and the treatment of the Code of Civil Procedure was carried along side by side, and the consolidated laws as presented have been prepared so that there will be no necessity for a rearrangement of them should a revision of the Code of Civil Procedure be undertaken in the future. It was considered that the primary duty of the board was to complete the consolidated laws, and should time permit, prepare a revision of the civil practice. With the progress of the work it became evident more and more that a revision of the Code of Civil Procedure could best be accomplished unincumbered with the work of the consolidation of the substantive statutes. So delicate and difficult a task is that of revising the present civil practice of the state, which has been in use for over thirty years, that it was deemed the part of wisdom to leave this work as a separate and independent task when the attention of those intrusted with it would not be diverted or divided by the consideration of other matters. After a thorough examination of the whole subject and after due consideration of all of the phases of Code revision, it was deemed advisable at this time not to attempt a revision of the practice, but merely to remove substantive provisions and to this extent to prepare the way for actual revision.

The substantive provisions removed from the Code of Civil Procedure by the board have been distributed in various consolidated laws, but chiefly arranged in a new law known as the Judiciary Law, embracing matters relating to courts and officers thereof, including such subjects as jurors so far as relates to the selection of jurors for a term of court, court clerks, court stenographers, attendants, messengers, criers, interpreters, reporters and attorneys and counselors. A few sections have been inserted in the Civil Rights Law. Various proceedings have been incorporated in the Debtor and Creditor Law. There existed in the session laws the statute relating to general assignments for the benefit of creditors. This statute was assigned

NOTE

to the proposed Debtor and Creditor Law. It was deemed best to consolidate with this statute certain proceedings in the Code of Civil Procedure relating to debtor and creditor. Thus there has been inserted from the Code the article relating to insolvent's discharge from debts, insolvent's exemption from arrest and imprisonment, judgment debtor's discharge from imprisonment and matters of a similar character. The provisions of the Code of Civil Procedure relating to the distribution of personal property have been included in an article in the Decedent Estate Law with the provisions of the Real Property Law relating to the descent of real property. Some matters relating to executors, administrators and testamentary trustees in the revised statutes and session laws have been included under an article in this law. There are many matters of a substantive character relating to executors, administrators and testamentary trustees which might, upon a revision of the Code of Civil Procedure, be included in the Decedent Estate Law. Most of these are to be found in the surrogate's court practice which it has been deemed best, for the present, not to disturb but rather to leave until such time as the practice in the surrogate's court shall be revised. The General Corporation Law contains some proceedings from the Code of Civil Procedure. These have been removed to the General Corporation Law for the purpose of making that law as complete as possible. Thus there have been included in the General Corporation Law from the Code of Civil Procedure provisions relating to change of name, sale of corporate real property, judicial supervision of corporations and of the officers and members thereof, actions for sequestration, actions for dissolution, actions to enforce the individual liability of officers and members of corporations, actions to annul corporations, proceedings for voluntary dissolution of corporations and provisions relating to two or more of the foregoing proceedings or actions. These have been brought together in the General Corporation Law with like provisions of a substantive character as were found in the session laws, such, for instance, as the provisions relating to the powers, duties and liabilities of receivers of corporations.

The amendatory act herewith presented was made necessary by the removal from the Code of the substantive provisions above mentioned. The amendatory act does not disturb the numbering of the sections remaining in the Code and the table at the end of the proposed act shows readily the distribution of the sections eliminated. This treatment will not disturb for the present the civil practice and at the same time will remove from the Code substantive provisions and thus prepare the way for an actual revision of the practice.

Respectfully,

ADOLPH J. RODENBECK,

Chairman,

WILLIAM B. HORNBLOWER,

JOHN G. MILBURN,

ADELBERT MOOT.

Board of Statutory Consolidation.

TABLE 1.

SHOWING THE STATUTES CONSOLIDATED IN THE CODE OF CIVIL PROCEDURE BY THE LAWS OF 1909, AND ALSO THE SECTIONS OF THE CODE OF CIVIL PROCEDURE ADDED OR AMENDED BY THE LAWS OF 1909, OTHERWISE THAN BY REMOVAL TO THE CONSOLIDATED LAWS.

A.

STATUTES CONSOLIDATED IN CODE OF CIVIL PROCEDURE BY L. 1909, CH. 65.

R. S., pt. 2, ch. 5, tit. 2, § 22, amended by L. 1880, ch. 423,	
§ 1	2344a
L. 1851, ch. 134, § 33, amended by L. 1893, ch. 101, § 1	841a
L. 1877, ch. 11, § 1	356
L. 180, ch. 36, § 1, amended by L. 1888, ch. 555, § 1	961d
L. 1880, ch. 393, § 1	1404a
L. 1880, ch. 423, § 1	2344a
L. 1880, ch. 561, § 5	801a
L. 1882, ch. 340, § 1	961a
L. 1883, ch. 195, § 1	961b
L. 1884, ch. 309, § 1	2481, subd. 12
L. 1884, ch. 376, §§ 1, 2	961c
L. 1888, ch. 555, § 1	961d
L. 1889, ch. 330, § 2, amended by L. 1895, ch. 544, § 2	3306e
L. 1889, ch. 330, § 3, amended by L. 1895, ch. 544, § 3 and L.	
1908, ch. 185, § 2	2509, subd. 7
L. 1890, ch. 158, § 1	961e
L. 1891, ch. 125, § 5, pt. as amended by L. 1897, ch. 403, § 1 .	941a
L. 1892, ch. 677, § 19, last sentence	931b
L. 1893, ch. 101, § 1	841a
L. 1894, ch. 731, § 1	2705
L. 1895, ch. 544, § 2	3306a
L. 1895, ch. 544, § 3	2509, subd. 7
L. 1897, ch. 403, § 1, pt.	941a
L. 1897, ch. 622, § 1	961f
L. 1899, ch. 150, §§ 1-3	3331a
L. 1900, ch. 223, § 1	2408a
L. 1900, ch. 510, § 1	2481, subd. 12
L. 1908, ch. 185, § 2	2509, subd. 7

TABLE 1

B.

SECTIONS TRANSFERRED TO ANOTHER PART OF CODE BY L. 1909,
CH. 65.

§ 27, pt. transf'd to	§ 2507	§ 97, pt. transf'd to	§ 2512
83, pt. transf'd to	1323-a	360, pt. transf'd to	2513-a
95, pt. transf'd to	2512	432, subd. 2, pt.	
96, pt. transf'd to	2512	transferred to	931-c

C.

SECTIONS ADDED, AMENDED OR REPEALED BY LAWS OF 1909, OTHER-
WISE THAN BY THE CONSOLIDATED LAWS.

§ 140	ch. 240	§ 1300	ch. 416
141	ch. 246	1325	ch. 418
266	ch. 586	1538	ch. 428
333	ch. 387	1902	ch. 221
438, subd. 1.	ch. 492	1943	ch. 310
798	ch. 423	2417, repealed.	ch. 417
803	ch. 173	2513	ch. 270
931-c, added.	ch. 425	2537	ch. 240
961	ch. 240	2662	ch. 184
976	ch. 493	2750	ch. 183
1055	ch. 240	2822	ch. 231

TABLE 2

[Prepared by the Board of Statutory Consolidation with notes by editors of
Parson's Code.]

**SHOWING DISTRIBUTION OF SECTIONS OF THE CODE OF
CIVIL PROCEDURE IN THE CONSOLIDATED LAWS,
ARRANGED NUMERICALLY**

Where it appears that a part only of a section is distributed
the remainder is left in the Code.

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
2	Judiciary.....	2.....	Courts of record.
3	Judiciary.....	3.....	Courts not of record.
5	Judiciary.....	4.....	Sittings of courts to be public.
6	Judiciary.....	5.....	Sitting of courts on Sunday.
8	Judiciary.....	750.....	Punishment for criminal con- tempt.
9	Judiciary.....	751.....	Punishment for criminal con- tempt.
10	Judiciary.....	751.....	Contempts in view of court.
11	Judiciary.....	752.....	Commitment for criminal con- tempt.
12	Judiciary.....	754.....	Punishment for civil contempt.
13	Penal.....	602.....	Indictment for contempt.
14	Judiciary.....	753.....	Contempts punishable civilly.
15	Civil Rights....	20.....	Imprisonment for costs.
16	Civil Rights....	21.....	Imprisonment for nonpayment of money on judgment or contract.
*17	Judiciary.....	93, 94.....	Appellate division; rules of prac- tice.
18	Judiciary.....	52, 95.....	Publication of rules.
19	Judiciary.....	154, 198.....	Printing court calendars.
20	County.....	240.....	Expense of court calendars.
	State Finance....	46.....	
21	Judiciary.....	87.....	Destruction of certain papers.
*27 pt.	Judiciary.....	28, 158, 194..	Court seals.
28	County.....	245.....	Court seals.
*30	Judiciary.....	29.....	Court seals.
31	County.....	42.....	Necessaries for court terms.
	Greater New York Charter	62.....	

17. The portion of section 17 reading, "The convention shall have power to appoint and remove a reporter" is omitted as covered by Judiciary Law, section 90. The portion of section 17 relating to seals has been omitted because the subject is now covered by Judiciary Law, section 828, which continues the seals of all courts of record, and section 329, which provides for replacing seals when lost or destroyed.

27. The part relating to surrogate is repealed by act amending Code of Civil Procedure generally. See Code Civil Procedure, section 2507.

30. The provision for the expense of seals of surrogates' courts has been omitted from Judiciary Law, section 29, because superseded by County Law, section 245.—En.

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
32	Penal.....	1790.....	Liquors not to be sold in court-house.
33	Penal... ..	1790.....	Penalty for selling liquors in court-house.
34 pt.	Judiciary.....	7, 534, 540...	Adjournment of terms.
35	Judiciary.....	6.....	Adjournment of terms.
36	Judiciary.....	6.....	Adjournment of terms.
*38	Judiciary.....	8.....	Place of holding term.
*39	Judiciary.....	8.....	Filing appointment of term.
	State Finance.....	46 }	
40	Judiciary.....	9.....	Place of holding court of record.
41 pt.	Judiciary.....	10.....	Adjournment of actual session.
42	Judiciary.....	11.....	Holding court in New York.
43	Judiciary.....	12.....	Changing place of court outside New York.
46	Judiciary.....	15, 22.....	Judge not to act in certain cases.
47	Judiciary.....	20.....	Judge must not be interested in costs.
48	Judiciary.....	16.....	Judge not disqualified because a taxpayer.
49	Judiciary.....	17, 21, 471...	Judge prohibited from practicing.
50	Judiciary.....	18, 471.....	Practice by judge or his partner.
*51	Judiciary.....	19.....	Judge prohibited from taking certain fees.
54	Executive.....	29 }	{ Certificate of judge's age and service.
	Judiciary.....	23 }	
56	Judiciary.....	53, 56, 88, 460-465, 467.	Examination and admission of attorneys.
57	Executive.....	30 }	Rules for admission.
	Judiciary.....	53 }	
58	Judiciary.....	53.....	Exemptions of graduates of law schools.
59	Judiciary.....	264, 466.....	Attorney's oath and certificate.
60 pt.	Judiciary.....	470.....	Attorneys residing in adjoining states.
61	Judiciary.....	250.....	Clerks not to practice.
62	Judiciary.....	473.....	Court officers not to practice.
63	Penal.....	271.....	None but attorneys to practice in New York city.
*64	Penal.....	272, 1877....	Penalty for practicing in New York contrary to last section.
66	Judiciary.....	474, 475.....	Compensation of attorneys.
67	Judiciary.....	88, 477.....	Suspension from practice.
*68	Judiciary.....	88, 476.....	Suspension of attorney, notice.
69	Judiciary.....	478.....	Removal effective in all courts.
70	Penal.....	273.....	Punishment of attorney for deceit.

38. This section has not been expressly repealed, but has been embodied in the Judiciary Law, section 8.

39. Only partly repealed. Balance of section not expressly repealed, but embodied in Judiciary Law, section 8.

51. This section not expressly repealed by Judiciary Law, but has been embodied in section 19 thereof.

*4. See Penal Law, section 1876, instead of section 1877.

68. Only partly repealed by Judiciary Law; but see Judiciary Law, sections 88 and 476, which embody the whole of this section.—Ed.

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
71	Penal.....	273.....	Punishment for wilful delay of action.
72	Judiciary.....	479.....	Attorney not to lend name.
73	Penal.....	274.....	Attorney not to buy claims.
74	Penal.....	274.....	Attorneys prohibited from making certain loans.
75	Penal.....	274.....	Penalty for violation of last two sections.
76	Penal.....	275.....	Limitation of three last sections.
77	Penal.....	276.....	Application of preceding sections.
78	Penal.....	278.....	Partner of district attorney not to defend prosecutions.
79	Penal.....	278.....	Attorney not to defend when he has been public prosecutor.
80	Penal.....	278.....	Penalty for violation of last two sections.
81	Penal.....	279.....	Limitation of preceding sections.
82	Judiciary.....	290, 291, 293, 294.....	Qualifications of stenographers.
*83 pt.	Judiciary.....	14, 24, 295-297, 301.....	General duties of stenographers.
84	Judiciary.....	292, 298, 299, 302.....	Presentation of stenographic notes.
85	Judiciary.....	300.....	Stenographic minutes to be written out.
86	Judiciary.....	303.....	Furnishing copies of proceedings.
87	Judiciary.....	304.....	Assistant stenographers.
88	County.....	12.....	County charge; stenographers' compensation.
*89	County.....	170.....	} Appellate division clerks.
	Judiciary.....	101, 156, 159, 264, 280, 281	
90	Judiciary.....	251.....	
91	Judiciary.....	169, 199, 365, 386.....	Clerks in New York county.
92	Judiciary.....	406.....	Criers of courts of record.
93	Judiciary.....	30.....	Sheriff or constable as crier.
94	Judiciary.....	167, 200, 381, 386.....	Seals of former courts.
			Interpreters in Kings and Queens counties.
*95 pt.	Judiciary.....	168, 200.....	Attendants in Kings, Queens and Richmond counties.
*96	Judiciary.....	230, 349, 351, 354.....	Duties of attendants in Kings, Queens and Richmond counties.
*97	Judiciary.....	180, 170, 201, 231-233, 279, 403, 405.....	Court officers in certain counties.
98	Judiciary.....	343.....	Attendants in certain counties.

83. All except fourth sentence repealed by Judiciary Law; fourth sentence repealed by act amending Code of Civil Procedure generally. See Code Civil Procedure, section 1323a.

89. See County Law, section 169, instead of section 170.

95. Part relating to surrogate is repealed by act amending Code of Civil Procedure generally. See Code Civil Procedure, section 2512.

96-97. See also Code Civil Procedure, section 2512.—En.

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
99	Judiciary.....	407.....	Deputy sheriff must attend court.
104	Judiciary.....	400.....	Sheriff may command power of county.
105	Judiciary.....	401.....	Certification of persons resisting mandate.
106	Penal.....	2501	Refusal to assist sheriff.
*107	Military.....	321†	Governor may order out militia.
112	County.....	240.....	Support of poor prisoners.
113	Prison.....	340.....	Charges by sheriff for food prohibited.
114	Prison.....	341.....	Gratuities to sheriff prohibited.
115	Prison.....	342.....	Rates of charges against persons arrested.
116	Prison.....	343.....	Prisoner kept in house.
117	Prison.....	344.....	Charges for rent in prison prohibited.
119	Civil Rights....	22.....	Privilege of officers and prisoners from arrest.
120	Prison.....	420.....	Jail in New York city.
*121	County.....	90.....	County jails.
122	Prison.....	347.....	Either of several jails may be used.
123	Prison.....	345.....	Civil and criminal prisoners to be kept separate.
124	Prison.....	346.....	Males and females to be kept separate.
*125	Penal.....	1876.....	Violation by sheriff of certain provisions relating to prisoners.
*126	Prison.....	348.....	Jail physician.
127 pt.	Prison.....	355.....	Removal of sick prisoner.
128	Prison.....	349.....	Sale of liquor in jail.
129	Prison.....	350.....	Permit to bring liquor into jail.
130	Penal.....	1791.....	Penalty for bringing liquor into jail.
135	Prison.....	351.....	Designation when jail unfit.
136	Prison.....	352.....	Annulment of designation.
137	Prison.....	353.....	Designation of jail in contiguous county.
143	Prison.....	354.....	Removal of prisoners in case of fire.
144	Prison.....	356.....	Certain officers may make designation of jails.
145	Prison.....	357.....	Jail liberties.
146	Prison.....	358.....	Jail liberties.
147	Prison.....	359.....	Laying out jail liberties.
148	Prison.....	360.....	Resolution establishing jail liberties to be posted.
159	Penal.....	1839.....	Connivance at escape by sheriff.

106. Repealed because covered by Penal Law, section 1848.

107. Superseded by L. 1898, ch. 212, section 86, which was likewise repealed by Military Law (L. 1909, ch. 41).

121. See also County Law, section 183.

125. Partly repealed by Penal Law; but see Penal Law, section 1875, instead of section 1876. Section 1875 embodies the whole of this section.

126. Except part relating to county of New York repealed by Prison Law. For remainder of section see Greater New York Charter.—En.

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
182	County.....	195.....	Proceedings when new sheriff assumes office.
183	County.....	195.....	Powers of former sheriff.
184	County.....	195.....	Duties of former sheriff when new sheriff assumes office.
185	County.....	195.....	Former sheriff to execute instrument of delivery.
186	County.....	195.....	Former sheriff to execute certain process.
187	County.....	195.....	Return of new sheriff to certain orders.
188	County.....	195.....	Proceedings on neglect or refusal of former sheriff.
189	County.....	195.....	Person performing duties of sheriff.
193	Judiciary.....	51, 53.....	Court of appeals; rules.
196	Judiciary.....	54.....	Court of appeals; terms.
197	Judiciary.....	54.....	Court of appeals; terms.
198	Judiciary.....	57.....	Court of appeals; appointment of officers.
*199	Judiciary.....	62, 256.....	Court of appeals; clerk.
200	Judiciary.....	257, 258.....	Court of appeals; deputy clerk.
201	Judiciary.....	257, 258.....	Court of appeals; clerk.
202	Judiciary.....	58, 259, 262..	Court of appeals; judges' clerks.
203	County.....	12.....	Court of appeals; judges' offices.
	Judiciary.....	55.....	
*209	Judiciary.....	800.....	State reporter; reporter of court of ap. eals.
210	Judiciary.....	60, 61, 431...	State reporter; duty.
211	Judiciary.....	433.....	Publication of reports of court of appeals.
212	Executive.....	31.....	Copyright of reports of court of appeals.
	Judiciary.....	435.....	
213	Executive.....	32.....	Distribution of reports of court of appeals.
214	Judiciary.....	432.....	Unreported decisions of court of appeals.
215	Judiciary.....	432.....	State reporter; expiration of term.
216	Judiciary.....	256, 434.....	Unreported opinions of court of appeals.
219	Judiciary.....	70.....	Appellate division; departments.
220 pt.	Judiciary.....	71, 72, 77, 81, 82, 85, 90..	Appellate division; organization, location and powers.
221	Judiciary.....	101, 106, 109, 111, 267, 268, 270, 271, 307, 347.....	Appellate division; clerks, attendants and stenographers.
222	Judiciary.....	73.....	Appellate division; revocation of designations.
223	Judiciary.....	72.....	Appellate division, designations to be filed.

199. The words, "and the trustees must assign him suitable rooms therein for that purpose," are covered by Public Buildings Law, section 3.

209. This section repealed by Judiciary Law, because covered by Judiciary Law, section 430.—Ed.

TABLE 2

C DE	CONSOLIDATED LAW		Subject
	Law	Section	
225	Judiciary.....	78.....	Appellate division; terms.
226	Executive.....	33.....	{ Appellate division; appointment of terms.
	Judiciary.....	79.....	
	State Finance..	46.....	
228	Judiciary.....	80.....	Appellate division; associate justice to preside in certain cases.
229 pt.	Judiciary.....	148.....	Holding special and trial terms.
230	Judiciary.....	81.....	Appellate division; justices necessary to a decision.
*232	Judiciary.....	84, 96, 148-150, 264...	Supreme court; appointment of terms.
233	Executive.....	33.....	{ Supreme court; publication of appointments.
		151.....	
	State Finance..	46.....	
234	Judiciary.....	79, 153.....	Extraordinary terms of appellate division and supreme court.
235 pt.	Judiciary.....	155.....	Supreme court justices in Erie county.
237	Judiciary.....	86.....	Designation of trial justices in certain cases.
238	Judiciary.....	152.....	Place of holding special and trial terms.
239 pt.	Judiciary.....	148, 276, 364, 404.....	Special terms at chambers.
*[241]	Judiciary.....	89, 264, 342, 402.....	
242	Judiciary.....	342, 402.....	Appellate division; officers attending.
243	Judiciary.....	90.....	Fees of officers attending term of appellate division.
244	Judiciary.....	91.....	Supreme court reporter; appointment.
245	Judiciary.....	92, 264, 437, 439-441...	Supreme court reporter; special meeting for appointment.
246	Judiciary.....	442, 443.....	Supreme court reporter; duties.
247	Judiciary.....	264, 438.....	Supreme court reporter; publication of reports.
248	Judiciary.....	31, 32.....	Papers for use of supreme court reporter.
249	Executive.....	444.....	{ Supreme court reporter; copyright of reports.
250	Judiciary.....	445.....	
251	Judiciary.....	161, 309, 316.	Supreme court reporter; compensation.
252	Judiciary.....	312.....	Stenographers in Kings county.
253	Judiciary.....	161, 309.....	Assistant stenographer in Kings county.
254	Judiciary.....	161, 309.....	Stenographers in second and ninth districts; appointment.

232. The last three sentences of section 232, relating to seals for the appellate division, have been omitted, as the matter is covered by the Judiciary Law, section 28, which continues the seals of all courts of record, and section 29, which provides for replacing seals when lost or destroyed.

241. This section was actually repealed by the Judiciary Law, section 800, but does not seem to have been transferred to the Judiciary or any other law. Provisions of this section probably covered by Code Civ. Proc., section 772.—En

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
257	Judiciary.....	316.....	Stenographers in second and ninth districts; salaries.
258	Judiciary.....	161, 309, 313.	Stenographers for certain judicial districts; appointment and salaries.
259	Judiciary.....	313.....	Stenographers in certain judicial districts; payment of salaries.
260	Judiciary.....	164, 314.....	Stenographers in certain judicial districts; expenses.
262	Judiciary.....	162, 163.....	Temporary stenographers.
334	Penal.....	1634.....	Misconduct of interpreters in New York city.
355 pt.	Judiciary.....	190, 191.....	Terms of county court.
356	County.....	240 }	Appointment of terms of county court.
	Judiciary.....	192 }	
357	Judiciary.....	533, 541.....	Jurors for county court.
*358	County.....	12 }	County court stenographers.
	Judiciary.....	197 }	
359	Judiciary.....	196, 197, 285, 318, 319...	County court stenographers in Kings and Queens counties.
*360 pt.	Judiciary.....	198, 382-385.	County court interpreters in Kings county.
361	Judiciary.....	197, 318, 319.	County court stenographers in certain counties.
*432 pt.	Gen. Corporation.	16.....	Designation by foreign corporation of person upon whom to serve papers.
450 pt.	Domestic Relations.....	51.....	Married woman's property.
548	Civil Rights.....	23.....	Arrest in civil proceeding.
545	Civil Rights.....	24.....	Privilege from arrest of officers of courts.
716 pt.	General Corporation.....	243.....	Certain receivers can hold real property.
744	County.....	240 }	Supervision of court funds by state comptroller.
	State Finance.....	4 }	
746 pt.	Banking.....	44.....	Depositories of court funds to give bonds and pay interest.
752 pt.	Banking.....	45.....	Depositories of court funds to keep books of account.
851	Penal.....	1622.....	Swearing falsely in any form, perjury.
860	Civil Rights....	25.....	Witness exempt from arrest.
863	Civil Rights....	25, 26.....	Certain arrests void.
864	Civil Rights....	26.....	Liability of sheriff for making arrest of exempt person.

358. This section only partly repealed by County Law, section 260 and Judiciary Law, section 800; but the whole of this section has been embodied in County Law, section 12 and Judiciary Law, section 197.

360. Part relating to surrogate repealed by act amending Code of Civil Procedure generally. See Code Civ. Pro., section 2513a.

432. As to copy of designation of person upon whom to make service, as evidence, formerly a part of subd. 2 of this section, see Code Civ. Pro., section 831a, which was added by L. 1906, ch. 65.—Ed.

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
*961 pt.	County.....	161	} Officers to search files and make transcripts.
	Judiciary.....	255	
	Penal.....	1875	
	Public Officers.....	66	
977 pt.	Judiciary.....	83	Power of appellate division as to calendars.
1007 pt.	Judiciary.....	305	Apportionment of stenographers' salaries.
1027	Judiciary.....	502	Qualifications of trial jurors.
1028	Judiciary.....	502	Qualifications of trial jurors.
1029	Judiciary.....	503	Certain public officers disqualified to serve as jurors.
1030	Judiciary.....	546	Exemption from jury duty.
1081	Judiciary.....	547, 548	Evidence of exemption.
1032	Judiciary.....	550	Discharge, when not qualified or exempt.
1033	Judiciary.....	544	Persons excused from serving.
1034	Judiciary.....	590, 600, 680, 687	Certain public officials disqualified
1035	Judiciary.....	500	Jury lists.
1036	Judiciary.....	501	Names to be taken from assessment rolls.
1037	Judiciary.....	505	Duplicate jury lists to be made and filed.
1038	Judiciary.....	508	County clerk to make and deposit ballots.
1039	Judiciary.....	509-512	County clerk to destroy old ballots and notify town clerk in case of failure to receive jury lists.
1040	Judiciary.....	506	Jurors to serve three years.
1041	Judiciary.....	507	Application of provisions to cities.
	Code Crim. Pro.	229	Drawing grand jurors in Albany county.
1042	Judiciary.....	513, 528, 543, 545	Drawing of jurors.
1043	Judiciary.....	514	Notice of drawing.
1044	Judiciary.....	26, 515	Officers to attend drawing.
1045	Judiciary.....	516	Officers to attend on adjourned day.
1046	Judiciary.....	517	Certain officers required to be present at drawing.
1047	Judiciary.....	518-520	Mode of drawing.
1048	Judiciary.....	536	Sheriff must notify jurors.
1049	Judiciary.....	504	Jury lists must be furnished applicants.
1050	Judiciary.....	521, 522	Matter of keeping jurors' names.
1051	Judiciary.....	523	Jurors who have served must be drawn again when other lists exhausted.
1052	Judiciary.....	524	Third jury box.
1053	Judiciary.....	525	Destruction of old ballots in third box.
1054	Judiciary.....	526	Drawing from third box.
1055 pt.	Judiciary.....	537	Sheriff must notify jurors from third box.

961. See Penal Law, section 1874, instead of section 1875 —En.

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Section	Section	
1056	Judiciary.....	527.....	Drawing of additional jurors.
1057	Judiciary.....	529, 530.....	Proceedings on drawing additional jurors.
1058	Judiciary.....	513, 528, 543, 545, 565....	Drawing of additional jurors.
1059	Judiciary.....	531, 532, 538.	Additional jurors drawn during term.
1060	Judiciary.....	539, 542.....	Attendance of jurors at county court.
1061	Judiciary.....	535.....	Powers of deputy county clerk as to jurors.
1062	Judiciary.....	590, 680.....	Application of provisions to New York and Kings counties.
1072	Judiciary.....	551.....	Fine of juror for nonattendance.
1073	Judiciary.....	552, 553.....	Fine of juror for nonattendance.
1074	Judiciary.....	554.....	Fine for nonattendance at trial term.
1075	Judiciary.....	555, 556.....	Duty of clerk and sheriff.
1076	Judiciary.....	557.....	Proceedings on order to show cause.
1077	Judiciary.....	558.....	Discontinuance of proceedings against delinquent juror.
1078	Judiciary.....	590, 680.....	Application of provisions to New York and Kings counties.
1079	Judiciary.....	598.....	Qualification of trial juror; New York.
1080	Judiciary.....	599.....	Qualification of trial juror; New York.
1081	Judiciary.....	635.....	Persons exempt in New York.
1082	Judiciary.....	636.....	Evidence of exemption in New York.
1083	Judiciary.....	637.....	Duty of military officers.
1084	Judiciary.....	549, 641-644.	Jury year.
1085	Judiciary.....	630, 647.....	Jurors excused in New York.
1086	Judiciary.....	608, 616, 631.	Jurors excused in New York.
1087	Judiciary.....	632, 633.....	Duty of juror applying to be excused.
1088	Judiciary.....	645.....	Service in court not of record as an excuse.
1089	Judiciary.....	634.....	Clerk to make return to commissioner after term.
1090	Judiciary.....	591, 592, 595, 601, 638, 640	Duty of commissioner in New York.
1091	Judiciary.....	593, 594.....	Assistants to commissioner.
1092	Judiciary.....	602.....	Public officers must aid commissioner.
*1093	Judiciary.....	800.....	Expenses of commissioner's office.
1094	Judiciary.....	597, 639.....	Preparation of lists of jurors in New York.
1095	Judiciary.....	603.....	Failure to testify as to liability to serve.
1096	Judiciary.....	604.....	Commissioner to return the lists to county clerk.

1093. This section is omitted because superseded by L. 1901, ch. 602, section 1.—Ed.

TABLE 2

Code	CONSOLIDATED LAW		Subject
	Law	Section	
1097	Judiciary.....	606, 607.....	Commissioner to make and deposit ballots.
1098	Judiciary.....	610.....	Number of jurors to be drawn.
1099	Judiciary.....	612.....	Officers to attend drawing.
1100	Judiciary.....	611.....	Notice of drawing.
1101	Judiciary.....	613.....	Officers attending on adjourned day.
1102	Judiciary.....	614.....	Jury must not be drawn on adjourned day unless officers attend.
1103	Judiciary.....	615, 617.....	Mode of drawing jurors in New York.
1104	Judiciary.....	618.....	Drawing where term consists of parts.
1105	Judiciary.....	623.....	Commissioner to notify jurors.
1106	Judiciary.....	619, 624, 625.....	Commissioner to notify jurors.
1107	Judiciary.....	628, 629.....	Proceedings when less than majority of persons drawn are notified.
1108	Judiciary.....	621, 622, 626, 627.....	Drawing of additional jurors.
1109	Judiciary.....	646, 649.....	Fine for non-attendance.
1110	Judiciary.....	648.....	Arrest for failure to attend.
1111	Judiciary.....	800*.....	Jurors for district courts.
1112	Judiciary.....	605, 609, 620.....	Sheriff's jury.
1113	Judiciary.....	650-659.....	Remitting and enforcing jury fines.
1117	Judiciary.....	660-663.....	Uncollected fines.
1118	Judiciary.....	664.....	Commissioner to receive fines and account therefor.
1119	Judiciary.....	665-667.....	Corporation counsel to prosecute.
1120	Penal.....	1232.....	Penalty for physician giving false certificate.
1121	Judiciary.....	596.....	Persons required to furnish information.
1122	Penal.....	1235.....	Bribery of officer by juror.
1123	Penal.....	1235.....	Officer accepting bribes.
1124	Penal.....	1235.....	Penalty for concealing offer to take bribe.
1125	Penal.....	1233.....	False swearing, perjury.
1126	Judiciary.....	686.....	Qualification of jurors in Kings county.
1127	Judiciary.....	720.....	Exemption in Kings county.
1128	Judiciary.....	721, 722.....	Evidence of exemption.
1129	Judiciary.....	714, 715.....	Jury service.
1130	Judiciary.....	716.....	Jurors excused.
1131	Judiciary.....	718, 719.....	Return by clerk after adjournment of term.
1132	Judiciary.....	681, 688-690, 723.....	Selection of trial jurors.
1133	Judiciary.....	682, 683.....	Commissioner to collect fees for county.

1111. This section is omitted because covered by Municipal Court act (L. 1902, ch. 580, section 233).—Ed.

TABLE 2

Code	CONSOLIDATED LAW		Subject
	Law	Section	
1134	Judiciary.....	800	Expenses of commissioner.
1135	Judiciary.....	691, 692.....	Selection of jurors.
1136	Judiciary.....	693, 694.....	Commissioner to publish notice of list.
1137	Judiciary.....	695.....	Commissioner to prepare list and file transcript.
1138	Judiciary.....	696, 698.....	Supplemental lists.
1139	Judiciary.....	697.....	Commissioner to make and deposit ballots.
1140	Judiciary.....	699, 700.....	Officers to attend drawing.
1141	Judiciary.....	701.....	Proceedings preliminary to drawing.
1142	Judiciary.....	702.....	Mode of drawing.
1143	Judiciary.....	703.....	Certificate to be made and boxes sealed.
1144	Judiciary.....	704.....	Subsequent drawings.
1145	Judiciary.....	705.....	Proceedings when first box exhausted.
1146	Judiciary.....	706, 709.....	Commissioner to notify juror.
1147	Judiciary.....	710, 717, 725.....	Notification of jurors.
1148	Judiciary.....	711.....	Commissioner to make return of jurors notified.
1149	Judiciary.....	707, 712.....	Additional jurors.
1150	Judiciary.....	708, 713.....	Jurors in certain special proceedings.
1151	Judiciary.....	26	Compensation to judges attending drawing.
1152	Judiciary.....	724.....	Fine for non-attendance.
1153	Judiciary.....	726.....	Arrest for non-attendance.
1154	Judiciary.....	727-729.....	Commissioner to notify jurors fined to appear.
1155	Judiciary.....	730, 731.....	Commissioner to collect jury fines.
1156	Judiciary.....	732-735.....	Fines not collected to be docketed.
1157	Judiciary.....	736.....	Discharge of lien created by docket.
1158	Penal.....	1234.....	Commissioner omitting name; felony.
1159	Penal.....	1234.....	Commissioner's wilful neglect; misdemeanor.
1160	Penal.....	1236.....	False information; misdemeanor.
1161	Penal.....	1232.....	Physician giving false certificate.
1162	Judiciary.....	684, 685.....	Commissioner to report and pay over money.
1190 pt.	Civil Rights....	12.....	Alien not entitled to special jury.
1192	Civil Rights....	14.....	Jurors not to be questioned for verdicts.
1193	Penal.....	375.....	Penalty when juror takes gift.
1194	Penal.....	377.....	Penalty for embracery.
1195	Judiciary.....	559.....	Fine of trial juror for non-attendance in special proceeding.
1196	Judiciary.....	560.....	Fine for neglect or misconduct of officer in charge of jury from special proceeding.

1134. This section is omitted because superseded by L. 1932, ch. 564, section 6.

1151. The first sentence of this section is omitted because superseded by the last amendment of the section.—Ed.

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
1197	Judiciary.....	561.....	Notice of fine in special proceeding.
1198	Judiciary.....	562.....	Special return of delinquency and fine to county court.
1199	Judiciary.....	563, 564.....	Collection or remission of fine.
1206	Dom. Relations	51.....	Judgment for or against married woman.
1268	Debtor & Cred'r	150.....	Discharge of bankrupt from judgment.
1273 pt.	Dom. Relations	51.....	Confession of judgment by married woman.
1737	Lien.....	206.....	Action to foreclose lien on chattel.
1738	Lien.....	207.....	Warrant to seize chattel and proceedings thereupon.
1739	Lien.....	208.....	Judgment in action to foreclose lien on chattel.
1740	Lien.....	209.....	Action to foreclose lien on chattel in inferior court.
1741	Lien.....	210.....	Application of sections.
1761	Dom. Relations	8.....	Marriage after divorce for adultery.
1781	Gen. Corp.....	90.....	Action against officers of corporation for misconduct.
1782	Gen. Corp.....	91.....	Who may bring such an action.
1783	Gen. Corp.....	92.....	Visitatorial power over corporation.
1784	Gen. Corp.....	100.....	Action by judgment-creditor for sequestration.
1785	Gen. Corp.....	101.....	Action to dissolve a corporation.
1786	Gen. Corp.....	102.....	Action to dissolve a corporation.
1787	Gen. Corp.....	103.....	Temporary injunction.
1788	Gen. Corp.....	104, 106.....	Temporary and permanent receiver.
1789	Gen. Corp.....	105.....	Powers and duties of temporary receiver.
1790	Gen. Corp.....	109.....	Officers and stockholders may be made parties.
1791	Gen. Corp.....	110.....	Separate action against officers and stockholders.
1792	Gen. Corp.....	111.....	Proceedings in such actions.
1793	Gen. Corp.....	112.....	Distribution of property by judgment.
1794	Gen. Corp.....	113.....	Recovery of stock subscriptions.
1795	Gen. Corp.....	114.....	Liability of directors and stockholders.
1796	Gen. Corp.....	115.....	Construction of provision relating to dissolution and enforcement of liability.
1797	Gen. Corp.....	130.....	Action by attorney-general to annul corporation when legislature directs.
1798	Gen. Corp.....	131.....	Action by attorney-general to annul corporation by leave of court.
1799	Gen. Corp.....	132.....	Notice of application for leave to commence action.
1806	Gen. Corp.....	133.....	Jury trial.

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
1801	Gen. Corp.....	134.....	Injunction and receiver in final judgment.
1802	Gen. Corp.....	135.....	Temporary injunction.
1803	Gen. Corp.....	136.....	Filing and publishing judgment.
1804	Gen. Corp.....	300.....	Certain corporations excepted from certain provisions.
1805	Gen. Corp.....	301.....	Testimony of officers and agents.
1806	Gen. Corp.....	302.....	Injunction staying action in certain cases.
1807	Gen. Corp.....	303.....	Proving claims of creditors.
1808	Gen. Corp.....	304.....	Action by attorney-general against corporations or officers.
1809 pt.	Gen. Corp.....	305.....	Requisites of injunction in certain cases.
1810	Gen. Corp.....	306.....	Appointment of receivers.
1811	Gen. Corp.....	307.....	Judicial suspension or removal of officer of corporation.
1812 pt.	Gen. Corp.....	308.....	Application of last three sections.
1813 pt.	Gen. Corp.....	309.....	Misnomer not available.
1843	Deced. Estate..	101.....	Liability of heirs and devisees for death of decedent.
1859	Deced. Estate..	102.....	Liability of heirs and devisees where will provides for debts.
1868	Deced. Estate..	28.....	Action by child born after making a will or by subscribing witness.
1909	Pers. Property.	41.....	Rights of transferee of claim or demand.
1910	Pers. Property.	41.....	Transfer of claim.
1911	Gen. Business..	375.....	Transfer of cause of action for usury.
1912	Pers. Property.	41.....	Assignment of judgment.
1942	Debtor & Cred'r	230, 231.....	Compositions by joint debtors.
1944	Debtor & Cred'r	232, 233.....	Compositions by joint debtors.
1966 pt.	County.....	201.....	District attorney to bring action on forfeited recognizance.
1967	County.....	201.....	District attorney to pay over certain moneys collected.
1968	County.....	201.....	District attorney to render certain account.
2149	Debtor & Cred'r	50.....	Insolvent's discharge; who may be discharged.
2150	Debtor & Cred'r	51.....	Insolvent's discharge; application.
2151	Debtor & Cred'r	52.....	Insolvent's discharge; petition.
2152	Debtor & Cred'r	53.....	Insolvent's discharge; consent of creditors.
2153	Debtor & Cred'r	54.....	Insolvent's discharge; consent of representative or trustee.
2154	Debtor & Cred'r	55.....	Insolvent's discharge; consent of corporation.
2155	Debtor & Cred'r	56.....	Insolvent's discharge; consent of partnership.
2156	Debtor & Cred'r	57.....	Insolvent's discharge; effect of consent where petitioner is joint debtor.
2157	Debtor & Cred'r	58.....	Insolvent's discharge; consent of purchaser of debt.

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
2158	Debtor & Cred'r 59.....		Insolvent's discharge; consenting creditor must relinquish security.
2159	Debtor & Cred'r 60.....		Insolvent's discharge; penalty when creditor swears falsely.
2160	Debtor & Cred'r 61.....		Insolvent's discharge; affidavit of consenting creditor.
2161	Debtor & Cred'r 62.....		Insolvent's discharge; non-resident creditor to annex accounts.
2162	Debtor & Cred'r 63.....		Insolvent's discharge; petitioner's schedule.
2163	Debtor & Cred'r 64.....		Insolvent's discharge; petitioner's affidavit.
2164	Debtor & Cred'r 65.....		Insolvent's discharge; order to show cause.
2165	Debtor & Cred'r 66.....		Insolvent's discharge; publication and service of order.
2166	Debtor & Cred'r 67.....		Insolvent's discharge; hearing.
2167	Debtor & Cred'r 68.....		Insolvent's discharge; putting cause on calendar.
2168	Debtor & Cred'r 69.....		Insolvent's discharge; filing specifications and demanding jury trial.
2169	Debtor & Cred'r 70.....		Insolvent's discharge; opposing creditor to file proofs.
2170	Debtor & Cred'r 71.....		Insolvent's discharge; proceedings if jurors do not agree.
2171	Debtor & Cred'r 72.....		Insolvent's discharge; non-resident wife.
2172	Debtor & Cred'r 73.....		Insolvent's discharge; examination of insolvent.
2173	Debtor & Cred'r 74.....		Insolvent's discharge; discharge.
2174	Debtor & Cred'r 75.....		Insolvent's discharge; assignment.
2175	Debtor & Cred'r 76.....		Insolvent's discharge; assignment.
2176	Debtor & Cred'r 77.....		Insolvent's discharge; trustees.
2177	Debtor & Cred'r 78.....		Insolvent's discharge; effect of assignment.
2178	Debtor & Cred'r 79.....		Insolvent's discharge; discharge.
2179	Debtor & Cred'r 80.....		Insolvent's discharge; order to show cause where trustee refuses to give certificate.
2180	Debtor & Cred'r 81.....		Insolvent's discharge; proceedings on return of order.
2181	Debtor & Cred'r 82.....		Insolvent's discharge; recording papers.
2182	Debtor & Cred'r 83.....		Insolvent's discharge; effect of discharge.
2183	Debtor & Cred'r 84.....		Insolvent's discharge; effect of discharge.
2184	Debtor & Cred'r 85.....		Insolvent's discharge; effect of discharge.
2185	Debtor & Cred'r 86.....		Insolvent's discharge; release from imprisonment.
2186	Debtor & Cred'r 87.....		Insolvent's discharge; void discharge.
2187	Debtor & Cred'r 88.....		Insolvent's discharge; invalidity may be proved.

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
2188	Debtor & Cred'r	100.....	Insolvent's exemption; who may be exempted.
2189	Debtor & Cred'r	101.....	Insolvent's exemption; petition.
2190	Debtor & Cred'r	102.....	Insolvent's exemption; petitioner's schedule.
2191	Debtor & Cred'r	103.....	Insolvent's exemption; petitioner's affidavit.
2192	Debtor & Cred'r	104.....	Insolvent's exemption; order to show cause.
2193	Debtor & Cred'r	105.....	Insolvent's exemption; hearing.
2194	Debtor & Cred'r	106.....	Insolvent's exemption; assignment.
2195	Debtor & Cred'r	107.....	Insolvent's exemption; discharge.
2196	Debtor & Cred'r	108.....	Insolvent's exemption; recording papers.
2197	Debtor & Cred'r	109.....	Insolvent's exemption; release.
2198	Debtor & Cred'r	110.....	Insolvent's exemption; debts and demands not affected.
2199	Debtor & Cred'r	111.....	Insolvent's exemption; void discharge.
2200	Debtor & Cred'r	120.....	Judgment debtor's discharge, who may be discharged.
2201	Debtor & Cred'r	121.....	Judgment debtor's discharge; application.
2202	Debtor & Cred'r	122.....	Judgment debtor's discharge, petition.
2203	Debtor & Cred'r	123.....	Judgment debtor's discharge, contents of petition.
2204	Debtor & Cred'r	124.....	Judgment debtor's discharge; affidavit of petitioner.
2205	Debtor & Cred'r	125.....	Judgment debtor's discharge, notice to creditors.
2206	Debtor & Cred'r	126.....	Judgment debtor's discharge; notice when service cannot be made.
2207	Debtor & Cred'r	127.....	Judgment debtor's discharge; notice when state a creditor.
2208	Debtor & Cred'r	128.....	Judgment debtor's discharge; hearing.
2209	Debtor & Cred'r	129.....	Judgment debtor's discharge; adjournment.
2210	Debtor & Cred'r	130.....	Judgment debtor's discharge; proceedings on adjournment.
2211	Debtor & Cred'r	131.....	Judgment debtor's discharge; assignment.
2212	Debtor & Cred'r	132.....	Judgment debtor's discharge; discharge.
2213	Debtor & Cred'r	133.....	Judgment debtor's discharge; petitioner's property still liable.
2214	Debtor & Cred'r	134.....	Judgment debtor's discharge; new execution.
2215	Debtor & Cred'r	135.....	Judgment debtor's discharge; trustee.
2216	Debtor & Cred'r	136.....	Judgment debtor's discharge; creditor may notify debtor to apply for discharge.
2217	Debtor & Cred'r	137.....	Judgment debtor's discharge; failure so to apply.

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
2218	Debtor & Cred'r 138.....		Judgment debtor's discharge; discharge of debtors to state or United States.
2219	Prison..... 390.....		Care of prisoner's property; application.
2220	Prison..... 391.....		Care of prisoner's property; who may apply.
2221	Prison..... 392.....		Care of prisoner's property; creditor must relinquish security.
2222	Prison..... 393.....		Care of prisoner's property; petition.
2223	Prison..... 394.....		Care of prisoner's property; copy of sentence and affidavit.
2224	Prison..... 395.....		Care of prisoner's property; proceedings on presentation of papers.
2225	Prison..... 396.....		Care of prisoner's property; proceedings on return of order.
2226	Prison..... 397.....		Care of prisoner's property; order appointing trustee.
2227	Prison..... 398.....		Care of prisoner's property; removal of trustee.
2228	Prison..... 399.....		Care of prisoner's property; distribution of property.
2229	Prison..... 400.....		Care of prisoner's property; property to be delivered to prisoner on discharge.
2230	Prison..... 401.....		Care of prisoner's property; application of article.
2266	Judiciary..... 754.....		Contempt proceedings; application.
2267	Judiciary..... 755.....		Contempt proceedings; summary punishment.
2268	Judiciary..... 756.....		Contempt proceedings; warrant without notice.
2269	Judiciary..... 757.....		Contempt proceedings; order to show cause or warrant to attach.
2270	Judiciary..... 758.....		Contempt proceedings; notice to delinquent officer.
2271	Judiciary..... 757.....		Contempt proceedings; orders granted out of court.
2272	Judiciary..... 759.....		Contempt proceedings; contempt before referee.
2273	Judiciary..... 760-762.....		Contempt proceedings; effect of order and warrant.
2274	Judiciary..... 763.....		Contempt proceedings; affidavit and warrant to be served on accused.
2275	Judiciary..... 764.....		Contempt proceedings; undertaking.
2276	Judiciary..... 765.....		Contempt proceedings; execution of warrant.
2277	Judiciary..... 766.....		Contempt proceedings; undertaking for discharge.
2278	Judiciary..... 767.....		Contempt proceedings; habeas corpus.

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
2279	Judiciary.....	768.....	Contempt proceedings; sheriff to file undertaking.
2280	Judiciary.....	769.....	Contempt proceedings; interrogatories.
2281	Judiciary.....	770.....	Contempt proceedings; final order directing punishment.
2282	Judiciary.....	771.....	Contempt proceedings; punishment on return of habeas corpus.
2283	Judiciary.....	772....	Contempt proceedings; punishment on return of order to show cause.
2284	Judiciary.....	773.....	Contempt proceedings; amount of fine.
2285	Judiciary.....	774.....	Contempt proceedings; length of imprisonment.
2286	Judiciary.....	775.....	Contempt proceedings; release of offender.
2287	Judiciary.....	776.....	Contempt proceedings; indictment of offender.
2288	Judiciary.....	777.....	Contempt proceedings; proceedings when accused does not appear.
2289	Judiciary.....	778.....	Contempt proceedings; prosecution of undertaking.
2290	Judiciary.....	779.....	Contempt proceedings; prosecution of undertaking in name of people.
2291	Judiciary.....	780.....	Contempt proceedings; sheriff liable for taking insufficient sureties.
2292	Judiciary.....	781.....	Contempt proceedings; misconduct at trial term.
2293	Judiciary.....	790.....	Collection of fine; schedule of fines imposed.
2294	Judiciary.....	791.....	Collection of fine; warrant.
2295	Judiciary.....	791.....	Collection of fine; warrant when delinquent non-resident of county.
2296	Judiciary.....	792.....	Collection of fine; execution of warrant.
2297	Judiciary.....	793.....	Collection of fine; return of warrant.
2298	Judiciary.....	794.....	Collection of fine; proceedings if fine not collected.
2299	Judiciary.....	795.....	Collection of fine; contents of schedule annexed to warrant.
2300	Judiciary.....	796.....	Collection of fine; liability of sheriff for omission of duty.
2301	Judiciary.....	797.....	Collection of fine; special provisions for collection.
2411	Gen. Corp.....	60.....	Change of name; by corporation.
2412 pt.	Gen. Corp.....	61.....	Change of name; contents of petition.
2413 pt.	Gen. Corp.....	62.....	Change of name; notice of presentation of petition.

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
*2414	County..... 161.....	}	Change of name; order changing name.
	Gen. Corp..... 63.....		
*2415	Gen. Corp..... 64.....		Change of name; when to take effect.
2416	Gen. Corp..... 65.....		Change of name; substitution of new name in pending action.
*2417	County..... 161.....	}	Change of name; reports of names changed.
	Executive..... 34.....		
	Judiciary..... 254.....		
2419	Gen. Corp..... 170.....		Voluntary dissolution of corporation; grounds for petition.
2420	Gen. Corp..... 171-173.....		Voluntary dissolution of corporation; petition when directors or trustees divided.
2421	Gen. Corp..... 174.....		Voluntary dissolution of corporation; contents of petition.
2422	Gen. Corp..... 175.....		Voluntary dissolution of corporation; affidavit to be annexed.
2423	Gen. Corp..... 176, 178, 181, 182, 184....		Voluntary dissolution of corporation; presentation of petition, temporary receiver.
2424	Gen. Corp..... 179.....		Voluntary dissolution of corporation; order to be published.
2425	Gen. Corp..... 180.....		Voluntary dissolution of corporation; service of order.
2426	Gen. Corp..... 185-187.....		Voluntary dissolution of corporation; hearing.
2427	Gen. Corp..... 188, 189.....		Voluntary dissolution of corporation; papers.
2428	Gen. Corp..... 190.....		Voluntary dissolution of corporation; application for final order.
2429	Gen. Corp..... 191, 192, 194.		Voluntary dissolution of corporation; final order.
2430	Gen. Corp..... 193.....		Voluntary dissolution of corporation; certain sales and transfers void.
2431	Gen. Corp..... 177, 195.....		Voluntary dissolution of corporation; certain corporations excepted.
2431-a	Gen. Corp..... 277.....		Voluntary dissolution of corporation; commissions of receiver.
2431-b	Gen. Corp..... 268.....		Voluntary dissolution of corporation; final accounting.
2471-a	Public Officers.. 80.....		Delivery of public books and papers.

2414. Only partly repealed. This section also amended by act amending Code of Civil Procedure generally. See present section 2414.

2415. It was only intended to repeal this section as far as it related to change of name of corporations. See present section as amended by act amending the Code of Civil Procedure generally.

2417. Part of this section was not expressly repealed by the Consolidated Laws but was made a portion of County Law, section 161, subd. 7. Afterwards the whole section was expressly repealed by L. 1909, ch. 417.

—Ed

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
2529	Judiciary.....	472.....	Attorney who is surrogate's father or son prohibited from practicing before him.
2611	Decedent Est..	23-25.....	What wills may be proved.
2628	Decedent Est..	46.....	Validity of purchase notwithstanding devise.
2633	Decedent Est..	42.....	Record of wills in county clerk's office.
2634 pt.	Decedent Est..	43.....	County clerk's index of recorded wills.
2660 pt.	Decedent Est..	103.....	Action against husband for debts of deceased wife.
2694	Decedent Est..	47.....	Validity and effect of testamentary dispositions.
2703	Decedent Est..	44.....	Recording will found in another state or country.
2704	Decedent Est..	45.....	Authentication of papers from another state or country.
2732	Decedent Est..	98.....	Distribution of personal property of decedent.
2733 pt.	Decedent Est..	99.....	Advancements of personal estates.
2734	Decedent Est..	100.....	Estates of married women.
3260	Judiciary.....	252.....	Fees of clerks and officers.
	Public Officers..	67.....	
3281	Public Officers..	67.....	
3282	Public Officers..	67.....	
3283	Judiciary.....	256.....	Clerk of court of appeals must account for fees.
3285	County.....	161.....	County clerks must account for fees.
3286	Public Officers..	70.....	Accounting for fees generally.
3289	Public Officers..	69.....	Fee for administering certain official oaths prohibited.
3290	Executive.....	84.....	Certain searches ordered by state officers to be gratuitous.
3291	Public Officers..	68.....	Allowance of additional fees and expenses.
3295	State Finance..	46.....	Comptroller to audit and pay certain fees and charges.
3303	Judiciary.....	253.....	Clerk's fees upon naturalization.
3390	Gen. Corp.....	70.....	Sale of corporate and joint-stock association real property; method.
	Joint-Stk. Ass'n	8.....	
3391	Gen. Corp.....	71.....	Sale of corporate real property; petition.
3392	Gen. Corp.....	72.....	Sale of corporate real property; hearing.
3393	Gen. Corp.....	72, 73.....	Sale of corporate real property; order of sale.
3394	Gen. Corp.....	74.....	Sale of corporate real property; insolvent corporations.
3395	Gen. Corp.....	75.....	Sale of corporate real property; service of notices.
3396	Gen. Corp.....	76.....	Sale of corporate real property; practice in cases not provided for.
3397	Gen. Corp.....	330.....	Sale of corporate real property; time title takes effect.

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
3398	Lien.....	40.....	Mechanics' liens; construction.
3399	Lien.....	41.....	Mechanics' liens; enforcement.
3400	Lien.....	42.....	Mechanics' liens; enforcement of lien for public improvement.
3401	Lien.....	43.....	Mechanics' liens; action in court of record.
3402	Lien.....	44.....	Mechanics' liens; parties.
3403	Lien.....	45.....	Mechanics' liens; equities to be determined.
3404	Lien.....	46.....	Mechanics' liens action in court not of record.
3405	Lien.....	47.....	Mechanics' liens; service of summons.
3406	Lien.....	48.....	Mechanics' liens; answer; judgment by default.
3407	Lien.....	49.....	Mechanics' liens; trial and judgment.
3408	Lien.....	50.....	Mechanics' liens; execution.
3409	Lien.....	51.....	Mechanics' liens; appeals.
3410	Lien.....	52.....	Mechanics' liens; transcripts of judgments.
3411	Lien.....	53.....	Mechanics' liens; costs and disbursements.
3412	Lien.....	54.....	Mechanics' liens; judgment in case of failure to establish lien.
3413	Lien.....	55.....	Mechanics' liens; payment into court.
3414	Lien.....	56.....	Mechanics' liens; preference over contractors.
3415	Lien.....	57.....	Mechanics' liens; terms of judgment.
3416	Lien.....	58.....	Mechanics' liens; judgment for deficiency.
3417	Lien.....	59.....	Mechanics' liens; vacating lien.
3418	Lien.....	60.....	Mechanics' liens; judgment in action on account of public improvement.
3419	Lien.....	61.....	Mechanics' liens; judgment in action to foreclose lien on property of railroad.
*3419(bis)	Lien.....	85.....	Lien on vessel; enforcement.
3420	Lien.....	86.....	Lien on vessel; application for warrant.
3421	Lien.....	87.....	Lien on vessel; undertaking.
3422	Lien.....	88.....	Lien on vessel; execution of warrant.
3423	Lien.....	89.....	Lien on vessel; order to show cause.
3424	Lien.....	90.....	Lien on vessel; notice to be published and served.
3425	Lien.....	91.....	Lien on vessel; trial.
3426	Lien.....	92.....	Lien on vessel; order of sale.
3427	Lien.....	93.....	Lien on vessel; sale and proceeds.
3428	Lien.....	94.....	Lien on vessel; notice of distribution.

3419. L. 1897, ch. 419, which added titles III and IV to the Code, ended said title III with section 3419 and began title IV with a section 3419.—Ed.

TABLE 2

CODE	CONSOLIDATED LAW		Subject
	Law	Section	
3429	Lien.....	95.....	Lien on vessel; liens for which no warrants are issued.
3430	Lien.....	96.....	Lien on vessel; contested claims.
3431	Lien.....	97.....	Lien on vessel; trial of issues and appeal.
3432	Lien.....	98.....	Lien on vessel; distribution of proceeds.
3433	Lien.....	99.....	Lien on vessel; payment of uncontested claims.
3434	Lien.....	100.....	Lien on vessel; distribution of surplus.
3435	Lien.....	101.....	Lien on vessel; application for discharge of warrant.
3436	Lien.....	102.....	Lien on vessel; undertaking to accompany application.
3437	Lien.....	103.....	Lien on vessel; discharge of warrant.
3438	Lien.....	104.....	Lien on vessel; action on under taking.
3439	Lien.....	105.....	Lien on vessel; costs of proceedings.
3440	Lien.....	106.....	Lien on vessel; sheriff must return warrant.
3441	Lien..	107.....	Lien on vessel; discharge of lien before issue of warrant

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TABLE 3

[Prepared by the Board of Statutory Consolidation, with notes by editors of
Parsons' Code.]

**SHOWING DISTRIBUTION OF SECTIONS OF THE CODE OF
CIVIL PROCEDURE IN THE CONSOLIDATED LAWS,
ARRANGED ACCORDING TO THE CONSOLIDATED
LAWS.**

Code Section	Law Section	Subject
BANKING LAW		
746 pt.	44.....	Depositories of court funds to give bonds and pay interest.
752 pt.	45.....	Depositories of court funds to keep books of account.
CIVIL RIGHTS LAW		
15	20.....	Imprisonment for costs.
16	21.....	Imprisonment for nonpayment of money on judgment or contract.
119	22.....	Privilege of officers and prisoners from arrest
548	23.....	Arrest in civil proceeding.
565	24.....	Privilege from arrest of officers of courts.
860	25.....	Witness exempt from arrest.
863	25, 26.....	Certain arrests void.
864	26.....	Liability of sheriff for making arrest of exempt person.
1190 pt.	12.....	Alien not entitled to special jury.
1192	14.....	Jurors not to be questioned for verdicts.
CODE CRIMINAL PROCEDURE		
1041 pt.	229.....	Drawing grand jurors in Albany county.
COUNTY LAW		
20 pt.	240.....	County charge; expense of calendars of supreme and county courts.
28	245.....	County seals.
31 pt.	42.....	Supervisors to furnish necessities for term of county court.
88	12.....	County charge; stenographers' compensation.
89 pt.	170(a).....	Special deputy clerks in certain counties.
112	240.....	Support of poor prisoners.
121	90(b).....	County jails.
182	195.....	Proceedings when new sheriff assumes office.
183	195.....	Powers of former sheriff.

(a) See County Law, section 169 instead of section 170.

(b) See also section 183 of County Law.—Ed.

TABLE 3

Code Section	Law Section	Subject
184	195.....	Duties of former sheriff when new sheriff assumes office.
185	195.....	Former sheriff to execute instrument of delivery.
186	195.....	Former sheriff to execute certain process.
187	195.....	Return of new sheriff to certain orders.
188	195.....	Proceedings on neglect or refusal of former sheriff.
189	195.....	Person performing duties of sheriff.
203 pt.	12.....	Supervisors to furnish library for judges of court of appeals.
356 pt.	240.....	Expense of publication of terms of county court to be county charge.
358 pt.	12.....	Stenographers of county court to be paid by county.
744 pt.	240.....	Fees of county clerks for certain papers furnished.
961 pt.	161.....	County clerk to make certain searches and transcripts.
1966 pt.	201.....	District attorney to bring action on certain forfeited recognizances.
1967	201.....	District attorney to pay over certain moneys collected.
1968	201.....	District attorney to render certain account.
2414 pt.	161.....	County clerks must record changes in corporation names.
2417 pt.	161.....	County clerks must report names changed.
3285	161.....	County clerks must account for fees.

DEBTOR AND CREDITOR LAW

1268	150.....	Discharge of bankrupt from judgment.
1942	230, 231	Compositions by joint debtors.
1944	232, 233.....	Compositions by joint debtors.
2140-2187	50-88.....	Discharge of insolvent from his debts.
2184-2199	100-111.....	Exemption from arrest or discharge from imprisonment of insolvent debtor.
2200-2218	120-138.....	Discharge of imprisoned judgment-debtor from imprisonment.

DECEDENT ESTATE LAW

1843	101.....	Liability of heirs and devisees for debt of decedent.
1859	102.....	Liability of heirs and devisees where will provides for debts.
1868	28.....	Action by child born after making of will, or by subscribing witness.
2611	23-25.....	What wills may be proved
2628	46.....	Validity of purchase notwithstanding devise.
2633	42.....	Record of wills in county clerk's office.
2634 pt.	43.....	County clerk's index of recorded wills.
2660 pt.	103.....	Action against husband for debts of deceased wife.
2694	47.....	Validity and effect of testamentary dispositions.
2703	44.....	Recording will found in another state or country.

TABLE 3

Code Section	Law Section	Subject
2704	45.....	Authentication of papers from another state or country.
2732	98.....	Distribution of personal property of decedent.
2733 pt.	99.....	Advancements of personal estates
2734	100.....	Estates of married women.

DOMESTIC RELATIONS LAW

450 pt.	51.....	Married woman's property.
1206	51.....	Judgment for or against married woman.
1273 pt.	51.....	Confession of judgment by married woman.
1761	8.....	Marriage after divorce for adultery.

EXECUTIVE LAW

54 pt.	29.....	Record of terms of judges of courts of record.
57 pt.	30.....	Copies of amendments to rules for admission of attorneys.
112 pt.	31.....	Copyright of reports of court of appeals.
113	32.....	Distribution of reports of court of appeals.
126 pt.	33.....	Publication of appointment of terms of appellate division.
133 pt.	33.....	Publication of appointment of terms of supreme court.
249 pt.	31, 32.....	Copyright of notes prepared by supreme court reporter and distribution of appellate division reports.
1417 pt.	24.....	Publication by secretary of state of statement of names changed.
1290	24.....	Certain searches ordered by state officers to be gratuitous.

GENERAL BUSINESS LAW

1911	375.....	Transfer of cause of action for usury.
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GENERAL CORPORATION LAW

432 pt.	16.....	Designation by foreign corporation of person upon whom to serve papers.
716 pt.	243.....	Certain receivers can hold property.
1781	90.....	Action against officers of corporation for misconduct.
1782	91.....	Who may bring such an action.
1783	92.....	Visitation power over corporation.
1784	100.....	Action by judgment-creditor for sequestration.
1785	101.....	Action to dissolve a corporation.
1786	102.....	Action to dissolve a corporation.
1787	103.....	Temporary injunction.
1788	104, 106.....	Temporary and permanent receiver.
1789	105.....	Powers and duties of temporary receiver.
1790	109.....	Officers and stockholders may be made parties.
1791	110.....	Separate action against officers and stockholders.
1792	111.....	Proceedings in such actions.
1793	112.....	Distribution of property by judgment.
1794	113.....	Recovery of stock subscriptions.

TABLE 3

Code Section	Law Section	Subject
1795	114.....	Liability of directors and stockholders.
1796	115.....	Construction of provisions relating to dissolution and enforcement of liability.
1797	130.....	Action by attorney-general to annul corporation when legislature directs.
1798	131.....	Action by attorney-general to annul corporation by leave of court.
1799	132.....	Notice of application for leave to commence action.
1800	133.....	Jury trial.
1801	134.....	Injunction and receiver in final judgment.
1802	135.....	Temporary injunction.
1803	136.....	Filing and publishing judgment.
1804	300.....	Certain corporations excepted from certain provisions.
1805	301.....	Testimony of officers and agents.
1806	302.....	Injunction staying action in certain cases.
1807	303.....	Proving claims of creditors.
1808	304.....	Action by attorney-general against corporations or officers.
1809 pt.	305.....	Requisites of injunction in certain cases.
1810	306.....	Appointment of receivers.
1811	307.....	Judicial suspension or removal of officer of corporation.
1812 pt.	308.....	Application of last three sections.
1813 pt.	309.....	Misnomer not available.
2411	60.....	Change of name; by corporation.
2412 pt.	61.....	Change of name; contents of petition.
2413 pt.	62.....	Change of name; notice of presentation of petition.
2414 pt.	63.....	Change of name; order changing name.
2415	64.....	Change of name; when to take effect.
2416	65.....	Change of name; substitution of new name in pending action.
2419	170.....	Voluntary dissolution of corporation; grounds for petition.
2420	171-173.....	Voluntary dissolution of corporation; petition; when directors or trustees divided.
2421	174.....	Voluntary dissolution of corporation; contents of petition.
2422	175.....	Voluntary dissolution of corporation; affidavit to be annexed.
2423	176, 178, 181, 182, 184...	Voluntary dissolution of corporation; presentation of petition, temporary receiver.
2424	179.....	Voluntary dissolution of corporation; order to be published.
2425	180.....	Voluntary dissolution of corporation; service of order.
2426	185-187.....	Voluntary dissolution of corporation; hearing.
2427	188, 189.....	Voluntary dissolution of corporation; papers.
2428	190.....	Voluntary dissolution of corporation; application for final order.
2429	191, 192, 194.	Voluntary dissolution of corporation; final order.
2430	193.....	Voluntary dissolution of corporation; certain sales and transfers void.
2431	177, 195.....	Voluntary dissolution of corporation; certain corporations excepted.

TABLE 3

Code Section	Law Section	Subject
2431-a	277.....	Voluntary dissolution of corporation; commissions of receiver.
2431-b	288.....	Voluntary dissolution of corporation; final accounting.
3390 pt.	70.....	Sale of corporate real property; method.
3391	71.....	Sale of corporate real property; petition.
3392	72.....	Sale of corporate real property; hearing.
3393	72, 73.....	Sale of corporate real property; order of sale.
3394	74.....	Sale of corporate real property; insolvent corporations.
3395	75.....	Sale of corporate real property; service of notices.
3396	76.....	Sale of corporate real property; practice in cases not provided for.
3397	330.....	Sale of corporate real property; time title takes effect.
JOINT-STOCK ASSOCIATION LAW		
3390 pt.	8.....	Sale of real property of joint-stock association.
JUDICIARY LAW		
2	2.....	Courts of record.
3	3.....	Courts not of record.
5	4.....	Sittings of courts to be public.
6	5.....	Sitting of courts on Sunday.
8	750.....	Punishment for criminal contempts.
9	751.....	Punishment for criminal contempts.
10	751.....	Contempts in view of court.
11	752.....	Commitment for criminal contempts.
12	754.....	Punishment for civil contempts.
14	753.....	Contempts punishable civilly.
17	93, 94 (a)....	Appellate division; rules of practice.
18	52, 95.....	Publication of rules.
19	154, 193.....	Printing court calendars.
21	87.....	Destruction of certain papers.
27 pt.	28, 158, 194..	Court seals.
30	29(b).....	Court seals.
34 pt.	7, 534, 540...	Adjournment of terms.
35	6.....	Adjournment of terms.
36	6.....	Adjournment of terms.
38(c)	8.....	Place of holding term.
39 pt.(d)	8.....	Filing appointment of term.
40	9.....	Place of holding court of record.

(a) The portion of section 17 of the Code of Civil Procedure reading, "the convention shall have power to appoint and remove a reporter," is omitted as covered by Judiciary Law, section 90. The portion of section 17 relating to seals has been omitted because the subject is now covered by Judiciary Law, section 328, which continues the seals of all courts of record, and section 329, which provides for replacing seals when lost or destroyed.

(b) The provision for the expense of seals of surrogates' courts has been omitted from Judiciary Law, section 29, because superseded by County Law, section 245.

(c) Section 38 of the Code of Civil Procedure has not been expressly repealed by the Judiciary Law, but has been embodied in the Judiciary Law, section 8.

(d) Section 39 of the Code of Civil Procedure is only partly repealed by the Judiciary Law but the whole section has been embodied in Judiciary Law, section 8.—Ed.

TABLE 3

Code Section	Law Section	Subject
41 pt.	10.....	Adjournment of actual session.
42	11.....	Holding court in New York.
43	12.....	Changing place of court outside New York.
64	15, 22.....	Judge not to act in certain cases.
47	20.....	Judge must not be interested in costs.
48	16.....	Judge not disqualified because a taxpayer.
49	17, 21, 471...	Judge prohibited from practicing.
50	18, 471.....	Practice by judge or his partner.
51(a)	19.....	Judge prohibited from taking certain fees.
54 pt.	23.....	Certificate of judge's age and service.
56	53, 56, 88, 460-465, 467	Examination and admission of attorneys.
57 pt.	53.....	Rules for admission.
58	53.....	Exemptions of graduates of law schools.
59	264, 466.....	Attorney's oath and certificate.
60 pt.	470.....	Attorneys residing in adjoining states.
61	250.....	Clerks not to practice.
62	473.....	Court officers not to practice.
66	474, 475.....	Compensation of attorneys.
67	88, 477.....	Suspension from practice.
68(b)	88, 476.....	Suspension of attorney, notice.
69	478.....	Removal effective in all courts.
72	479.....	Attorney not to lend name.
82	200, 291, 293, 294.....	Qualifications of stenographers.
83 pt.	14, 24, 295- 297, 301.....	General duties of stenographers.
84	292, 298, 299 (c).....	Preservation of stenographic minutes.
85	300.....	Stenographic minutes to be written out.
86	303.....	Furnishing copies of proceedings.
87	304.....	Assistant stenographers.
89 pt.	101, 156, 159, 264, 280, 281.....	Appellate division clerks.
90	251.....	Clerks in New York county.
91	169, 199, 365, 366.....	Criers of courts of record.
92	406.....	Sheriff or constable as crier.
93	30.....	Seals of former superior city courts.
94	167, 200, 381, 396.....	Interpreters in Kings and Queens counties.
95 pt.	168, 200.....	Attendants in Kings, Queens and Richmond counties.
96	230, 340, 351, 354.....	Duties of attendants in Kings, Queens and Richmond counties.
97	160, 170, 201, 231-233, 279, 403, 405.....	Court officers in certain counties.

(a) Section 51 of the Code of Civil Procedure was not expressly repealed by the Judiciary Law but the whole section has been embodied in Judiciary Law, section 19.

(b) Section 68 of the Code of Civil Procedure is only partly repealed by Judiciary Law, but the whole section has been embodied in Judiciary Law, sections 88 and 476.

(c) Portion of section 84 of the Code has been transferred to section 302 of the Judiciary Law.—Ed.

TABLE 3

Code Section	Law Section	Subject
98	343.....	Attendants in certain counties.
99	407.....	Deputy sheriff must attend court.
104	400.....	Sheriff may command power of county.
105	401.....	Certification of persons resisting mandate.
193	51, 53	Court of appeals; rules.
196	54.....	Court of appeals; terms.
197	54.....	Court of appeals; terms.
198	57.....	Court of appeals; appointment of officers.
199	62, 256.....	Court of appeals; clerk.
200	257, 258.....	Court of appeals; deputy, clerk.
201	257, 258.....	Court of appeals; clerk.
202	58, 259, 262..	Court of appeals; judges' clerks.
203 pt	55.....	Court of appeals; judges' offices.
209	800(a).....	State reporter; reporter of court of appeals.
210	60, 61, 431..	State reporter; duty.
211	433.....	Publication of reports of court of appeals.
212 pt.	435.....	Copyright of reports of court of appeals.
214	432.....	Unreported decisions of court of appeals.
215	432.....	State reporter; expiration of term.
216	256, 434.....	Unreported opinions of court of appeals.
219	70.....	Appellate division; departments.
220 pt.	71, 72, 77, 81, 82, 85, 90..	Appellate division; organization, location and powers.
221	101, 106, 109, 111, 267, 268, 270, 271, 307, 347.....	Appellate division; clerks, attendants and stenographers.
222	73.....	Appellate division; revocation of designations.
223	72.....	Appellate division; designations to be filed.
225	78.....	Appellate division; terms.
226 pt.	79.....	Appellate division; appointment of terms.
228	80.....	Appellate division; associate justice to preside in certain cases.
229 pt.	148.....	Holding special and trial terms.
230	81.....	Appellate division; justices necessary to a decision.
232	84, 96, 148- 150, 264(b)	Supreme court; appointment of terms.
233 pt.	151.....	Supreme court; publication of appointments.
234	79, 153.....	Extraordinary terms of appellate division and supreme court.
235 pt.	155.....	Supreme court justices in Erie county.
237	86.....	Designation of trial justices in certain cases.
238	152.....	Place of holding special and trial terms.
239 pt.	148, 276, 364, 404.....	Special terms at chambers.
[241](c)	0	
242	89, 264, 342, 402.....	Appellate division; officers attending.

(a) Section 209 of the Code is repealed by the Judiciary Law, because covered by Judiciary Law, section 430.

(b) The last three sentences of section 232 of the Code relating to seals for the appellate division have been omitted, as the matter is covered by the Judiciary Law, section 28, which continues the seals of all courts of record, and section 29, which provides for replacing seals when lost or destroyed.

(c) Section 241 of the Code was actually repealed by the Judiciary Law, section 800, but does not seem to have been transferred to the Judiciary Law.—Ed.

TABLE 3

Code Section	Law Section	Subject
243	342, 402.....	Fees of officers attending term of appellate division.
244	90.....	Supreme court reporter; appointment.
245	91.....	Supreme court reporter; special meeting for appointment.
246	92, 264, 437, 439-441....	Supreme court reporter; duties.
247	442, 443.....	Supreme court reporter; publication of reports.
248	264, 438.....	Papers for use of supreme court reporter.
249 pt.	444.....	Supreme court reporter; copyright of reports.
250	445.....	Supreme court reporter; compensation
254	161, 309, 316..	Stenographers in Kings county.
255	312.....	Assistant stenographer in Kings county.
256	161, 309.....	Stenographers in second and ninth districts; appointment.
257	316.....	Stenographers in second and ninth districts; salaries.
258	161, 309, 313..	Stenographers for certain judicial districts; appointment and salaries.
259	313.....	Stenographers in certain judicial districts; payment of salaries.
260	164, 314.....	Stenographers in certain judicial districts; expenses.
262	162, 163.....	Temporary stenographers.
353 pt.	190, 191.....	Terms of county court.
356 pt.	192.....	Appointment of terms of county court.
357	533, 541.....	Jurors for county court.
358 pt.	197.....	County court stenographers.
359	196, 197, 285, 318, 319....	County court stenographers in Kings and Queens counties.
360 pt.	198, 312-385..	County court interpreters in Kings county.
361	197, 318, 319..	County court stenographers in certain counties.
961 pt.	255.....	Clerks to search files and make transcripts.
977 pt.	83.....	Power of appellate division as to calendars.
1007 pt.	305.....	Apportionment of stenographers' salaries.
1027	502.....	Qualifications of trial jurors.
1028	502.....	Qualifications of trial jurors.
1029	503.....	Certain public officers disqualified to serve as jurors.
1030	546.....	Exemption from jury duty.
1031	547, 548.....	Evidence of exemption.
1032	550.....	Discharged, when not qualified or exempt.
1033	544.....	Persons excused from serving.
1034	590, 600, 680, 687.....	Certain public officials disqualified.
1035	500.....	Jury lists.
1036	501.....	Names to be taken from assessment rolls.
1037	505.....	Duplicate jury lists to be made and filed.
1038	508.....	County clerk to make and deposit ballots.
1039	509-512.....	County clerk to destroy old ballots and notify town clerk in case of failure to receive jury lists.
1040	506.....	Jurors to serve three years.
1041 pt.	507.....	Application of provisions to cities.
1042	513, 528, 543, 545.....	Drawing of jurors.
1043	514.....	Notice of drawing.
1044	26, 515.....	Officers to attend drawing.
1045	516.....	Officers to attend on adjourned day.
1046	517.....	Certain officers required to be present at drawing
1047	518-520.....	Mode of drawing.
1048	536.....	Sheriff must notify jurors.

TABLE 3

Code Section	Law Section	Subject
1049	504.....	Jury lists must be furnished applicants.
1050	521, 522.....	Matter of keeping jurors' names.
1051	523.....	Jurors who have served must be drawn again when other lists exhausted.
1052	524.....	Third jury box.
1053	525.....	Destruction of old ballots in third box.
1054	526.....	Drawing from third box.
1055 pt.	537.....	Sheriff must notify jurors from third box.
1056	527.....	Drawing of additional jurors.
1057	529, 530.....	Proceedings on drawing additional jurors.
1058	513, 528, 543, 545, 565....	Drawing of additional jurors.
1059	531, 532, 538..	Additional jurors drawn during term.
1060	539, 542.....	Attendance of jurors at county court.
1061	535.....	Powers of deputy county clerk as to jurors.
1062	590, 680.....	Application of provisions to New York and Kings counties.
1072	551.....	Fine of juror for non-attendance.
1073	552, 553.....	Fine of juror for non-attendance.
1074	554.....	Fine for non-attendance at trial term.
1075	555, 556.....	Duty of clerk and sheriff.
1076	557.....	Proceedings on order to show cause.
1077	558.....	Discontinuance of proceedings against delinquent juror.
1078	590, 680.....	Application of provisions to New York and Kings counties.
1079	598.....	Qualification of trial juror; New York.
1080	599.....	Qualification of trial juror; New York.
1081	635.....	Persons exempt in New York.
1082	636.....	Evidence of exemption in New York.
1083	637.....	Duty of military officers.
1084	549, 641-644..	Jury year.
1085	630, 647.....	Jurors excused in New York.
1086	608, 616, 631..	Jurors excused in New York.
1087	632, 633.....	Duty of juror applying to be excused.
1088	645.....	Services in court not of record as an excuse.
1089	634.....	Clerk to make return to commissioner after term.
1090	591, 592, 595, 601, 638, 640	Duty of commissioner in New York.
1091	593, 594.....	Assistants to commissioner.
1092	602.....	Public officers must aid commissioner.
1093	800(a).....	Payment of expenses of commissioner's office.
1094	597, 639.....	Preparation of lists of jurors in New York.
1095	603.....	Failure to testify as to liability to serve.
1096	604.....	Commissioner to return the lists to county clerk.
1097	606, 607.....	Commissioner to make and deposit ballots.
1098	610.....	Number of jurors to be drawn.
1099	612.....	Officers to attend drawing.
1100	611.....	Notice of drawing.
1101	613.....	Officers attending on adjourned day.
1102	614.....	Jury must not be drawn on adjourned day unless officers attend.
1103	615, 617.....	Mode of drawing jurors in New York.
1104	618.....	Drawing where term consists of parts.
1105	623.....	Commissioner to notify jurors.
1106	619, 624, 625..	Commissioner to notify jurors.
1107	628, 629.....	Proceedings when less than majority of persons drawn are notified.

(a) Section 1093 of the Code is repealed by Judiciary Law because superseded by L. 1901, ch. 602, section 1.—En

TABLE 3

Code Section	Law Section	Subject
1108	621, 622, 626, 627.....	Drawing of additional jurors.
1109	646, 649.....	Fine for non-attendance.
1110	648.....	Arrest for failure to attend.
1111	800(a).....	Jurors for district courts.
1112	605, 609, 620..	Sheriff's jury.
1113	650-659.....	Remitting and enforcing jury fines.
1117	660-663.....	Uncollected fines.
1118	664.....	Commissioner to receive fines and account therefor.
1119	665-667.....	Corporation counsel to prosecute.
1121	596.....	Persons required to furnish information.
1126	686.....	Qualification of jurors in Kings county.
1127	720.....	Exemption in Kings county.
1128	721, 722.....	Evidence of exemption.
1129	714, 715.....	Jury service.
1130	716.....	Jurors excused.
1131	718, 719.....	Return by clerk after adjournment of term.
1132	681, 688-690, 723.....	Selection of trial jurors.
1133	682, 683.....	Commissioner to collect fees for county.
1134	800(b).....	Expenses of commissioner.
1135	691, 692.....	Selection of jurors.
1136	693, 694.....	Commissioner to publish notice of list.
1137	695.....	Commissioner to prepare list and file transcript.
1138	696, 698.....	Supplemental lists.
1139	697.....	Commissioner to make and deposit ballots.
1140	699, 700.....	Officers to attend drawing.
1141	701.....	Proceedings preliminary to drawing.
1142	702.....	Mode of drawing.
1143	703.....	Certificate to be made and boxes sealed.
1144	704.....	Subsequent drawings.
1145	705.....	Proceedings when first box exhausted.
1146	706, 709.....	Commissioner to notify juror.
1147	710, 717, 725..	Notification of jurors.
1148	711.....	Commissioner to make return of jurors notified.
1149	707, 712.....	Additional jurors.
1150	708, 713.....	Jurors in certain special proceedings.
1151	26.....	Compensation to judges attending drawing.
1152	724.....	Fine for non-attendance.
1153	728.....	Arrest for non-attendance.
1154	727-729.....	Commissioner to notify jurors fined to appear.
1155	730, 731.....	Commissioner to collect jury fines.
1156	732-735.....	Fines not collected to be docketed.
1157	736.....	Discharge of lien created by docket.
1162	684, 685.....	Commissioner to report and pay over money.
1195	559.....	Fine of trial juror for non-attendance in special proceeding.
1196	560.....	Fine for neglect or misconduct of officer in charge of jury from special proceeding.
1197	561.....	Notice of fine in special proceeding.
1198	562.....	Special return of delinquency and fine to county court.
1199	563, 564.....	Collection or remission of fine.
2266	754.....	Contempt proceedings; application.

(a) Section 1111 of the Code is repealed by the Judiciary Law because covered by Municipal Court act (L. 1902, ch. 580, section 233).

(b) Section 1134 of the Code is repealed by the Judiciary Law because superseded by L. 1902, ch. 564, section 6.—Ed.

TABLE 3

Code Section	Law Section	Subject
2267	755.....	Contempt proceedings; summary punishment.
2268	756.....	Contempt proceedings; warrant without notice.
2269	757.....	Contempt proceedings; order to show cause or warrant to attach.
2270	758.....	Contempt proceedings; notice to delinquent officer.
2271	757.....	Contempt proceedings; orders granted out of court.
2272	759.....	Contempt proceedings; contempt before referee.
2273	760-762.....	Contempt proceedings; effect of order and warrant.
2274	763.....	Contempt proceedings; affidavit and warrant to be served on accused.
2275	764.....	Contempt proceedings; undertaking.
2276	765.....	Contempt proceedings; execution of warrant.
2277	766.....	Contempt proceedings; undertaking for discharge.
2278	767.....	Contempt proceedings; habeas corpus.
2279	768.....	Contempt proceedings; sheriff to file undertaking.
2280	769.....	Contempt proceedings; interrogatories.
2281	770.....	Contempt proceedings; final order directing punishment.
2282	771.....	Contempt proceedings; punishment on return of habeas corpus.
2283	772.....	Contempt proceedings; punishment on return of order to show cause.
2284	773.....	Contempt proceedings; amount of fine.
2285	774.....	Contempt proceedings; length of imprisonment.
2286	775.....	Contempt proceedings; release of offender.
2287	776.....	Contempt proceedings; indictment of offender.
2288	777.....	Contempt proceedings; proceedings when accused does not appear.
2289	778.....	Contempt proceedings; prosecution of undertaking.
2290	779.....	Contempt proceedings; prosecution of undertaking in name of people.
2291	780.....	Contempt proceedings; sheriff liable for taking insufficient sureties.
2292	781.....	Contempt proceedings; misconduct at trial term.
2293	790.....	Collection of fine; schedule of fines imposed.
2294	701.....	Collection of fine; warrant.
2295	791.....	Collection of fine; warrant when delinquent non-resident of county.
2296	792.....	Collection of fine; execution of warrant.
2297	793.....	Collection of fine; return of warrant.
2298	794.....	Collection of fine; proceedings if fine not collected.
2299	795.....	Collection of fine; contents of schedule annexed to warrant.
2300	796.....	Collection of fine; liability of sheriff for omission of duty.
2301	797.....	Collection of fine; special provisions for collection.
2417 pt.	254.....	Change of name; reports of names changed.
2529	472.....	Attorney who is surrogate's father or son prohibited from practicing before him.
3280 pt.	252.....	Fees of clerks and officers.
3283	256.....	Clerk of court of appeals must account for fees.
3303	253.....	Clerk's fees upon naturalization.

TABLE 3

Code Section	Law Section	Subject
LIEN LAW		
1737	206.....	Action to foreclose lien on chattel.
1738	207.....	Warrant to seize chattel and proceedings thereupon.
1739	208.....	Judgment in action to foreclose lien on chattel.
1740	209.....	Action to foreclose lien on chattel in inferior court.
1741	210.....	Application of sections,
3398	40.....	Mechanics' liens; construction.
3399	41.....	Mechanics' liens; enforcement.
3400	42.....	Mechanics' liens; enforcement of lien for public improvement.
3401	43.....	Mechanics' liens; action in court of record.
3402	44.....	Mechanics' liens; parties.
3403	45.....	Mechanics' liens; equities to be determined.
3404	46.....	Mechanics' liens; action in court not of record.
3405	47.....	Mechanics' liens; service of summons.
3406	48.....	Mechanics' liens; answer; judgment by default.
3407	49.....	Mechanics' liens; trial and judgment.
3408	50.....	Mechanics' liens; execution.
3409	51.....	Mechanics' liens; appeals.
3410	52.....	Mechanics' liens; transcripts of judgments.
3411	53.....	Mechanics' liens; costs and disbursements.
3412	54.....	Mechanics' liens; judgment in case of failure to establish lien.
3413	55.....	Mechanics' liens; payment into court.
3414	56.....	Mechanics' liens; preference over contractors.
3415	57.....	Mechanics' liens; terms of judgment.
3416	58.....	Mechanics' liens; judgment for deficiency.
3417	59.....	Mechanics' liens; vacating lien.
3418	60.....	Mechanics' liens; judgment in action on account of public improvement.
3419	61.....	Mechanics' liens; judgment in action to foreclose lien on property of railroad.
3419-bis(a)	85.....	Lien on vessel; enforcement.
3420	86.....	Lien on vessel; application for warrant.
3421	87.....	Lien on vessel; undertaking.
3422	88.....	Lien on vessel; execution of warrant.
3423	89.....	Lien on vessel; order to show cause.
3424	90.....	Lien on vessel; notice to be published and served.
3425	91.....	Lien on vessel; trial.
3426	92.....	Lien on vessel; order of sale.
3427	93.....	Lien on vessel; sale and proceeds.
3428	94.....	Lien on vessel; notice of distribution.
3429	95.....	Lien on vessel; liens for which no warrants are issued.
3430	96.....	Lien on vessel; contested claims.
3431	97.....	Lien on vessel; trial of issues and appeal.
3432	98.....	Lien on vessel; distribution of proceeds.
3433	99.....	Lien on vessel; payment of uncontested claims.
3434	100.....	Lien on vessel; distribution of surplus.
3435	101.....	Lien on vessel; application for discharge of warrant.
3436	102.....	Lien on vessel; undertaking to accompany application.

(a) L. 1897, ch. 419, which added titles III and IV to the Code, ended said title III with section 3419 and began title IV with a section 3419.—Ed

TABLE 3

Code Section	Law Section	Subject
3437	103.....	Lien on vessel; discharge of warrant.
3438	104.....	Lien on vessel; action on undertaking.
3439	105.....	Lien on vessel; costs of proceedings.
3440	106.....	Lien on vessel; sheriff must return warrant.
3441	107.....	Lien on vessel; discharge of lien before issue of warrant.

MILITARY LAW

107	321(a).....	Governor may order out militia.
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PENAL LAW

[13](b)		
32	1790.....	Liquors not to be sold in courthouse.
33	1790.....	Penalty for selling liquors in courthouse.
63	271.....	None but attorneys to practice in New York city.
64	272, 1877(c)...	Penalty for practicing in New York contrary to last section.
70	273.....	Punishment of attorney for deceit.
71	273.....	Punishment for wilful delay of action.
73	274.....	Attorneys not to buy claims.
74	274.....	Attorneys prohibited from making certain loans.
75	274.....	Penalty for violation of last two sections.
76	275.....	Limitation of last three sections.
77	276.....	Application of preceding sections.
78	278.....	Partner of district attorney not to defend prosecutions.
79	278.....	Attorney not to defend when he has been public prosecutor.
80	278.....	Penalty for violation of last two sections.
81	279.....	Limitation of preceding sections.
106	2501(d).....	Refusal to assist sheriff.
125(e)	1876.....	Violations by sheriff of certain provisions relating to prisoners.
130	1791.....	Penalty for bringing liquor into jails.
[159](f)		
334	1634.....	Misconduct of interpreters in New York city.
851	1622.....	Swearing falsely in any form, perjury.
961 pt.	1875(g).....	Penalty for neglecting to make transcripts or for making false certificates.
1120	1232.....	Penalty for physician giving false certificate.
1122	1235.....	Bribery of officer by juror.

(a) Section 107 of the Code is repealed by the Military Law, because superseded by L. 1898, ch. 212, section 86, which was likewise repealed by Military Law (L. 1909, ch. 41).

(b) Section 13 of the Code was also repealed by the Penal Law and transferred to section 602 thereof. Section 13 related to indictment for contempt.

(c) See Penal Law, section 1376, instead of section 1877.

(d) Section 106 of the Code is repealed by Penal Law, section 2501, because covered by Penal Law, section 1848.

(e) Section 125 of the Code is only partly repealed by Penal Law; but see Penal Law, section 1875, instead of 1876. Section 1875 embodies the whole of Code, section 125.

(f) Section 159 of the Code, relating to connivance at escape by sheriff, was also repealed by the Penal Law and transferred to section 1839 thereof.

(g) See Penal Law, section 1874, instead of section 1875.—En

TABLE 3

Code Section	Law Section	Subject
1123	1235	Officer accepting bribes.
1124	1235	Penalty for concealing offer to take bribe.
1125	1233	False swearing, perjury.
1158	1234	Commissioner omitting name; felony.
1159	1234	Commissioner's wilful neglect; misdemeanor.
1160	1236	False information; misdemeanor.
1161	1232	Physician giving false certificate.
1193	375	Penalty when juror takes gift.
1194	377	Penalty for embezzlement.
PERSONAL PROPERTY LAW		
1909	41	Rights of transferee of claim or demand.
1910	41	Transfer of claim.
1912	41	Assignment of judgment.
PRISON LAW		
113	340	Charges by sheriff for food prohibited.
114	341	Gratuities to Sheriff prohibited.
115	342	Rates of charges against persons arrested.
116	343	Prisoner kept in house.
117	344	Charges for rent in prison prohibited.
[120](a)		
122	347	Either of several jails may be used.
123	345	Civil and criminal prisoners to be kept separate.
124	346	Males and females to be kept separate.
126	348	Jail physician.
127 pt.	355	Removal of sick prisoner.
128	349	Sale of liquor in jail.
129	350	Permit to bring liquor into jail.
135	351	Designation when jail unfit.
136	352	Annulment of designation.
137	353	Designation of jail in contiguous county.
143	354	Removal of prisoners in case of fire.
144	356	Certain officers may make designations of jails.
145	357	Jail liberties.
146	358	Jail liberties.
147	359	Laying out jail liberties.
148	360	Resolution establishing jail liberties to be posted.
2219	390	Care of prisoner's property; application.
2220	391	Care of prisoner's property; who may apply.
2221	392	Care of prisoner's property; creditor must relinquish security.
2222	393	Care of prisoner's property; petition.
2223	394	Care of prisoner's property; copy of sentence and affidavit.
2224	395	Care of prisoner's property; proceedings on presentation of papers.
2225	396	Care of prisoner's property; proceedings on return of order.
2226	397	Care of prisoner's property; order appointing trustee.
2227	398	Care of prisoner's property; removal of trustee.
2228	399	Care of prisoner's property; distribution of property.

(a) Section 120 of the Code, relating to jail in New York city, was also repealed by the Prison Law and transferred to section 420 thereof.—Ed.

CONSTITUTION OF NEW YORK

§ 3. Freedom of worship; religious liberty.

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

Const. 1846, art. I, § 3.

§ 4. Habeas corpus.

The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require its suspension.

Const. 1846, art. I, § 4.

§ 5. Excessive bail and fines.

Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

Const. 1846, art. I, § 5.

§ 6. Bill of rights.

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which this State may keep with the consent of Congress in time of peace, and in cases of petit larceny, under the regulation of the Legislature), unless on presentment or indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

Const. 1846, art. I, § 6.

§ 7. Compensation for taking private property; private roads; drainage of agricultural lands.

When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited. General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof.

necessary drains, ditches and dykes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes.

Const. 1846, art. I, § 7.

§ 8. Freedom of speech and press; criminal prosecutions for libel.

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

Const. 1846, art. I, § 8.

§ 9. Right to assemble and petition; divorces; lotteries, pool-selling and gambling, laws to prevent.

No law shall be passed abridging the right of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; nor shall any lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling hereafter be authorized or allowed within this State; and the Legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

Const. 1846, art. I, § 10.

§ 10. Escheats.

The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall fail, from a defect of heirs, shall revert, or escheat to the people.

Const. 1846, art. I, § 11.

§ 11. Feudal tenures abolished.

All feudal tenures of every description, with all their incidents, are declared to be abolished, saving however, all rents and services certain which at any time heretofore have been lawfully created or reserved.

Const. 1846, art. I, § 12.

§ 12. Allodial tenures.

All lands within this State are declared to be allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates.

Const. 1846, art. I, § 13.

§ 13. Leases of agricultural lands.

No lease or grant of agricultural land, for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid.

Const. 1846, art. I, § 14.

§ 14. Fines and quarter-sales abolished.

All fines, quarter-sales or other like restraints upon alienation, reserved in any grant of land hereafter to be made, shall be void.

Const. 1846, art. I, § 15.

§ 15. Purchase of lands of Indians.

No purchase or contract for the sale of lands in this State, made since the fourteenth day of October, one thousand seven hundred and seventy-five; or which may hereafter be made, of, or with the Indians, shall be valid, unless made under the authority, and with the consent of the Legislature.

Const. 1846, art. I, § 16.

§ 16. Common law and acts of the colonial and state legislatures.

Such parts of the common law, and of the acts of the Legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the Congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have not since expired, or been repealed or altered; and such acts of the Legislature of this State as are now in force, shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this Constitution, are hereby abrogated.

Const. 1846, art. I, § 17.

§ 17. Grants of land made by the king of Great Britain since 1775; prior grants.

All grants of land within this State, made by the king of Great Britain, or persons acting under his authority, after the fourteenth day of October, one thousand seven hundred and seventy-five, shall be null and void; but nothing contained in this Constitution shall affect any grants of land within this State, made by the authority of the said king or his predecessors, or shall annul any charters to bodies politic and corporate, by him or them made, before that day; or shall affect any such grants or charters since made by this State, or by persons acting under its authority; or shall impair the obligation of any debts contracted by the State, or individuals, or bodies corporate, or any other rights of property, or any suits, actions, rights of action, or other proceedings in courts of justice.

Const. 1846, art. I, § 18.

§ 18. Damages for injuries causing death.

The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.

New.

ARTICLE SECOND.

- Sec. 1. Qualification of voters.**
2. Persons excluded from right of suffrage.
3. Certain occupations and conditions not to affect residence.
4. Registration and election laws to be passed.
5. Manner of voting.
6. Registration and election boards to be non-partisan, except at town and village elections.

§ 1. Qualification of voters.

Every male citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this State one year next preceding an election, and for the last four months a resident of the county, and for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people, provided that in time of war no elector in the actual military service of the State, or of the United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from such election district; and the Legislature shall have power to provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

Const. 1846, art. II, § 1.

§ 2. Persons excluded from the right of suffrage.

No person who shall receive, accept, or offer to receive, or pay, offer or promise to pay, contribute, offer or promise to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at an election, or who shall make any promise to influence the giving or withholding any such vote, or who shall make or become directly or indirectly interested in any bet or wager depending upon the result of any election, shall vote at such election; and upon challenge for such cause, the person so challenged, before the officers authorized for that purpose shall receive his vote, shall swear or affirm before such officers that he has not received or offered, does not expect to receive, has not paid, offered or promised to pay, contributed, offered or promised to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at such election, and has not made any promise to influence the giving or withholding of any such vote, nor made or become directly or indirectly interested in any bet or wager depending upon the result of such election. The Legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime.

Const. 1846, art. II, § 2.

§ 3. Certain occupations and conditions not to affect residence.

For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this State, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or other asylum, or institution wholly or partly supported at public expense or by charity; nor while confined in any public prison.

Const. 1846, art. II, § 3.

§ 4. Registration and election laws to be passed.

Laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established, and for the registration of voters; which registration shall be completed at least ten days before each election. Such registration shall not be required for town and village elections except by express provision of law. In cities and villages having five thousand inhabitants or more, according to the last preceding State enumeration of inhabitants, voters shall be registered upon personal application only; but voters not residing in such cities or villages shall not be required to apply in person for registration at the first meeting of the officers having charge of the registry of voters.

Const. 1846, art. II, § 4.

§ 5. Manner of voting.

All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved.

Const. 1846, art. II, § 5.

§ 6. Registration and election boards to be bi-partisan, except at town and village elections.

All laws creating, regulating or affecting boards or officers charged with the duty of registering voters, or of distributing ballots at the polls to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes. All such boards and officers shall be appointed or elected in such manner, and upon the nomination of such representatives of said parties respectively, as the Legislature may direct. Existing laws on this subject shall continue until the Legislature shall otherwise provide. This section shall not apply to town meetings, or to village elections.

Now.

ARTICLE THIRD.

- Sec. 1. Legislative powers.
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§ 1. Legislative powers.

The legislative power of this State shall be vested in the Senate and Assembly.

Const. 1846, art. III, § 1.

§ 2. Number and terms of senators and assemblymen.

The Senate shall consist of fifty members, except as hereinafter provided. The senators elected in the year one thousand eight hundred and ninety-five shall hold their offices for three years, and their successors shall be chosen for two years. The Assembly shall consist of one hundred and fifty members who shall be chosen for one year.

Const. 1846, art. III, § 2.

§ 3. Senate districts.

The State shall be divided into fifty districts to be called senate districts, each of which shall choose one senator. The districts shall be numbered from one to fifty, inclusive.

District number one (1) shall consist of the counties of Suffolk and Richmond.

District number two (2) shall consist of the county of Queens.

District number three (3) shall consist of that part of the county of Kings comprising the first, second, third, fourth, fifth and sixth wards of the city of Brooklyn.

District number four (4) shall consist of that part of the county of Kings comprising the seventh, thirteenth, nineteenth and twenty-first wards of the city of Brooklyn.

District number five (5) shall consist of that part of the county

of Kings comprising the eighth, tenth, twelfth and thirtieth wards of the city of Brooklyn, and the ward of the city of Brooklyn which was formerly the town of Gravesend.

District number six (6) shall consist of that part of the county of Kings comprising the ninth, eleventh, twentieth and twenty-second wards of the city of Brooklyn.

District number seven (7) shall consist of that part of the county of Kings comprising the fourteenth, fifteenth, sixteenth and seventeenth wards of the city of Brooklyn.

District number eight (8) shall consist of that part of the county of Kings comprising the twenty-third, twenty-fourth, twenty-fifth and twenty-ninth wards of the city of Brooklyn, and the town of Flatlands.

District number nine (9) shall consist of that part of the county of Kings comprising the eighteenth, twenty-sixth, twenty-seventh and twenty-eighth wards of the city of Brooklyn.

District number ten (10) shall consist of that part of the county of New York within and bounded by a line beginning at Canal street and the Hudson river, and running thence along Canal street, Hudson street, Dominick street, Varick street, Broome street, Sullivan street, Spring street, Broadway, Canal street, the Bowery, Division street, Grand street and Jackson street, to the East river and thence around the southern end of Manhattan island, to the place of beginning, and also Governor's, Bedloe's and Ellis islands.

District number eleven (11) shall consist of that part of the county of New York lying north of district number ten, and within and bounded by a line beginning at the junction of Broadway and Canal street, and running thence along Broadway, Fourth street, the Bowery and Third avenue, St. Mark's place, Avenue A, Seventh street, Avenue B, Clinton street, Rivington street, Norfolk street, Division street, Bowery and Canal street, to the place of beginning.

District number twelve (12) shall consist of that part of the county of New York lying north of districts numbers ten and eleven and within and bounded by a line beginning at Jackson street and the East river, and running thence through Jackson street, Grand street, Division street, Norfolk street, Rivington street, Clinton street, Avenue B, Seventh street, Avenue A, St. Mark's place, Third avenue, East Fourteenth street to the East river, and along the East river, to the place of beginning.

District number thirteen (13) shall consist of that part of the county of New York lying north of district number ten, and within and bounded by a line beginning at the Hudson river at the foot of Canal street, and running thence along Canal street, Hudson street, Dominick street, Varick street, Broome street, Sullivan street, Spring street, Broadway, Fourth street, the Bowery and Third avenue, Fourteenth street, Sixth avenue, West Fifteenth street, Seventh avenue, West Nineteenth street, Eighth avenue, West Twentieth street, and the Hudson river, to the place of beginning.

District number fourteen (14) shall consist of that part of the county of New York lying north of districts numbers twelve and thirteen, and within and bounded by a line beginning at East Fourteenth street and the East river, and running thence along East Fourteenth street, Irving place, East Nineteenth street, Third avenue, East Twenty-third street, Lexington avenue, East

Fifty-third street, Third avenue, East Fifty-second street, and the East river, to the place of beginning.

District number fifteen (15) shall consist of that part of the county of New York lying north of district number thirteen, and within and bounded by a line beginning at the junction of West Fourteenth street and Sixth avenue, and running thence along Sixth avenue, West Fifteenth street, Seventh avenue, West Fortieth street, Eighth avenue, and the transverse road across Central park to Ninety-seventh street, Fifth avenue, East Ninety-sixth street, Lexington avenue, East Twenty-third street, Third avenue, East Nineteenth street, Irving place and Fourteenth street, to the place of beginning.

District number sixteen (16) shall consist of that part of the county of New York lying north of district number thirteen, and within and bounded by a line beginning at Seventh avenue and West Nineteenth street, and running thence along West Nineteenth street, Eighth avenue, West Twentieth street, the Hudson river, West Forty-sixth street, Tenth avenue, West Forty-third street, Eighth avenue, West Fortieth street and Seventh avenue, to the place of beginning.

District number seventeen (17) shall consist of that part of the county of New York lying north of district number sixteen, and within and bounded by a line beginning at the junction of Eighth avenue and West Forty-third street, and running thence along West Forty-third street, Tenth avenue, West Forty-sixth street, the Hudson river, West Eighty-ninth street, Tenth or Amsterdam avenue, West Eighty-sixth street, Ninth or Columbus avenue, West Eighty-first street and Eighth avenue, to the place of beginning.

District number eighteen (18) shall consist of that part of the county of New York lying north of district number fourteen, and within and bounded by a line beginning at the junction of East Fifty-second street and the East river, and running thence along East Fifty-second street, Third avenue, East Fifty-third street, Lexington avenue, East Eighty-fourth street, Second avenue, East Eighty-third street and the East river, to the place of beginning; and also Blackwell's island.

District number nineteen (19) shall consist of that part of the county of New York lying north of district number seventeen, and within and bounded by a line beginning at West Eighty-ninth street and the Hudson river, and running thence along the Hudson river and Spuyten Duyvil creek around the northern end of Manhattan island; thence southerly along the Harlem river to the north end of Fifth avenue; thence along Fifth avenue, East One Hundred and Twenty-ninth street, Fourth or Park avenue, East One Hundred and Tenth street, Fifth avenue, to transverse road across Central park at Ninety-seventh street, Eighth avenue, West Eighty-first street, Ninth or Columbus avenue, West Eighty-sixth street, Tenth or Amsterdam avenue and West Eighty-ninth street, to the place of beginning.

District number twenty (20) shall consist of that part of the county of New York lying north of districts numbers eighteen and fifteen, and within and bounded by a line beginning at East Eighty-third street and the East river, running thence through East Eighty-third street, Second avenue, East Eighty-fourth street, Lexington avenue, East Ninety-sixth street, Fifth avenue, East One Hundred and Tenth street, Fourth or Park avenue,

East One Hundred and Nineteenth street to the Harlem river, and along the Harlem and East rivers, to the place of beginning; and also Randall's island and Ward's island.

All the above districts in the county of New York bounded upon or along the boundary waters of the county, shall be deemed to extend to the county line.

District number twenty-one (21) shall consist of that part of the county of New York lying north of districts numbers nineteen and twenty, within and bounded by a line beginning at East One Hundred and Nineteenth street and the Harlem river, and running thence along East One Hundred and Nineteenth street, Fourth or Park avenue, One Hundred and Twenty-Ninth street, Fifth avenue and the Harlem river to the place of beginning; and all that part of the county of New York not hereinbefore described.

District number twenty-two (22) shall consist of the county of Westchester.

District number twenty-three (23) shall consist of the counties of Orange and Rockland.

District number twenty-four (24) shall consist of the counties of Dutchess, Columbia and Putnam.

District number twenty-five (25) shall consist of the counties of Ulster and Greene.

District number twenty-six (26) shall consist of the counties of Delaware, Chenango and Sullivan.

District number twenty-seven (27) shall consist of the counties of Montgomery, Fulton, Hamilton and Schoharie.

District number twenty-eight (28) shall consist of the counties of Saratoga, Schenectady and Washington.

District number twenty-nine (29) shall consist of the county of Albany.

District number thirty (30) shall consist of the county of Rensselaer.

District number thirty-one (31) shall consist of the counties of Clinton, Essex and Warren.

District number thirty-two (32) shall consist of the counties of St. Lawrence and Franklin.

District number thirty-three (33) shall consist of the counties of Otsego and Herkimer.

District number thirty-four (34) shall consist of the county of Oneida.

District number thirty-five (35) shall consist of the counties of Jefferson and Lewis.

District number thirty-six (36) shall consist of the county of Onondaga.

District number thirty-seven (37) shall consist of the counties of Oswego and Madison.

District number thirty-eight (38) shall consist of the counties of Broome, Cortland and Tioga.

District number thirty-nine (39) shall consist of the counties of Cayuga and Seneca.

District number forty (40) shall consist of the counties of Chemung, Tompkins and Schuyler.

District number forty-one (41) shall consist of the counties of Steuben and Yates.

District number forty-two (42) shall consist of the counties of Ontario and Wayne.

District number forty-three (43) shall consist of that part of the

county of Monroe comprising the towns of Brighton, Henrietta, Irondequoit, Mendon, Penfield, Perinton, Pittsford, Rush and Webster, and the fourth, sixth, seventh, eighth, twelfth, thirteenth, fourteenth, sixteenth, seventeenth and eighteenth wards of the city of Rochester, as at present constituted.

District number forty-four (44) shall consist of that part of the county of Monroe comprising the towns of Chili, Clarkson, Gates, Greece, Hamlin, Ogden, Parma, Riga, Sweden and Wheatland, and the first, second, third, fifth, ninth, tenth, eleventh, fifteenth, nineteenth and twentieth wards of the city of Rochester, as at present constituted.

District number forty-five (45) shall consist of the counties of Niagara, Genesee and Orleans.

District number forty-six (46) shall consist of the counties of Allegany, Livingston and Wyoming.

District number forty-seven (47) shall consist of that part of the county of Erie comprising the first, second, third, sixth, fifteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third and twenty-fourth wards of the city of Buffalo, as at present constituted.

District number forty-eight (48) shall consist of that part of the county of Erie comprising the fourth, fifth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and sixteenth wards of the city of Buffalo, as at present constituted.

District number forty-nine (49) shall consist of that part of the county of Erie comprising the seventeenth, eighteenth and twenty-first wards of the city of Buffalo, as at present constituted; and all the remainder of the said county of Erie not hereinbefore described.

District number fifty (50) shall consist of the counties of Chautauqua and Cattaraugus.

Const. 1846, art. III, § 3.

§ 4. Enumerations and reapportionments.

An enumeration of the inhabitants of the State shall be taken under the direction of the Secretary of State, during the months of May and June, in the year one thousand nine hundred and five, and in the same months every tenth year thereafter; and the said districts shall be so altered by the Legislature at the first regular session after the return of every enumeration, that each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county. No town, and no block in a city inclosed by streets or public ways, shall be divided in the formation of senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district. Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens.

No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall have more than one-third of all the senators; and no two counties or the territory

thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators.

The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the Senate shall always be composed of fifty members, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent.

Const. 1846, art. III, § 4.

§ 5. Apportionment of assemblymen; creation of assembly districts.

The members of the assembly shall be chosen by single districts, and shall be apportioned by the Legislature at the first regular session after the return of every enumeration among the several counties of the State, as nearly as may be according to the number of their respective inhabitants, excluding aliens. Every county heretofore established and separately organized, except the county of Hamilton, shall always be entitled to one member of assembly, and no county shall hereafter be erected unless its population shall entitle it to a member. The county of Hamilton shall elect with the county of Fulton, until the population of the county of Hamilton shall, according to the ratio, entitle it to a member. But the Legislature may abolish the said county of Hamilton and annex the territory thereof to some other county or counties.

The quotient obtained by dividing the whole number of inhabitants of the State, excluding aliens, by the number of members of assembly, shall be the ratio for appointment, which shall be made as follows: One member of assembly shall be apportioned to every county, including Fulton and Hamilton as one county, containing less than the ratio and one-half over. Two members shall be apportioned to every other county. The remaining members of assembly shall be apportioned to the counties having more than two ratios according to the number of inhabitants, excluding aliens. Members apportioned on remainders shall be apportioned to the counties having the highest remainders on the order thereof respectively. No county shall have more members of assembly than a county having a greater number of inhabitants, excluding aliens.

Until after the next enumeration, members of the Assembly shall be apportioned to the several counties as follows: Albany county, four members; Allegany county, one member; Broome county, two members; Cattaraugus county, two members; Cayuga county, two members; Chautauqua county, two members; Chemung county, one member; Chenango county, one member; Clinton county, one member; Columbia county, one member; Cortland county, one member; Delaware county, one member; Dutchess county, two members; Erie county, eight members; Essex county, one member; Franklin county, one member; Fulton and Hamilton counties, one member; Genesee county, one member; Greene county, one member; Herkimer county, one member; Jefferson county, two members; Kings county, twenty-one members; Lewis county, one member; Livingston county, one mem-

ber; Madison county, one member; Monroe county, four members; Montgomery county, one member; New York county, thirty-five members; Niagara county, two members; Oneida county, three members; Onondaga county, four members; Ontario county, one member; Orange county, two members; Orleans county, one member; Oswego county, two members; Otsego county, one member; Putnam county, one member; Queens county, three members; Rensselaer county, three members; Richmond county, one member; Rockland county, one member; St. Lawrence county, two members; Saratoga county, one member; Schenectady county, one member; Schoharie county, one member; Schuyler county, one member; Seneca county, one member; Steuben county, two members; Suffolk county, two members; Sullivan county, one member; Tioga county, one member; Tompkins county, one member; Ulster county, two members; Warren county, one member; Washington county, one member; Wayne county, one member; Westchester county, three members; Wyoming county, one member, and Yates county, one member.

In any county entitled to more than one member, the board of supervisors, and in any city embracing an entire county and having no board of supervisors, the common council, or if there be none, the body exercising the powers of a common council, shall assemble on the second Tuesday of June, one thousand eight hundred and ninety-five, and at such times as the Legislature making an apportionment shall prescribe, and divide such counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be, of convenient and contiguous territory in as compact form as practicable, each of which shall be wholly within a senate district formed under the same apportionment, equal to the number of members of assembly to which such county shall be entitled, and shall cause to be filed in the office of the Secretary of State and of the clerk of such county, a description of such districts, specifying the number of each district and of the inhabitants thereof, excluding aliens, according to the last preceding enumeration; and such apportionment and districts shall remain unaltered until another enumeration shall be made, as herein provided; but said division of the city of Brooklyn and the county of Kings to be made on the second Tuesday of June, one thousand eight hundred and ninety-five, shall be made by the common council of the said city and the board of supervisors of said county, assembled in joint session. In counties having more than one senate district, the same number of assembly districts shall be put in each senate district unless the assembly districts cannot be evenly divided among the senate districts of any county, in which case one more assembly district shall be put in the senate district in such county having the largest, or one less assembly district shall be put in the senate district in such county having the smallest number of inhabitants, excluding aliens, as the case may require. No town and no block in a city inclosed by streets or public ways, shall be divided in the formation of assembly districts, nor shall any district contain a greater excess in population over an adjoining district in the same senate district, than the population of a town or block therein adjoining such assembly district. Towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens; but in

the division of cities under the first apportionment, regard shall be had to the number of inhabitants, excluding aliens, of the election districts according to the State enumeration of one thousand eight hundred and ninety-two, so far as may be, instead of blocks. Nothing in this section shall prevent the division, at any time, of counties and towns, and the erection of new towns by the Legislature.

An apportionment by the Legislature, or other body, shall be subject to review by the Supreme Court, at the suit of any citizen, under such reasonable regulations as the Legislature may prescribe; and any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same.

Const. 1846, art. III, § 5.

§ 6. Compensation of members.

Each member of the Legislature shall receive for his services an annual salary of one thousand five hundred dollars. The members of either house shall also receive the sum of one dollar for every ten miles they shall travel in going to and returning from their place of meeting, once in each session, on the most usual route. Senators, when the Senate alone is convened in extraordinary session, or when serving as members of the court for the trial of impeachments, and such members of the Assembly, not exceeding nine in number, as shall be appointed managers of an impeachment, shall receive an additional allowance of ten dollars a day.

Const. 1846, art. III, § 6.

§ 7. Civil appointments of members void.

No member of the Legislature shall receive any civil appointment within this State, or the Senate of the United States, from the Governor, the Governor and Senate, or from the Legislature, or from any city government, during the time for which he shall have been elected; and all such appointments and all votes given for any such member for any such office or appointment shall be void.

Const. 1846, art. III, § 7.

§ 8. Persons disqualified from being members.

No person shall be eligible to the Legislature, who at the time of his election, is, or within one hundred days previous thereto has been, a member of Congress, a civil or military officer under the United States, or an officer under any city government. And if any person shall, after his election as a member of the Legislature, be elected to Congress, or appointed to any office, civil or military, under the government of the United States, or under any city government, his acceptance thereof shall vacate his seat.

Const. 1846, art. III, § 8.

§ 9. Time of elections.

The elections of senators and members of assembly, pursuant to the provisions of this Constitution, shall be held on the Tuesday succeeding the first Monday of November, unless otherwise directed by the Legislature.

Const. 1846, art. III, § 9.

§ 10. Powers of each house.

A majority of each house shall constitute a quorum to do business. Each house shall determine the rules of its own proceedings, and be the judge of the elections, returns and qualifications of its own members; shall choose its own officers; and the Senate shall choose a temporary president to preside in case of the absence or impeachment of the Lieutenant-Governor, or when he shall refuse to act as president, or shall act as Governor.

Const. 1846, art. III, § 10.

§ 11. Journals; open sessions; adjournments.

Each house shall keep a journal of its proceedings, and publish the same, except such parts as may require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall, without the consent of the other, adjourn for more than two days.

Const. 1846, art. III, § 11.

§ 12. Members not to be questioned for speeches.

For any speech or debate in either house of the Legislature, the members shall not be questioned in any other place.

Const. 1846, art. III, § 12.

§ 13. Bills may originate in either house.

Any bill may originate in either house of the Legislature, and all bills passed by one house may be amended by the other.

Const. 1846, art. III, § 13.

§ 14. Enacting clause of bills.

The enacting clause of all bills shall be "The People of the State of New York, represented in Senate and Assembly, do enact as follows," and no law shall be enacted except by bill.

Const. 1846, art. III, § 14.

§ 15. Manner of passing bills.

No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the Governor, or the acting Governor, shall have certified to the necessity of its immediate passage, under his hand and the seal of the State; nor shall any bill be passed or become a law, except by the assent of a majority of the members elected to each branch of the Legislature; and upon the last reading of a bill, no amendment thereof shall be allowed, and the question upon its final passage shall be taken immediately thereafter, and the yeas and nays entered on the journal.

Const. 1846, art. III, § 15.

§ 16. Private and local bills not to embrace more than one subject.

No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title.

Const. 1846, art. III, § 16.

§ 17. Existing laws made applicable to be inserted.

No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act.

Const. 1846, art. III, § 17.

§ 18. Cases in which private and local bills shall not be passed; restrictions as to laws authorizing street railroads.

The legislature shall not pass a private or local bill in any of the following cases:

Changing the names of persons.

Laying out, opening, altering, working or discontinuing roads, highways or alleys, or for draining swamps or other low lands.

Locating or changing county seats.

Providing for changes of venue in civil or criminal cases.

Incorporating villages.

Providing for election of members of boards of supervisors.

Selecting, drawing, summoning or impaneling grand or petit jurors.

Regulating the rate of interest on money.

The opening and conducting of elections or designating places of voting.

Creating, increasing or decreasing fees, percentages or allowances of public officers, during the term for which said officers are elected or appointed.

Granting to any corporation, association or individual the right to lay down railroad tracks.

Granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever.

Granting to any person, association, firm or corporation an exemption from taxation on real or personal property.

Providing for building bridges, and chartering companies for such purposes, except on the Hudson river below Waterford, and on the East river, or over the waters forming a part of the boundaries of the State.

The Legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment, may be provided for by general laws. But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners. [As amended in 1901. To take effect Jan. 1, 1902.]

Const. 1846, art. III, § 18, added in 1874.

§ 19. Private claims not to be audited by legislature.

The Legislature shall neither audit nor allow any private claim or account against the State, but may appropriate money to pay such claims as shall have been audited and allowed according to law.

Const. 1846, art. III, § 19, added in 1874.

§ 20. Two-thirds bills.

The assent of two-thirds of the members elected to each branch of the Legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes.

Const. 1846, art. I, § 9.

§ 21. Appropriation bills.

No money shall ever be paid out of the treasury of this State, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act; and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum.

Const. 1846, art. VII, § 8.

§ 22. Restrictions as to provisions in the appropriation or supply bills.

No provision or enactment shall be embraced in the annual appropriation or supply bill, unless it relates specifically to some particular appropriation in the bill; and any such provision or enactment shall be limited in its operation to such appropriation.

New.

§ 23. Certain sections not to apply to commission bills.

Sections seventeen and eighteen of this article shall not apply to any bill, or the amendments to any bill, which shall be reported to the Legislature by commissioners who have been appointed pursuant to law to revise the statutes.

Const. 1846, art. III, § 26, added in 1874.

§ 24. Tax bills to state tax distinctly.

Every law which imposes, continues or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object.

Const. 1846, art. III, § 20, added in 1874.

§ 25. When yeas and nays necessary; three-fifths to constitute quorum.

On the final passage, in either house of the Legislature, of any act which imposes, continues or revives a tax, or creates a debt or charge, or makes, continues or revives any appropriation of public or trust money or property, or releases, discharges or commutes any claim or demand of the State, the question shall be taken by yeas and nays, which shall be duly entered upon the

journals, and three-fifths of all the members elected to either house shall, in all such cases, be necessary to constitute a quorum therein.

Const. 1846, art. III, § 21, added in 1874.

§ 26. Board of supervisors.

There shall be in each county, except in a county wholly included in a city, a board of supervisors, to be composed of such members and elected in such manner and for such period as is or may be provided by law. In a city which includes an entire county, or two or more entire counties, the powers and duties of a board of supervisors may be devolved upon the municipal assembly, common council, board of aldermen or other legislative body of the city. [As amended in 1899.]

Const. 1846, art. III, § 22, added in 1874.

§ 27. Local legislative powers.

The Legislature shall, by general laws, confer upon the boards of supervisors of the several counties of the State such further powers of local legislation and administration as the Legislature may, from time to time, deem expedient, and in counties which now have, or may hereafter have, county auditors or other fiscal officers, authorized to audit bills, accounts, charges, claims or demands against the county, the Legislature may confer such powers upon said auditors, or fiscal officers, as the Legislature may, from time to time deem expedient.

Const. 1846, art. III, § 23, added in 1874, amended 1900.

§ 28. Extra compensation prohibited.

The Legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor.

Const. 1846, art. III, § 24.

§ 29. Prison labor; contract system abolished.

The Legislature shall, by law, provide for the occupation and employment of prisoners sentenced to the several state prisons, penitentiaries, jails and reformatories in the State; and on and after the first day of January, in the year one thousand eight hundred and ninety-seven, no person in any such prison, penitentiary, jail or reformatory, shall be required or allowed to work, while under sentence thereto, at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be farmed out, contracted, given or sold to any person, firm, association or corporation. This section shall not be construed to prevent the Legislature from providing that convicts may work for, and that the products of their labor may be disposed of to, the State or any political division thereof, or for or to any public institution owned or managed and controlled by the State, or any political division thereof.

New.

ARTICLE FOURTH.

- Sec. 1. Executive power.**
2. Qualifications of governor and lieutenant-governor.
3. Election of governor and lieutenant-governor.
4. Duties and powers of governor; compensation.
5. Reprieves, commutations and pardons to be granted by governor.
6. When lieutenant-governor to act as governor.
7. Qualifications and duties of lieutenant-governor; succession to the governorship.
8. Salary of lieutenant-governor.
9. Bills to be presented to governor; approval; passage of bills by legislature if not approved.

§ 1. Executive power.

The executive power shall be vested in a Governor, who shall hold his office for two years; a Lieutenant-Governor shall be chosen at the same time, and for the same term. The Governor and Lieutenant-Governor elected next preceding the time when this section shall take effect, shall hold office until and including the thirty-first day of December, one thousand eight hundred and ninety-six, and their successors shall be chosen at the general election in that year.

Const. 1846, art. IV, § 1.

§ 2. Qualifications of governor and lieutenant-governor.

No person shall be eligible to the office of Governor or Lieutenant-Governor, except a citizen of the United States, of the age of not less than thirty years, and who shall have been five years next preceding his election a resident of this State.

Const. 1846, art. IV, § 2.

§ 3. Election of governor and lieutenant-governor.

The Governor and Lieutenant-Governor shall be elected at the times and places of choosing members of the Assembly. The persons respectively having the highest number of votes for Governor and Lieutenant-Governor shall be elected; but in case two or more shall have an equal and the highest number of votes for Governor, or for Lieutenant-Governor, the two houses of the Legislature at its next annual session shall forthwith, by joint ballot, choose one of the said persons so having an equal and the highest number of votes for Governor or Lieutenant-Governor.

Const. 1846, art. IV, § 3.

§ 4. Duties and powers of governor; compensation.

The Governor shall be Commander-in-Chief of the military and naval forces of the State. He shall have power to convene the Legislature, or the Senate only, on extraordinary occasions. At extraordinary sessions no subject shall be acted upon, except such as the Governor may recommend for consideration. He shall communicate by message to the Legislature at every session the condition of the State, and recommend such matters to it as he shall judge expedient. He shall transact all necessary business with the officers of government, civil and military. He shall expedite all such measures as may be resolved upon by the Legislature, and shall take care that the laws are faithfully executed. He shall receive for his services an annual salary of ten thousand

dollars, and there shall be provided for his use a suitable and furnished executive residence.

Const. 1846, art. IV, § 4, amended in 1874.

§ 5. Reprieves, commutations, and pardons to be granted by governor.

The Governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he shall have power to suspend the execution of the sentence, until the case shall be reported to the Legislature at its next meeting, when the Legislature shall either pardon, or commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall annually communicate to the Legislature each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve.

Const. 1846, art. IV, § 5.

§ 6. When lieutenant-governor to act as governor.

In case of the impeachment of the Governor, or his removal from office, death, inability to discharge the powers and duties of the said office, resignation, or absence from the State, the powers and duties of the office shall devolve upon the Lieutenant-Governor for the residue of the term, or until the disability shall cease. But when the Governor shall, with the consent of the Legislature, be out of the State, in time of war, at the head of a military force thereof, he shall continue Commander-in-Chief of all the military force of the State.

Const. 1846, art. IV, § 6.

§ 7. Qualifications and duties of lieutenant-governor; succession to the governorship.

The Lieutenant-Governor shall possess the same qualifications of eligibility for office as the Governor. He shall be president of the Senate, but shall have only a casting vote therein. If during a vacancy of the office of Governor, the Lieutenant-Governor shall be impeached, displaced, resign, die, or become incapable of performing the duties of his office, or be absent from the State, the President of the Senate shall act as Governor until the vacancy be filled or the disability shall cease; and if the President of the Senate for any of the above causes shall become incapable of performing the duties pertaining to the office of Governor, the Speaker of the Assembly shall act as Governor until the vacancy be filled or the disability shall cease.

Const. 1846, art. IV, § 7.

§ 8. Salary of lieutenant-governor.

The Lieutenant-Governor shall receive for his services an annual salary of five thousand dollars, and shall not receive or be entitled to any other compensation, fee or perquisite, for any duty

or service he may be required to perform by the Constitution by law.

Const. 1846, art. IV, § 8, amended in 1874.

§ 9. Bills to be presented to governor; approval; veto of bill by legislature if not approved.

Every bill which shall have passed the Senate and Assembly, before it becomes a law, be presented to the Governor. If he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it shall have originated, which shall enter the objections at large on the journal, and proceed to reconsider it. If after such reconsideration, two-thirds of the members elected to that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house by which it shall likewise be reconsidered; and if approved by two-thirds of the members elected to that house, it shall become a law notwithstanding the objections of the Governor. In such cases, the votes in both houses shall be determined by yeas and nays, and the names of the members voting shall be entered on the journal of each house respectively. If any bill shall be returned by the Governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall have the same effect as if he had signed it, unless the Legislature shall, by their adjournment, prevent its return, in which case it shall not become a law without the approval of the Governor. No bill shall become a law after the final adjournment of the Legislature, unless approved by the Governor within thirty days after such adjournment. If any bill presented to the Governor contain several items of appropriation of money, he may object to one or more of such items while approving of the other portions of the bill. In such case, he shall append to the bill, at the time of signing it, a statement of the items to which he objects; the appropriation so objected to shall not take effect. If the Legislature be in session, he shall transmit to the house in which the bill originated a copy of such statement, and the items objected to shall be separately reconsidered. If on reconsideration one or more of such items be approved by two-thirds of the members elected to each house, the same shall be part of the law notwithstanding the objections of the Governor. All the provisions of this section, in relation to bills not approved by the Governor, shall apply in cases in which he shall withhold approval from any item or items contained in a bill appropriating money.

Const. 1846, art. IV, § 9, amended in 1874.

ARTICLE FIFTH.

- Sec.**
1. State officers.
 2. First election of state officers.
 3. Superintendent of public works; appointment; powers and duties.
 4. Superintendent of state prisons; appointment; powers and duties.
 5. Commissioners of the land office; of the canal fund; canal board.
 6. Powers and duties of boards.
 7. State treasurer; suspension by governor.
 8. Certain offices abolished.
 9. Civil service appointments and promotions.

§ 1. State officers.

The Secretary of State, Comptroller, Treasurer, Attorney-General and State Engineer and Surveyor shall be chosen at a general election, at the times and places of electing the Governor and Lieutenant-Governor, and shall hold their offices for two years, except as provided in section two of this article. Each of the officers in this article named, excepting the Speaker of the Assembly, shall, at stated times during his continuance in office, receive for his services a compensation which shall not be increased or diminished during the term for which he shall have been elected; nor shall he receive to his use any fees or perquisites of office or other compensation. No person shall be elected to the office of State Engineer and Surveyor who is not a practical civil engineer.

Const. 1846, art. V, §§ 1, 2.

§ 2. First election of state officers.

The first election of the Secretary of State, Comptroller, Treasurer, Attorney-General and State Engineer and Surveyor, pursuant to this article, shall be held in the year one thousand eight hundred and ninety-five, and their terms of office shall begin on the first day of January following, and shall be for three years. At the general election in the year one thousand eight hundred and ninety-eight, and every two years thereafter, their successors shall be chosen for the term of two years.

New.

§ 3. Superintendent of public works; appointment; powers and duties of.

A Superintendent of Public Works shall be appointed by the Governor, by and with the advice and consent of the Senate, and hold his office until the end of the term of the Governor by whom he was nominated, and until his successor is appointed and qualified. He shall receive a compensation to be fixed by law. He shall be required by law to give security for the faithful execution of his office before entering upon the duties thereof. He shall be charged with the execution of all laws relating to the repair and navigation of the canals, and also of those relating to the construction and improvement of the canals, except so far as the execution of the laws relating to such construction or improvement shall be confided to the State Engineer and Surveyor; subject to the control of the Legislature, he shall make the rules and regulations for the navigation or use of the canals. He may be suspended or removed from office by the Governor, whenever, in his judgment, the public interest shall so require; but in case of the removal of such Superintendent of Public

Works from office, the Governor shall file with the Secretary of State a statement of the cause of such removal, and shall report such removal and the cause thereof to the Legislature at its next session. The Superintendent of Public Works shall appoint not more than three assistant superintendents, whose duties shall be prescribed by him, subject to modification by the Legislature, and who shall receive for their services a compensation to be fixed by law. They shall hold their office for three years, subject to suspension or removal by the Superintendent of Public Works, whenever, in his judgment, the public interest shall so require. Any vacancy in the office of any such assistant superintendent shall be filled for the remainder of the term for which he was appointed, by the Superintendent of Public Works; but in case of the suspension or removal of any such assistant superintendent by him, he shall at once report to the Governor, in writing, the cause of such removal. All other persons employed in the care and management of the canals, except collectors of tolls, and those in the department of the State Engineer and Surveyor, shall be appointed by the Superintendent of Public Works, and be subject to suspension or removal by him. The Superintendent of Public Works shall perform all the duties of the former Canal Commissioners and Board of Canal Commissioners, as now declared by law, until otherwise provided by the Legislature. The Governor, by and with the advice and consent of the Senate, shall have power to fill vacancies in the office of Superintendent of Public Works; if the Senate be not in session, he may grant commissions which shall expire at the end of the next succeeding session of the Senate.

Const. 1846, art. V, § 3, amended in 1874.

§ 4. Superintendent of state prisons; appointment; powers and duties of.

A Superintendent of State Prisons shall be appointed by the Governor, by and with the advice and consent of the Senate, and hold his office for five years, unless sooner removed; he shall give security in such amount, and with such sureties as shall be required by law for the faithful discharge of his duties; he shall have the superintendence, management and control of state prisons, subject to such laws as now exist or may hereafter be enacted; he shall appoint the agents, wardens, physicians and chaplains of the prisons. The agent and warden of each prison shall appoint all other officers of such prison, except the clerk, subject to the approval of the same by the Superintendent. The Comptroller shall appoint the clerks of the prisons. The Superintendent shall have all the powers and perform all the duties not inconsistent herewith, which were formerly had and performed by the Inspectors of State Prisons. The Governor may remove the Superintendent for cause at any time, giving to him a copy of the charges against him, and an opportunity to be heard in his defense.

Const. 1846, art. V, § 4, amended in 1876.

§ 5. Commissioners of the land office; of the canal fund; canal board.

The Lieutenant-Governor, Speaker of the Assembly, Secretary of State, Comptroller, Treasurer, Attorney-General and State

Engineer and Surveyor shall be the commissioners of the land office. The Lieutenant-Governor, Secretary of State, Comptroller, Treasurer and Attorney-General shall be the commissioners of the canal fund. The canal board shall consist of the commissioners of the canal fund, the State Engineer and Surveyor and the Superintendent of Public Works.

Const. 1846, art. V, § 5.

§ 6. Powers and duties of boards.

The powers and duties of the respective boards, and of the several officers in this article mentioned, shall be such as now are or hereafter may be prescribed by law.

Const. 1846, art. V, § 6.

§ 7. State treasurer, suspension by governor.

The Treasurer may be suspended from office by the Governor, during the recess of the Legislature, and until thirty days after the commencement of the next session of the Legislature, whenever it shall appear to him that such Treasurer has, in any particular, violated his duty. The Governor shall appoint a competent person to discharge the duties of the office during such suspension of the Treasurer.

Const. 1846, art. V, § 7.

§ 8. Certain offices abolished.

All offices for the weighing, gauging, measuring, culling or inspecting any merchandise, produce, manufacture or commodity whatever, are hereby abolished; and no such office shall hereafter be created by law; but nothing in this section contained shall abrogate any office created for the purpose of protecting the public health or the interests of the State in its property, revenue, tolls or purchases, or of supplying the people with correct standards of weights and measures, or shall prevent the creation of any office for such purposes hereafter.

Const. 1846, art. V, § 8.

§ 9. Civil service appointments and promotions.

Appointments and promotions in the civil service of the State, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late civil war, who are citizens and residents of this State, shall be entitled to preference in appointment and promotion without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section.

New.

ARTICLE SIXTH.

- Sec. 1. Supreme court; how constituted; judicial districts.
 2. Judicial departments; appellate division, how constituted; governor to designate justices; reporter; time and place of holding courts.
 3. Judge or justice not to sit in review; testimony in equity cases.
 4. Terms of office; vacancies, how filled.
 5. City courts abolished; judges become justices of supreme court; salaries; jurisdiction vested in supreme court.
 6. Circuit courts and courts of oyer and terminer abolished.
 7. Court of appeals.
 8. Vacancy in court of appeals, how filled.
 9. Jurisdiction of court of appeals.
 10. Judges not to hold any other office.
 11. Removal of judges.
 12. Compensation; age restriction; assignment by governor.
 13. Trial of impeachments.
 14. County courts.
 15. Surrogates' courts: surrogates, their powers and jurisdiction; vacancies.
 16. Local judicial officers.
 17. Justices of the peace; district court justices.
 18. Inferior local courts.
 19. Clerks of courts.
 20. No judicial officer, except justice of the peace, to receive fees; not to act as attorney or counselor.
 21. Publication of statutes.
 22. Terms of office of present justices of the peace and local judicial officers.
 23. Courts of special sessions.

§ 1. Supreme court; how constituted; judicial districts.

The Supreme Court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the Court of Appeals as now is or may be prescribed by law not inconsistent with this article. The existing judicial districts of the State are continued until changed as hereinafter provided. The Supreme Court shall consist of the Justices now in office, and of the Judges transferred thereto by the fifth section of this article, all of whom shall continue to be Justices of the Supreme Court during their respective terms, and of twelve additional Justices who shall reside in and be chosen by the electors of, the several existing judicial districts, three in the first district, three in the second, and one in each of the other districts; and of their successors. The successors of said Justices shall be chosen by the electors of their respective judicial districts. The Legislature may alter the judicial districts once after every enumeration under the Constitution, of the inhabitants of the State, and there-

upon reapportionment the Justices to be thereafter elected in the districts so altered. The Legislature may from time to time increase the number of justices in any judicial district except that the number of justices in the first and second district or in any of the districts into which the second district may be divided, shall not be increased to exceed one justice for each eighty thousand, or fraction over forty thousand of the population thereof, as shown by the last State, or Federal census or enumeration, and except that the number of justices in any other district shall not be increased to exceed one justice for each sixty thousand or fraction over thirty-five thousand of the population thereof as shown by the last State or Federal census or enumeration. The Legislature may erect out of the second judicial district as now constituted, another judicial district and apportion the justices in office between the districts, and provide for the election of additional justices in the new district not exceeding the limit herein provided.

Const. 1846, art. VI, § 6, amended in 1905.

§ 2. Judicial departments; appellate division, how constituted; governor to designate justices; reporter; time and place of holding courts.

The Legislature shall divide the State into four judicial departments. The first department shall consist of the county of New York; the others shall be bounded by county lines, and be compact and equal in population as nearly as may be. Once every ten years the Legislature may alter the judicial departments, but without increasing the number thereof.

There shall be an Appellate Division of the Supreme Court, consisting of seven Justices in the first department, and of five Justices in each of the other departments. In each department four shall constitute a quorum, and the concurrence of three shall be necessary to a decision. No more than five Justices shall sit in any case.

From all the Justices elected to the Supreme Court the Governor shall designate those who shall constitute the Appellate Division in each department; and he shall designate the Presiding Justice thereof, who shall act as such during his term of office, and shall be a resident of the department. The other Justices shall be designated for terms of five years or the unexpired portions of their respective terms of office, if less than five years. From time to time as the terms of such designations expire, or vacancies occur, he shall make new designations. A majority of the Justices so designated to sit in the Appellate Division, in each department shall be residents of the department. He may also make temporary designations in case of the absence or inability to act of any Justice in the Appellate Division, or in case the Presiding Justice of any Appellate Division shall certify to him that one or more additional Justices are needed for the speedy

disposition of the business before it. Whenever the Appellate Division in any department shall be unable to dispose of its business within a reasonable time, a majority of the Presiding Justices of the several departments at a meeting called by the Presiding Justice of the department in arrears may transfer any pending appeals from such department to any other department for hearing and determination. No Justice of the Appellate Division shall, within the department to which he may be designated to perform the duties of an Appellate Justice, exercise any of the powers of a Justice of the Supreme Court, other than those of a Justice out of court, and those pertaining to the Appellate Division, or to the hearing and decision of motions submitted by consent of counsel, but any such Justice, when not actually engaged in performing the duties of such Appellate Justice in the department to which he is designated, may hold any term of the Supreme Court and exercise any of the powers of a Justice of the Supreme Court in any county or judicial district in any other department of the State. From and after the last day of December, eighteen hundred and ninety-five, the Appellate Division shall have the jurisdiction now exercised by the Supreme Court at its General Terms and by the General Terms of the Court of Common Pleas for the City and County of New York, the Superior Court of the City of New York, the Superior Court of Buffalo and the City of Brooklyn, and such additional jurisdiction as may be conferred by the Legislature. It shall have power to appoint and remove a reporter.

The Justices of the Appellate Division in each department shall have power to fix the times and places for holding Special Terms therein, and to assign the Justices in the departments to hold such terms; or to make rules therefor.

Const. 1846, art. VI, §§ 7 and 28, added in 1882, amended in 1905.

§ 3. Judge or justice not to sit in review; testimony in equity cases.

No Judge or Justice shall sit in the Appellate Division or in the Court of Appeals in review of a decision made by him or by any court of which he was at the time a sitting member. The testimony in equity cases shall be taken in like manner as in cases at law; and, except as herein otherwise provided, the Legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised.

Const. 1846, art. VI, § 8.

§ 4. Terms of office; vacancies, how filled.

The official terms of the Justices of the Supreme Court shall be fourteen years from and including the first day of January next after their election. When a vacancy shall occur otherwise than

by expiration of term in the office of Justice of the Supreme Court the same shall be filled for a full term, at the next general election, happening not less than three months after such vacancy occurs; and, until the vacancy shall be so filled, the Governor by and with the advice and consent of the Senate, if the Senate shall be in session, or if not in session the Governor, may fill such vacancy by appointment, which shall continue until and including the last day of December next after the election at which the vacancy shall be filled.

Const. 1846, art. VI, §§ 9, 13.

§ 5. City courts abolished; judges become justices of supreme court; salaries; jurisdiction vested in supreme court.

The Superior Court of the City of New York, the Court of Common Pleas for the City and County of New York, the Superior Court of Buffalo, and the City Court of Brooklyn, are abolished from and after the first day of January, one thousand eight hundred and ninety-six, and thereupon the seals, records, papers and documents of or belonging to such courts, shall be deposited in the offices of the Clerks of the several counties in which said courts now exist; and all actions and proceedings then pending in such courts shall be transferred to the Supreme Court for hearing and determination. The Judges of said courts in office on the first day of January, one thousand eight hundred and ninety-six, shall, for the remainder of the term for which they were elected or appointed, be Justices of the Supreme Court; but they shall sit only in the counties in which they were elected or appointed. Their salaries shall be paid by the said counties respectively, and shall be the same as the salaries of the other Justices of the Supreme Court residing in the same counties. Their successors shall be elected as Justices of the Supreme Court by the electors of the judicial districts in which they respectively reside.

The jurisdiction now exercised by the several courts hereby abolished, shall be vested in the Supreme Court. Appeals from inferior and local courts now heard in the Court of Common Pleas for the City and County of New York and the Superior Court of Buffalo, shall be heard in the Supreme Court in such manner and by such Justice or Justices as the Appellate Divisions in the respective departments which include New York and Buffalo shall direct, unless otherwise provided by the Legislature.

New.

§ 6. Circuit courts and courts of oyer and terminer abolished.

Circuit Courts and Courts of Oyer and Terminer are abolished from and after the last day of December, one thousand eight

hundred and ninety-five. All their jurisdiction shall thereupon be vested in the Supreme Court, and all actions and proceedings then pending in such courts shall be transferred to the Supreme Court for hearing and determination. Any Justice of the Supreme Court, except as otherwise provided in this article, may hold court in any county.

New.

§ 7. Court of appeals.

The Court of Appeals is continued. It shall consist of the Chief Judge and Associate Judges now in office, who shall hold their offices until the expiration of their respective terms, and their successors, who shall be chosen by the electors of the State. The official terms of the Chief Judge and Associate Judges shall be fourteen years from and including the first day of January next after their election. Five members of the court shall form a quorum, and the concurrence of four shall be necessary to a decision. The court shall have power to appoint and to remove its reporter, clerk and attendants. Whenever and as often as a majority of the Judges of the Court of Appeals shall certify to the Governor that said court is unable, by reason of the accumulation of causes pending therein, to hear and dispose of the same with reasonable speed, the Governor shall designate not more than four Justices of the Supreme Court to serve as Associate Judges of Court of Appeals. The Justices so designated shall be relieved from their duties as Justices of the Supreme Court and shall serve as Associate Judges of the Court of Appeals until the causes undisposed of in said court are reduced to two hundred, when they shall return to the Supreme Court. The Governor may designate Justices of the Supreme Court to fill vacancies. No Justice shall serve as Associate Judge of the Court of Appeals except while holding the office of Justice of the Supreme Court, and no more than seven Judges shall sit in any case. [As amended in 1899.]

Const. 1846, art. VI, § 3, amended in 1860.

§ 8. Vacancy in court of appeals, how filled.

When a vacancy shall occur otherwise than by expiration of term, in the office of Chief or Associate Judge of the Court of Appeals, the same shall be filled, for a full term, at the next general election happening not less than three months after such vacancy occurs; and until the vacancy shall be so filled, the Governor, by and with the advice and consent of the Senate, if the Senate shall be in session, or if not in session the Governor may fill such vacancy by appointment. If any such appointment of Chief Judge shall be made from among the Associate Judges, a temporary appointment of Associate Judge shall be made in like manner; but in such case, the person appointed Chief Judge shall not be deemed to vacate his office of Associate Judge any longer than until the expiration of his appointment as Chief Judge. The powers and jurisdiction of the court shall not be suspended for want of appointment or election, when the number of Judges is sufficient to constitute a quorum. All appointments under this section shall continue until and including the last day of December next after the election at which the vacancy shall be filled.

Const. 1846, art. VI, § 3, amended in 1860.

§ 9. Jurisdiction of court of appeals.

After the last day of December, one thousand eight hundred and ninety-five, the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals. Except where the judgment is of death, appeals may be taken, as of right, to said court only from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court, finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them. The Appellate Division in any department may, however, allow an appeal upon any question of law which, in its opinion, ought to be reviewed by the Court of Appeals.

The Legislature may further restrict the jurisdiction of the Court of Appeals and the right of appeal thereto, but the right to appeal shall not depend upon the amount involved.

The provisions of this section shall not apply to orders made or judgments rendered by any General Term before the last day of December, one thousand eight hundred and ninety-five, but appeals therefrom may be taken under existing provisions of law.

New.

§ 10. Judges not to hold any other office.

The Judges of the Court of Appeals and the Justices of the Supreme Court shall not hold any other office or public trust. All votes for any of them, for any other than a judicial office, given by the Legislature or the people, shall be void.

Const. 1846, art. VI, § 10, amended in 1869.

§ 11. Removal of judges.

Judges of the Court of Appeals and Justices of the Supreme Court may be removed by concurrent resolution of both houses of the Legislature, if two-thirds of all the members elected to each house concur therein. All other judicial officers, except Justices of the Peace and judges or justices of inferior courts not of record, may be removed by the Senate, on the recommendation of the Governor, if two-thirds of all the members elected to the Senate concur therein. But no officer shall be removed by virtue of this section except for cause, which shall be entered on the journals, nor unless he shall have been served with a statement of the cause alleged, and shall have had an opportunity to be heard. On the question of removal, the yeas and nays shall be entered on the journal.

Const. 1846, art. VI, § 11, amended in 1869.

§ 12. Compensation; age restriction; assignment by governor.

No person shall hold the office of Judge or Justice of any court longer than until and including the last day of December next after he shall be seventy years of age. Each justice of the supreme court shall receive from the state the sum of ten thousand dollars per year. Those assigned to the appellate divisions in the third and fourth departments shall each receive in addition the sum of two thousand dollars, and the presiding justices thereof the sum of two thousand five hundred dollars per year. Those justices elected in the first and second judicial departments shall

continue to receive from their respective cities, counties or districts, as now provided by law, such additional compensation as will make their aggregate compensation what they are now receiving. Those justices elected in any judicial department other than the first or second, and assigned to the appellate divisions of the first or second departments, shall, while so assigned, receive from those departments respectively, as now provided by law, such additional sum as is paid to the justices of those departments. A justice elected in the third or fourth department assigned by the appellate division or designated by the governor to hold a trial or special term in a judicial district other than that in which he is elected shall receive in addition ten dollars per day for expenses while actually so engaged in holding such term, which shall be paid by the state and charged upon the judicial district where the service is rendered. The compensation herein provided shall be in lieu of and shall exclude all other compensation and allowance to said justices for expenses of every kind and nature whatsoever. The provisions of this section shall apply to the judges and justices now in office and to those hereafter elected.

Const. 1846, art. VI, §§ 13, 14, amended in 1860 and 1900.

§ 13. Trial of impeachments.

The Assembly shall have the power of impeachment, by a vote of a majority of all the members elected. The Court for the Trial of Impeachments shall be composed of the President of the Senate, the senators or the major part of them, and the Judges of the Court of Appeals, or the major part of them. On the trial of an impeachment against the Governor or Lieutenant-Governor, the Lieutenant-Governor shall not act as a member of the court. No judicial officer shall exercise his office, after articles of impeachment against him shall have been preferred to the Senate, until he shall have been acquitted. Before the trial of an impeachment the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to the evidence, and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any office of honor, trust or profit under this State; but the party impeached shall be liable to indictment and punishment according to law.

Const. 1846, art. VI, § 1, amended in 1860.

§ 14. County courts.

The existing County Courts are continued, and the Judges thereof now in office shall hold their offices until the expiration of their respective terms. In the county of Kings there shall be two County Judges and the additional County Judge shall be chosen at the next general election held after the adoption of this article. The successors of the several County Judges shall be chosen by the electors of the counties for the term of six years. County Courts shall have the powers and jurisdiction they now possess, and also original jurisdiction in actions for the recovery of money only, where the defendants reside in the county, and in which the complaint demands judgment for a sum not exceeding two thousand dollars. The Legislature may hereafter enlarge or restrict the jurisdiction of the County Courts, provided, however, that their jurisdiction shall not be so extended as to authorize an action therein for the recovery of money only, in which

the sum demanded exceeds two thousand dollars, or in which any person not a resident of the county is a defendant.

Courts of Sessions, except in the county of New York, are abolished from and after the last day of December, one thousand eight hundred and ninety-five. All the jurisdiction of the Court of Sessions in each county, except the county of New York, shall thereupon be vested in the County Court thereof, and all actions and proceedings then pending in such Courts of Sessions shall be transferred to said County Courts for hearing and determination. Every County Judge shall perform such duties as may be required by law. His salary shall be established by law, payable out of the county treasury. A County Judge of any county may hold County Courts in any other county when requested by the Judge of such other county.

Const. 1846, art. VI, § 15, amended in 1869.

§ 15. Surrogates' courts; surrogates, their powers and jurisdiction; vacancies.

The existing Surrogates' Courts are continued, and the Surrogates now in office shall hold their offices until the expiration of their terms. Their successors shall be chosen by the electors of their respective counties, and their terms of office shall be six years, except in the county of New York, where they shall continue to be fourteen years. Surrogates and Surrogates' Courts shall have the jurisdiction and powers which the Surrogates and existing Surrogates' Courts now possess, until otherwise provided by the Legislature. The County Judge shall be Surrogate of his county, except where a separate Surrogate has been or shall be elected. In counties having a population exceeding forty thousand, wherein there is no separate Surrogate, the Legislature may provide for the election of a separate officer to be Surrogate, whose term of office shall be six years. When the Surrogate shall be elected as a separate officer his salary shall be established by law, payable out of the county treasury. No County Judge or Surrogate shall hold office longer than until and including the last day of December next after he shall be seventy years of age. Vacancies occurring in the office of County Judge or Surrogate shall be filled in the same manner as like vacancies occurring in the Supreme Court. The compensation of any County Judge or Surrogate shall not be increased or diminished during his term of office. For the relief of Surrogates' Courts the Legislature may confer upon the Supreme Court in any county having a population exceeding four hundred thousand, the powers and jurisdiction of Surrogates, with authority to try issues of fact by jury in probate cases.

Const. 1846, art. VI, § 15, amended in 1869.

§ 16. Local judicial officers.

The Legislature may, on application of the board of supervisors, provide for the election of local officers, not to exceed two in any county, to discharge the duties of County Judge and of Surrogate, in cases of their inability or of a vacancy, and in such other cases as may be provided by law, and to exercise such other powers in special cases as are or may be provided by law.

Const. 1846, art. VI, § 16, amended in 1869.

§ 17. Justices of the peace; district court justices.

The electors of the several towns shall, at their annual town meetings, or at such other time and in such manner as the Legislature may direct, elect Justices of the Peace, whose term of office shall be four years. In case of an election to fill a vacancy occurring before the expiration of a full term, they shall hold for the residue of the unexpired term. Their number and classification may be regulated by law. Justices of the Peace and judges or justices of inferior courts not of record, and their clerks may be removed for cause, after due notice and an opportunity of being heard, by such courts as are or may be prescribed by law. Justices of the Peace and District Court Justices may be elected in the different cities of this State in such manner, and with such powers, and for such terms, respectively, as are or shall be prescribed by law; all other judicial officers in cities, whose election or appointment is not otherwise provided for in this article, shall be chosen by the electors of such cities, or appointed by some local authorities thereof.

Const. 1846, art. VI, § 18, amended in 1869.

§ 18. Inferior local courts.

Inferior local courts of civil and criminal jurisdiction may be established by the Legislature, but no inferior local court hereafter created shall be a court of record. The Legislature shall not hereafter confer upon any inferior or local court of its creation, any equity jurisdiction or any greater jurisdiction in other respects than is conferred upon County Courts by or under this article. Except as herein otherwise provided, all judicial officers shall be elected or appointed at such times and in such manner as the Legislature may direct.

Const. 1846, art. VI, § 19, amended in 1869.

§ 19. Clerks of courts.

Clerks of the several counties shall be clerks of the Supreme Court, with such powers and duties as shall be prescribed by law. The Justices of the Appellate Division in each department shall have power to appoint and to remove a clerk, who shall keep his office at a place to be designated by said Justices. The Clerk of the Court of Appeals shall keep his office at the seat of government. The Clerk of the Court of Appeals and the clerks of the Appellate Division shall receive compensation to be established by law and paid out of the public treasury.

Const. 1846, art. VI, § 20, amended in 1869.

§ 20. No judicial Officer, except justice of the peace, to receive fees; not to act as attorney or counselor.

No judicial officer, except Justices of the Peace, shall receive to his own use any fees or perquisites of office; nor shall any Judge of the Court of Appeals, or Justice of the Supreme Court, or any County Judge or Surrogate hereafter elected in a county having a population exceeding one hundred and twenty thousand, practice as an attorney or counselor in any court of record in this State, or act as referee. The Legislature may impose a similar prohibition upon County Judges and Surrogates in other counties. No one shall be eligible to the office of Judge of the

Court of Appeals, Justice of the Supreme Court, or, except in the county of Hamilton, to the office of County Judge or Surrogate, who is not an attorney and counselor of this State.

Const. 1846, art. VI, § 21, amended in 1869.

§ 21. Publication of statutes.

The Legislature shall provide for the speedy publication of all statutes, and shall regulate the reporting of the decisions of the courts; but all laws and judicial decisions shall be free for publication by any person.

Const. 1846, art. VI, § 23, amended in 1869.

§ 22. Terms of office of present justices of the peace and local judicial officers.

Justices of the Peace and other local judicial officers provided for in sections seventeen and eighteen, in office when this article takes effect, shall hold their offices until the expiration of their respective terms.

Const. 1846, art. VI, § 25, amended in 1869.

§ 23. Courts of special sessions.

Courts of Special Sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law.

Const. 1846, art. VI, § 26, amended in 1869.

ARTICLE SEVENTH.

- Sec. 1. State credit not to be given.
2. State debts, power to contract.
3. State debts to repel invasions.
4. Limitation of legislative power to create debts.
5. Sinking fund, how kept and invested.
6. Claims barred by statute of limitations.
7. Forest preserve.
8. Canals, not to be sold; not applicable to certain canals; disposition of funds.
9. No tolls to be imposed; contracts for work and materials; no extra compensation.
10. Canal improvement and cost thereof.
11. Payment of debts of the State.
12. Improvement of highways.

§ 1. State credit not to be given.

The credit of the State shall not in any manner be given or loaned to or in aid of any individual, association or corporation.

Const. 1846, art. VII, § 9.

§ 2. State debts, power to contract.

The State may, to meet casual deficits or failures in revenues, or for expenses not provided for, contract debts; but such debts, direct or contingent, singly or in the aggregate, shall not at any time exceed one million of dollars; and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained, or to repay the debt so contracted, and to no other purpose whatever.

Const. 1846, art. VII, § 10.

§ 3. State debts to repel invasions.

In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection, or defend the State in war; but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

Const. 1846, art. VII, § 11.

§ 4. Limitation of legislative power to create debts.

Except the debts specified in sections two and three of this article, no debts shall be hereafter contracted by or in behalf of this State, unless such debt shall be authorized by a law, for some single work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within fifty years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election have been submitted to the people, and have received a majority of all the votes cast for and against it at such election. On the final passage of such bill in either house of the Legislature, the question shall be taken by ayes and noes, to be duly entered on the journals thereof, and shall be: "Shall this bill pass, and ought the same to receive the sanction of the people?"

The Legislature may at any time, after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time, by law, forbid the contracting of any further debt or liability under such law; but the tax imposed by such act, in proportion to the debt and liability which may have been contracted, in pursuance of such law, shall remain in force and be irrepealable, and be annually collected, until the proceeds thereof shall have made the provision hereinbefore specified to pay and discharge the interest and principal of such debt and liability. The money arising from any loan or stock creating such debt or liability shall be applied to the work or object specified in the act authorizing such debt or liability, or for the payment of such debt or liability, and for no other purpose whatever. No such law shall be submitted to be voted on, within three months after its passage or at any general election when any other law, or any bill shall be submitted to be voted for or against. The Legislature may provide for the issue of bonds of the state to run for a period not exceeding fifty years in lieu of bonds heretofore authorized but not issued and shall impose and provide for the collection of a direct annual tax for the payment of the same as hereinbefore required. When any sinking fund created under this section shall equal in amount the debt for which it was created, no further direct tax shall be levied on account of said sinking fund and the Legislature shall reduce the tax to an amount equal to the accruing interest on such debt. The Legislature may from time to time alter the rate of interest to be paid upon any State debt, which has been or may be authorized pursuant to the provisions of this section, or upon any part of such debt, provided, however, that the rate of interest shall not be altered upon any part of such debt or upon any bond or other evidence thereof, which has been, or shall be created or issued before such alteration. In case the Legislature increase the rate of interest upon any such debt, or part thereof, it shall impose and provide for the collection of a direct annual tax to pay and sufficient to pay the increased or altered interest on such debt as it falls due and also to pay and discharge the principal of such debt within fifty years from the time of the contracting thereof, and shall appropriate annually to the sinking fund moneys in amount sufficient to pay such interest and pay and discharge the principal of such debt when it shall become due and payable.

Const. 1846, art. VII, § 12, amended in 1905 and 1906.

§ 5. Sinking fund, how kept and invested.

The sinking funds provided for the payment of interest and the extinguishment of the principal of the debts of the State shall be separately kept and safely invested, and neither of them shall be appropriated or used in any manner other than for the specific purpose for which it shall have been provided.

Const. 1846, art. VII, § 13, amended in 1874.

§ 6. Claims barred by statute of limitations.

Neither the Legislature, canal board, nor any person or persons acting in behalf of the State, shall audit, allow or pay any claim which, as between citizens of the State, would be barred by lapse of time. This provision shall not be construed to repeal

any statute fixing the time within which claims shall be presented or allowed, nor shall it extend to any claim duly presented within the time allowed by law, and prosecuted with due diligence from the time of such presentation. But if the claimant shall be under legal disability, the claim may be presented within two years after such disability is removed.

Const. 1846, art. VII, § 14, amended in 1874.

§ 7. Forest preserve.

The lands of the State, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.

New.

§ 8. Canals, not to be sold; not applied to certain canals; disposition of funds.

The Legislature shall not sell, lease or otherwise dispose of the Erie canal, the Oswego canal, the Champlain canal, the Cayuga and Seneca canal, or the Black River canal; but they shall remain the property of the State and under its management forever. The prohibition of lease, sale or other disposition herein contained, shall not apply to the canal known as the Main and Hamburg street canal, situated in the city of Buffalo; and which extends easterly from the westerly line of Main street to the westerly line of Hamburg street. All funds that may be derived from any lease, sale or other disposition of any canal shall be applied to the improvement, superintendence or repair of the remaining portion of the canals.

Const. 1846, art. VII, § 6, amended in 1882.

§ 9. No tolls to be imposed; contracts for work and materials; no extra compensation.

No tolls shall hereafter be imposed on persons or property transported on the canals, but all boats navigating the canals, and the owners and masters thereof, shall be subject to such laws and regulations as have been or may hereafter be enacted concerning the navigation of the canals. The Legislature shall annually, by equitable taxes, make provision for the expenses of the superintendence and repairs of the canals. All contracts for work or materials on any canal shall be made with the persons who shall offer to do or provide the same at the lowest price, with adequate security for their performance. No extra compensation shall be made to any contractor; but if, from any unforeseen cause, the terms of any contract shall prove to be unjust and oppressive, the canal board may, upon the application of the contractor, cancel such contract.

Const. 1846, art. VII, § 3, amended in 1882.

§ 10. Canal improvement, and cost thereof.

The canals may be improved in such manner as the Legislature shall provide by law. A debt may be authorized for that purpose in the mode prescribed by section four of this article, or the cost of such improvement may be defrayed by the appropriation of funds from the state treasury, or by equitable annual tax.

New.

§ 11. Payment of debts of the state.

The Legislature may appropriate out of any funds in the treasury, moneys to pay the accruing interest and principal of any debt heretofore or hereafter created, or any part thereof and may set apart in each fiscal year, moneys in the state treasury as a sinking fund to pay the interest as it falls due and to pay and discharge the principal of any debt heretofore or hereafter created under section four of article seven of the constitution until the same shall be wholly paid, and the principal and income of such sinking fund shall be applied to the purpose for which said sinking fund is created and to no other purpose whatever; and, in the event such moneys so set apart in any fiscal year be sufficient to provide such sinking fund, a direct annual tax for such year need not be imposed and collected, as required by the provisions of said section four of article seven, or of any law enacted in pursuance thereof.

Added in 1905.

§ 12. Improvement of highways.

A debt or debts of the state may be authorized by law for the improvement of highways. Such highways shall be determined under general laws, which shall also provide for the equitable apportionment thereof among the counties. The aggregate of the debts authorized by this section shall not at any one time exceed the sum of fifty millions of dollars. The payment of the annual interest on such debt and the creation of a sinking fund or at least two per centum per annum to discharge the principal at maturity shall be provided by general laws whose force and effect shall not be diminished during the existence of any debt created thereunder. The Legislature may by general laws require the county or town or both to pay to the sinking fund the proportionate part of the cost of any such highway within the boundaries of such county or town and the proportionate part of the interest thereon, but no county shall at any time for any highway be required to pay more than thirty-five hundredths of the cost of such highway, and no town more than fifteen hundredths. None of the provisions of the fourth section of this article shall apply to debts for the improvement of highways hereby authorized.

Added in 1905.

ARTICLE EIGHTH.

- Sec. 1. Corporations, formation of.
2. Dues of corporations.
3. Corporation, definition of term.
4. Savings bank charters; restrictions upon trustees; special charters not to be granted.
5. Specie payment.
6. Registry of bills or notes.
7. Liability of stockholders of banks.
8. Billholders of insolvent bank, preferred creditors.
9. Credit or money of the state not to be given.
10. Counties, cities and towns not to give or loan money or credit; limitation of indebtedness.
11. State board of charities; state commission in lunacy; state commission of prisoners.
12. Boards appointed by governor.
13. Existing laws to remain in force.
14. Maintenance and support of inmates of charitable institutions.
15. Commissioners continued in office.

§ 1. Corporations, formation of.

Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.

Const. 1846, art. VIII, § 1.

§ 2. Dues of corporations.

Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law.

Const. 1846, art. VIII, § 2.

§ 3. Corporation, definition of term.

The term corporations as used in this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons.

Const. 1846, art. VIII, § 3.

§ 4. Savings bank charters; restrictions upon trustees; special charters not to be granted.

The Legislature shall, by general law, conform all charters of savings banks, or institutions for savings, to a uniformity of powers, rights and liabilities, and all charters hereafter granted for such corporations shall be made to conform to such general law, and to such amendments as may be made thereto. And no such corporation shall have any capital stock, nor shall the trustees thereof, or any of them, have any interest whatever, direct or indirect, in the profits of such corporation; and no director or trustee of any such bank or institution shall be interested in any loan or use of any money or property of such bank or institution for savings. The Legislature shall have no power to

pass any act granting any special charter for banking purposes; but corporations or associations may be formed for such purposes under general laws.

Const. 1846, art. VIII, § 4, amended in 1874.

§ 5. Specie payment.

The Legislature shall have no power to pass any law sanctioning in any manner, directly or indirectly, the suspension of specie payments, by any person, association or corporation, issuing bank notes of any description.

Const. 1846, art. VIII, § 3.

§ 6. Registry of bills or notes.

The Legislature shall provide by law for the registry of all bills or notes, issued or put in circulation as money, and shall require ample security for the redemption of the same in specie.

Const. 1846, art. VIII, § 6.

§ 7. Liability of stockholders of banks.

The stockholders of every corporation and joint-stock association for banking purposes, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind.

Const. 1846, art. VIII, § 7.

§ 8. Billholders of insolvent bank, preferred creditors.

In case of the insolvency of any bank or banking association, the billholders thereof shall be entitled to preference in payment, over all other creditors of such bank or association.

Const. 1846, art. VIII, § 8.

§ 9. Credit or money of the state not to be given.

Neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking. This section shall not, however, prevent the Legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper. Nor shall it apply to any fund or property now held, or which may hereafter be held, by the State for educational purposes.

Const. 1846, art. VIII, § 10, added in 1874.

§ 10. Limitation of indebtedness of counties, cities, towns and villages; exception as to city of New York.

No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid or support of its poor as may be authorized by law. No county or city shall be allowed to become indebted for any purpose or in any manner to an amount which, including existing indebtedness, shall exceed ten per centum of the assessed valuation of the real estate of such county or city subject to taxation, as it appeared by the assessment-rolls of said county or city on the last assessment for state or county taxes prior to the incurring of such indebtedness; and all indebtedness in excess of such limitations, except such as now may exist, shall be absolutely void, except as herein otherwise provided. No county or city whose present indebtedness exceeds ten per centum of the assessed valuation of its real estate subject to taxation, shall be allowed to become indebted in any further amount until such indebtedness shall be reduced within such limit. This section shall not be construed to prevent the issuing of certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts, actually contained, or to be contained in the taxes for the year when such certificates or revenue bonds are issued and payable out of such taxes; nor to prevent the city of New York from issuing bonds to be redeemed out of the tax levy for the year next succeeding the year of their issue, provided that the amount of such bonds which may be issued in any one year in excess of the limitations herein contained shall not exceed one-tenth of one per centum of the assessed valuation of the real estate of said city subject to taxation. Nor shall this section be construed to prevent the issue of bonds to provide for the supply of water; but the term of the bonds issued to provide the supply of water, in excess of the limitation of indebtedness fixed herein, shall not exceed twenty years, and a sinking fund shall be created on the issuing of the said bonds for their redemption, by raising annually a sum which will produce an amount equal to the sum of the principal and interest of said bonds at their maturity. All certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes, which are not retired within five years after their date of issue, and bonds issued to provide for the supply of water, and any debt hereafter incurred by any portion or part of a city, if there shall be any such debt, shall be included in ascertaining the power of the city to become otherwise indebted; except that debts incurred by the city of New York after the first day of January, nineteen hundred and four, and debts incurred by any city of the second class after the first day of January, nineteen hundred and eight, and debts incurred by any city of the third class after the first day of

January, nineteen hundred and ten, to provide for the supply of water shall not be so included; and except further that any debt hereafter incurred by the city of New York, for a public improvement owned or to be owned by the city, which yields to the city current net revenue, after making any necessary allowance for repairs and maintenance for which the city is liable, in excess of the interest on said debt and of the annual installments necessary for its amortization may be excluded in ascertaining the power of said city to become otherwise indebted, provided that a sinking fund for its amortization shall have been established and maintained and that the indebtedness shall not be so excluded during any period of time when the revenue aforesaid shall not be sufficient to equal the said interest and amortization installments, and except further that any indebtedness heretofore incurred by the city of New York, for any rapid transit or dock investment, may be so excluded proportionately to the extent to which the current net revenue received by said city therefrom shall meet the interest and amortization installments thereof, provided that any increase in the debt incurring power of the city of New York which shall result from the exclusion of debts heretofore incurred, shall be available only for the acquisition or construction of properties to be used for rapid transit or dock purposes. The legislature shall prescribe the method by which and the terms and conditions under which the amount of any debt to be so excluded shall be determined, and no such debt shall be excluded except in accordance with the determination so prescribed. The legislature may in its discretion confer appropriate jurisdiction on the appellate division of the supreme court in the first judicial department for the purpose of determining the amount of any debt to be so excluded. No indebtedness of a city valid at the time of its inception, shall thereafter become invalid by reason of the operation of any of the provisions of this section. Whenever the boundaries of any city are the same as those of a county, or when any city shall include within its boundaries more than one county, the power of any county wholly included within such city to become indebted shall cease, but the debt of the county, heretofore existing, shall not, for the purposes of this section, be reckoned as a part of the city debt. The amount hereafter to be raised by tax for county or city purposes, in any county containing a city of over one hundred thousand inhabitants, or any such city of this State, in addition to providing for the principal and interest of existing debt shall not in the aggregate exceed in any one year two per centum of the assessed valuation of the real and personal estate of such county or city, to be ascertained as prescribed in this section in respect to county or city debt.

Const. 1846, art. VIII, § 11, added in 1874, and amended in 1884, 1889, 1905, 1907 and 1909.

§ 11. State board of charities; state commission in lunacy; state commission of prisons.

The Legislature shall provide for a state board of charities, which shall visit and inspect all institutions, whether state,

county, municipal, incorporated or not incorporated, which are of a charitable, eleemosynary, correctional or reformatory character, excepting only such institutions as are hereby made subject to the visitation and inspection of either of the commissions hereinafter mentioned, but including all reformatories except those in which adult males convicted of felony shall be confined; a state commission in lunacy, which shall visit and inspect all institutions, either public or private, used for the care and treatment of the insane (not including institutions for epileptics or idiots); a state commission of prisons which shall visit and inspect all institutions used for the detention of sane adults charged with or convicted of crime, or detained as witnesses or debtors.

New.

§ 12. Boards appointed by governor.

The members of the said board and of the said commissions shall be appointed by the Governor, by and with the advice and consent of the Senate; and any member may be removed from office by the Governor for cause, an opportunity having been given him to be heard in his defense.

New.

§ 13. Existing laws to remain in force.

Existing laws relating to institutions referred to in the foregoing sections and to their supervision and inspection, in so far as such laws are not inconsistent with the provisions of the Constitution, shall remain in force until amended or repealed by the Legislature. The visitation and inspection herein provided for shall not be exclusive of other visitation and inspection now authorized by law.

New.

§ 14. Maintenance and support of inmates of charitable institutions.

Nothing in this Constitution contained shall prevent the Legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper; or prevent any county, city, town or village from providing for the care, support, maintenance and secular education, of inmates of orphan asylums, homes for dependent children or correctional institutions, whether under public or private control. Payments by counties, cities, towns and villages to charitable, eleemosynary, correctional and reformatory institutions, wholly or partly under private control, for care, support and maintenance, may be authorized, but shall not be required by the Legislature. No such payments shall be made for any

inmate of such institutions who is not received and retained therein pursuant to rules established by the state board of charities. Such rules shall be subject to the control of the Legislature by general laws.

New.

§ 15. Commissioners continued in office.

Commissioners of the state board of charities and commissioners of the state commission in lunacy, now holding office, shall be continued in office for the term for which they were appointed, respectively, unless the Legislature shall otherwise provide. The Legislature may confer upon the commissions and upon the board mentioned in the foregoing sections any additional powers that are not inconsistent with other provisions of the Constitution.

New.

ARTICLE NINTH.

- Sec. 1.** Common schools.
2. Regents of the university.
3. Common school, literature and the United States deposit funds.
4. No aid to denominational schools.

§ 1. Common schools.

The Legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this State may be educated.

New.

§ 2. Regents of the university.

The corporation created in the year one thousand seven hundred and eighty-four, under the name of The Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the Legislature, shall be exercised by not less than nine regents.

New.

§ 3. Common school, literature and the United States deposit funds.

The capital of the common school fund, the capital of the literature fund, and the capital of the United States deposit fund, shall be respectively preserved inviolate. The revenue of the said common school fund shall be applied to the support of common schools; the revenue of the said literature fund shall be applied to the support of academies; and the sum of twenty-five thousand dollars of the revenues of the United States deposit fund shall each year be appropriated to and made part of the capital of the said common school fund.

Const. 1846, art. IX, § 1.

§ 4. No aid to denominational schools.

Neither the State nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.

New.

ARTICLE TENTH.

- Sec.** 1. Sheriffs, clerks of counties, district attorneys and registers; governor may remove.
 2. Appointment or election of officers not provided for by this constitution.
 3. Duration of term.
 4. Time of election.
 5. Vacancies in office, how filled.
 6. Political year.
 7. Removal from office for misconduct, etc.
 8. Office deemed vacant.
 9. Compensation of officers.

§ 1. Sheriffs, clerks of counties, district attorneys and registers; governor may remove.

Sheriffs, clerks of counties, district attorneys and registers in counties having registers, shall be chosen by the electors of the respective counties, once in every three years and as often as vacancies shall happen, except in the counties of New York and Kings, and in counties whose boundaries are the same as those of a city, where such officers shall be chosen by the electors once in every two or four years as the Legislature shall direct. Sheriffs shall hold no other office and be ineligible for the next term after the termination of their offices. They may be required by law to renew their security from time to time; and in default of giving such new security, their offices shall be deemed vacant. But the county shall never be made responsible for the acts of the sheriff. The Governor may remove any officer, in this section mentioned, within the term for which he shall have been elected; giving to such officer a copy of the charges against him, and an opportunity of being heard in his defense.

Const. 1846, art. X, § 1.

§ 2. Appointment or election of officers, not provided for by this constitution.

All county officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of the respective counties or appointed by the boards of supervisors, or other county authorities, as the Legislature shall direct. All city, town and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this Constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the Legislature may direct.

Const. 1846, art. X, § 2.

§ 3. Duration of term.

When the duration of any office is not provided by this Constitution it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment.

Const. 1846, art. X, § 3.

§ 4. Time of election.

The time of electing all officers named in this article shall be prescribed by law.

Const. 1846, art. X, § 4.

§ 5. Vacancies in offices, how filled.

The Legislature shall provide for filling vacancies in office, and in case of elective officers, no person appointed to fill a vacancy shall hold his office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy.

Const. 1846, art. X, § 5.

§ 6. Political year.

The political year and legislative term shall begin on the first day of January; and the Legislature shall, every year, assemble on the first Wednesday in January.

Const. 1846, art. X, § 6.

§ 7. Removal from office for misconduct, etc.

Provision shall be made by law for the removal for misconduct or malversation in office of all officers, except judicial, whose powers and duties are not local or legislative and who shall be elected at general elections, and also for supplying vacancies created by such removal.

Const. 1846, art. X, § 7.

§ 8. Office deemed vacant.

The Legislature may declare the cases in which any office shall be deemed vacant when no provision is made for that purpose in this Constitution.

Const. 1846, art. X, § 8.

§ 9. Compensation of officers.

No officer whose salary is fixed by the Constitution shall receive any additional compensation. Each of the other state officers named in the Constitution shall, during his continuance in office, receive a compensation, to be fixed by law, which shall not be increased or diminished during the term for which he shall have been elected or appointed; nor shall he receive to his use any fees or perquisites of office as other compensation.

Const. 1846, art. X, § 9.

ARTICLE ELEVENTH.

- Sec. 1.** State militia.
2. Enlistment.
3. Organization of militia.
4. Appointment of military officers by the governor.
5. Manner of election of military officers prescribed by the legislature.
6. Commissioned officers, their removal.

§ 1. State militia.

All able-bodied male citizens between the ages of eighteen and forty-five years, who are residents of the State, shall constitute the militia, subject however, to such exemptions as are now, or may be hereafter created by the laws of the United States, or by the Legislature of this State.

Const. 1846, art. XI, § 1.

§ 2. Enlistment.

The Legislature may provide for the enlistment into the active force of such other persons as may make application to be so enlisted.

New.

§ 3. Organization of militia.

The militia shall be organized and divided into such land and naval, and active and reserve forces as the Legislature may deem proper, provided however that there shall be maintained at all times a force of not less than ten thousand enlisted men, fully uniformed, armed, equipped, disciplined and ready for active service. And it shall be the duty of the Legislature at each session to make sufficient appropriation for the maintenance thereof.

New.

§ 4. Appointment of military officers by the governor.

The Governor shall appoint the chiefs of the several staff departments, his aides-de-camp and military secretary, all of whom shall hold office during his pleasure, their commissions to expire with the term for which the Governor shall have been elected; he shall also nominate, and with the consent of the Senate appoint, all major-generals.

Const. 1846, art. XI, § 3.

§ 5. Manner of election of military officers prescribed by legislature.

All other commissioned and non-commissioned officers shall be chosen or appointed in such manner as the Legislature may deem most conducive to the improvement of the militia, provided, however, that no law shall be passed changing the existing mode of election and appointment unless two-thirds of the members present in each house shall concur therein.

Const. 1846, art. XI, §§ 4, 6.

§ 6. Commissioned officers; their removal.

The commissioned officers shall be commissioned by the Governor as commander-in-chief. No commissioned officer shall be removed from office during the term for which he shall have been appointed or elected, unless by the Senate on the recommendation of the Governor, stating the grounds on which such removal is recommended, or by the sentence of a court-martial, or upon the findings of an examining board organized pursuant to law, or for absence without leave for a period of six months or more.

Const. 1846, art. XI, § 5.

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ARTICLE TWELFTH.

- Sec. 1.** Organization of cities and villages; regulation of wages, etc., of employees of state, county, city, town, etc.
2. Classification of cities; general and special city laws; special city laws; how passed by legislature and acceptance by cities.
3. Election of city officers, when to be held; extension and abridgment of terms.

§ 1. Organization of cities and villages; regulation of wages, etc., of employees of state, county, city, town, etc.

It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debt by such municipal corporations; and the Legislature may regulate and fix the wages or salaries, the hours of work or labor, and make provision for the protection, welfare and safety of persons employed by the state or by any county, city, town, village or other civil division of the state, or by any contractor or subcontractor performing work, labor or services for the state, or for any county, city, town, village or other civil division thereof.

Const. 1846, art. VIII, § 9, amended in 1905.

§ 2. Classification of cities; general and special city laws; special city laws; how passed by legislature and acceptance by cities.

All cities are classified according to the latest state enumeration, as from time to time made, as follows: The first class includes all cities having a population of one hundred and seventy-five thousand, or more; the second class, all cities having a population of fifty thousand and less than one hundred and seventy-five thousand; the third class, all other cities. Laws relating to the property, affairs or government of cities, and the several departments thereof, are divided into general and special city laws; general city laws are those which relate to all the cities of one or more classes; special city laws are those which relate to a single city, or to less than all the cities of a class. Special city laws shall not be passed except in conformity with the provisions of this section. After any bill for a special city law, relating to a city, has been passed by both branches of the Legislature, the house in which it originated shall immediately transmit a certified copy thereof to the mayor of such city, and within fifteen days thereafter the mayor shall return such bill to the house from which it was sent, or if the session of the Legislature at which such bill was passed has terminated, to the Governor, with the mayor's certificate thereon, stating whether the city has or has not accepted the same.

In every city of the first class, the mayor, and in every other city, the mayor and the legislative body thereof concurrently, shall act for such city as to such bill; but the Legislature may provide for the concurrence of the legislative body in cities of the first class. The Legislature shall provide for a public notice and opportunity for a public hearing concerning any such bill in every city to which it relates, before action thereon. Such a bill, if it relates to more than one city, shall be transmitted to the mayor of each city to which it relates, and shall not be deemed accepted unless accepted as herein provided, by every such city. When-

ever any such bill is accepted as herein provided, it shall be subject as are other bills, to the action of the Governor. Whenever, during the session at which it was passed, any such bill is returned without the acceptance of the city or cities to which it relates, or within such fifteen days is not returned, it may nevertheless again be passed by both branches of the Legislature, and it shall then be subject as are other bills, to the action of the Governor. In every special city law which has been accepted by the city or cities to which it relates, the title shall be followed by the words "accepted by the city," or "cities," as the case may be; in every such law which is passed without such acceptance, by the words "passed without the acceptance of the city," or "cities," as the case may be.

New. Amended in 1907.

§ 3. Election of city officers, when to be held; extension and abridgment of terms.

All elections of city officers, including supervisors and judicial officers of inferior local courts, elected in any city or part of a city, and of county officers elected in the counties of New York and Kings, and in all counties whose boundaries are the same as those of a city, except to fill vacancies, shall be held on the Tuesday succeeding the first Monday in November in an odd-numbered year, and the term of every such officer shall expire at the end of an odd-numbered year. The terms of office of all such officers elected before the first day of January, one thousand eight hundred and ninety-five, whose successors have not then been elected, which under existing laws would expire with an even-numbered year, or in an odd-numbered year and before the end thereof, are extended to and including the last day of December next following the time when such terms would otherwise expire; the terms of office of all such officers, which under existing laws would expire in an even-numbered year, and before the end thereof, are abridged so as to expire at the end of the preceding year. This section shall not apply to any city of the third class, or to elections of any judicial officer, except judges and justices of inferior local courts.

New.

ARTICLE THIRTEENTH.**Sec. 1. Oath of office.****2. Official bribery and corruption.****3. Offer or promise to bribe.****4. Person bribed or offering a bribe may be a witness.****5. Free passes, franking privileges, etc., not to be received by a public officer; penalty.****6. Removal of district attorney for failure to prosecute; expenses of prosecutions for bribery.****§ 1. Oath of office.**

Members of the Legislature, and all officers executive and judicial, except such inferior officers as shall be by law exempted shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of ———, according to the best of my ability;" and all such officers who shall have been chosen at any election shall, before they enter on the duties of their respective offices, take and subscribe the oath or affirmation above prescribed, together with the following addition thereto, as part thereof:

"And I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered or promised to contribute any money, or other valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote," and no other oath, declaration or test shall be required as a qualification for any office of public trust.

Const. 1846, art. XII, § 1, amended in 1874.

§ 2. Official bribery and corruption.

Any person holding office under the laws of this State who, except in payment of his legal salary, fees or perquisites, shall receive or consent to receive, directly or indirectly, anything of value or of personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the express or implied understanding that his official action or omission to act is to be in any degree influenced thereby, shall be deemed guilty of a felony. This section shall not affect the validity of any existing statute in relation to the offense of bribery.

Const. 1846, art. XV, § 1, added in 1874.

§ 3. Offer or promise to bribe.

Any person who shall offer or promise a bribe to an officer, if it shall be received, shall be deemed guilty of a felony and liable to punishment, except as herein provided. No person offering a bribe shall, upon any prosecution of the officer for receiving such bribe, be privileged from testifying in relation thereto, and he shall not be liable to civil or criminal prosecution therefor, if he shall testify to the giving or offering of such bribe. Any person who shall offer or promise a bribe, if it be rejected by the officer

to whom it was tendered, shall be deemed guilty of an attempt to bribe, which is hereby declared to be a felony.

Const. 1846, art. XV, § 2, added in 1874.

§ 4. Person bribed or offering a bribe may be a witness.

Any person charged with receiving a bribe, or with offering or promising a bribe, shall be permitted to testify in his own behalf in any civil or criminal prosecution therefor.

Const. 1846, art. XV, § 3, added in 1874.

§ 5. Free passes, franking privileges, etc., not to be received by public officer; penalty.

No public officer, or person elected or appointed to a public office, under the laws of this State, shall directly or indirectly ask, demand, accept, receive or consent to receive for his own use or benefit, or for the use or benefit of another, any free pass, free transportation, franking privilege or discrimination in passenger, telegraph or telephone rates, from any person or corporation, or make use of the same himself or in conjunction with another. A person who violates any provision of this section, shall be deemed guilty of a misdemeanor, and shall forfeit his office at the suit of the Attorney-General. Any corporation, or officer or agent thereof, who shall offer or promise to a public officer, or person elected or appointed to a public office, any such free pass, free transportation, franking privilege or discrimination, shall also be deemed guilty of a misdemeanor and liable to punishment except as herein provided. No person, or officer or agent of a corporation, giving any such free pass, free transportation, franking privilege or discrimination hereby prohibited, shall be privileged from testifying in relation thereto, and he shall not be liable to civil or criminal prosecution therefor if he shall testify to the giving of the same.

New.

§ 6. Removal of district attorney for failure to prosecute; expenses of prosecutions for bribery.

Any district attorney who shall fail faithfully to prosecute a person charged with the violation in his county of any provision of this article which may come to his knowledge, shall be removed from office by the Governor, after due notice and an opportunity of being heard in his defense. The expenses which shall be incurred by any county, in investigating and prosecuting any charge of bribery or attempting to bribe any person holding office under the laws of this State within such county, or of receiving bribes by any such person in said county, shall be a charge against the State, and their payment by the State shall be provided for by law.

Const. 1846, art. XV, § 4, added in 1874.

ARTICLE FOURTEENTH.

- Sec. 1.** Amendment to constitution, how proposed, voted upon and ratified.
2. Future constitutional conventions; how called; election of delegates; compensation; quorum; submission of amendments; officers; rules; vacancies; taking effect.
3. Amendments of convention and legislature submitted coincidently.

§ 1. Amendments to constitution, how proposed, voted upon and ratified.

Any amendment or amendments to this Constitution may be proposed in the Senate and Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, and the yeas and nays taken thereon, and referred to the Legislature to be chosen at the next general election of senators, and shall be published for three months previous to the time of making such choice; and if in the Legislature so next chosen, as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the Legislature to submit such proposed amendment or amendments to the people for approval in such manner and at such times as the Legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the Constitution from and after the first day of January next after such approval.

Const. 1846, art. XIII, § 1.

§ 2. Future constitutional conventions; how called; election of delegates; compensation; quorum; submission of amendments; officers; rules; vacancies; taking effect.

At the general election to be held in the year one thousand nine hundred and sixteen, and every twentieth year thereafter, and also at such times as the Legislature may by law provide, the question, "Shall there be a convention to revise the Constitution and amend the same?" shall be decided by the electors of the State; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the State, as then organized, shall elect three delegates at the next ensuing general election at which members of the Assembly shall be chosen, and the electors of the State voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. Every delegate shall receive for his services the same compensation and the same mileage as shall then be annually payable to the members of the Assembly. A majority of the convention shall constitute a quorum for the transaction of business, and no amendment to the Constitution shall be submitted for approval to the electors as hereinafter provided, unless by the assent of a majority of all the delegates elected to the convention, the yeas and nays being entered on the journal to be kept. The convention shall have the power to appoint such officers, employes and assistants as it may deem neces-

sary, and fix their compensation and to provide for the printing of its documents, journal and proceedings. The convention shall determine the rules of its own proceedings, choose its own officers, and be the judge of the election, returns and qualifications of its members. In case of a vacancy, by death, resignation or other cause, of any district delegate elected to the convention, such vacancy shall be filled by a vote of the remaining delegates representing the district in which such vacancy occurs. If such vacancy occurs in the office of a delegate-at-large, such vacancy shall be filled by a vote of the remaining delegates-at-large. Any proposed constitution or constitutional amendment which shall have been adopted by such convention, shall be submitted to a vote of the electors of the State at the time and in the manner provided by such convention, at an election which shall be held not less than six weeks after the adjournment of such convention. Upon the approval of such constitution or constitutional amendments, in the manner provided in the last preceding section, such constitution or constitutional amendment, shall go into effect on the first day of January next after such approval.

Const. 1846, art. XIII, § 2.

§ 3. Amendments of convention and legislature submitted coincidently.

Any amendment proposed by a constitutional convention relating to the same subject as an amendment proposed by the Legislature, coincidently submitted to the people for approval at the general election held in the year one thousand eight hundred and ninety-four, or at any subsequent election, shall, if approved, be deemed to supersede the amendment so proposed by the Legislature.

Now.

ARTICLE FIFTEENTH.

Sec. 1. Time of taking effect.

§ 1. Time of taking effect.

This Constitution shall be in force from and including the first day of January, one thousand eight hundred and ninety-five, except as herein otherwise provided.

Done in Convention at the Capitol in the city of Albany, the twenty-ninth day of September, in the year one thousand eight hundred and ninety-four, and of the Independence of the United States of America the one hundred and nineteenth.

In witness whereof, we have hereunto subscribed our names.

JOSEPH HODGES CHOATE,
President and Delegate-at-Large.

CHARLES ELLIOTT FITCH,
Secretary.

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RULES OF THE COURT OF APPEALS



RULES OF THE COURT OF APPEALS.

NOTICE.

The first Monday of each session only will be a motion day, on which *oral* arguments will be heard in original motions. Original motions may be *submitted*, without oral argument, on *any* Monday when the Court is in session, provided they are submitted by *both sides*.

After the day calendar is made up — at 6 o'clock P. M. — stipulations are too late. The Clerk has then no power to leave a number off.

The full number of cases and points (16) are required, without which appeals may not be heard.

The "Order Calendar" is composed of preferred causes, and the notice of argument must claim the preference "as an appeal entitled to be heard under Rule XI." Appeals from orders should be noticed for the first Monday of a session.

The County Clerk's certificate, or waiver thereof under section 3301, Code Civil Procedure, are necessary parts of the printed case on appeal.

When a new calendar is ordered, it is desirable to notice causes in which the returns are filed, *at once*.

Counsel residing in New York city and its vicinity who intend to argue causes on the General Calendar, should send their *residence* addresses to the Clerk, and should promptly notify him of changes in their *office* addresses.

The daily sessions of the Court are held from 2 o'clock P. M., to 6 o'clock P. M., except Fridays only when it will sit from 10 A. M. to 2 P. M.

Every exhibit presented to the Court should be plainly marked with the address of the Counsel presenting the same, as well as the title of the cause.

The Clerk always *submits* for Counsel who are absent when their cases are called for argument, provided their papers have been filed, as directed by Rule VII.

Requests for copies of opinions should be addressed to the State Reporter, Albany, N. Y.

The sixteen printed copies of the case required by Rule VII to be filed with the clerk must be bound in light-colored (not dark) paper and should not be sent to the Clerk for filing until after the appeal has received a calendar number.

Each day's calendar and all court notices to the Bar are printed in the New York Law Journal, which is the legal publication through which the clerk endeavors to reach the legal profession.

Attention of Attorneys is called to Rule VII, which will be strictly enforced.

RULES OF PRACTICE.

(Adopted October 22, 1894; amended December 15, 1906. To take effect January 7, 1907.)

RULE I.

Appellant to file return; effect of omission.—If the appellant shall not cause the proper return to be made and filed with the clerk of this Court within the time prescribed by law (Code Civ. Proc., § 1315), the respondent may, by notice in writing, require such return to be filed within ten days after the service of the notice, and if the return be not filed in pursuance of such notice, the appellant shall be deemed to have waived the appeal. On an affidavit proving that the appeal was perfected, and the service of such notice, and a certificate of the clerk that no return has been filed, the respondent may enter an order with the clerk dismissing the appeal for want of prosecution, with costs; and the court below may thereupon proceed as though there had been no appeal.

RULE II.

Further return may be ordered.—If the return made by the clerk of the court below shall be defective, either party may, on an affidavit, specifying the defect, and on notice to the opposite party, apply to one of the Judges of this court for an order, that the clerk make a further return without delay.

RULE III.

Attorneys and guardians below to continue to act.—The attorneys and guardians ad litem of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties respectively, in this court, until others shall be retained or appointed, and notice thereof shall be served on the adverse party.

RULE IV.

Appellant to make a case; its form.—In all calendar causes a case shall be made by the appellant, which shall consist of a copy of the return, and the reasons of the court below for its judgment, or an affidavit that the same cannot be procured, together with an index to the pleadings, exhibits, depositions and other principal matters. Every opinion in the cause at Special Term, as well as at the Appellate Division of the Supreme Court, relating to the questions involved in the appeal, is included by the foregoing provision.

RULE V.

Cases and points to be printed; mode of printing.—All cases and points, and all other papers furnished to the court in cal-

endar causes, shall be printed on white paper, as provided in section 796 of the Code of Civil Procedure, and, if bound, the covers shall be of light-colored paper, which can be legibly written upon. The folio, numbering from the commencement to the end of the case, shall be printed on the outer margin of the page. Small pica leaded or ten point leaded with four to pica leads, is the smallest letter and most compact mode of composition which is allowed. No charge for printing the papers mentioned in this rule shall be allowed as a disbursement in a cause unless the requirements of the preceding sentence shall be shown, by affidavit, to have been complied with in all papers printed. (Amended December 15, 1906.)

RULE VI.

Appellant to serve copies of case; effect of his default.—Within forty days after the appeal is perfected, the appellant shall serve three printed copies of the case on the attorney of the adverse party. If he fail to do so, the respondent may, by notice in writing, require the service of such copies within ten days after service of the notice, and, if the copies be not served in pursuance of such notice, the appellant shall be deemed to have waived the appeal; and on an affidavit proving the default and the service of such notice, the respondent may enter an order with the clerk dismissing the appeal for want of prosecution, with costs; and the court below may thereupon proceed as though there had been no appeal.

RULE VII.

Copies of cases and points.—At least twenty days before a cause is placed on the day calendar, the appellant shall file with the clerk eighteen printed copies, of the case; and shall at the same time file with the clerk eighteen printed copies, and serve on the attorney or counsel for the respondent three printed copies, of the points to be relied on by him, with a reference to the authorities to be cited. Within ten days after such service the respondent shall file with the clerk eighteen printed copies, and serve on the attorney or counsel for the appellant, three printed copies, of the points to be relied on by him, with a reference to the authorities to be cited.

If the appellant desires to present points or authorities in reply, he shall file with the clerk eighteen printed copies thereof and serve three printed copies on the attorney or counsel for the respondent, within five days after receipt of the respondent's points; and no supplemental points will be allowed from either side unless especially requested by the court.

No points will be received by the court on argument or submission unless they shall have been filed and served as above provided; except that in appeals under Rule XI, noticed for the

first Monday of a session, and in causes upon a new general calendar to be heard during the first two weeks of any session at which such new calendar is taken up, the parties shall file the printed cases, and file and serve or exchange the printed points, at least two days before the commencement of the session.

The cases and points filed with the clerk shall be disposed of as follows: One copy shall be furnished to each of the Judges; one copy shall be kept by the clerk, with the records of the court; one copy shall be deposited in the State Library; one copy shall be deposited in each branch of the library of the Court of Appeals; one copy shall be deposited in the library of the New York Law Institute; one copy shall be deposited in the Law Library of Brooklyn; one copy shall be deposited in the Law Library of the Eighth Judicial District, and one copy shall be delivered to the reporter. (As amended October 13, 1910.)

RULE VIII.

Statement and discussion of facts.—In all causes each party shall briefly state upon his printed points, in a separate form, the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found. And the court will not hear an extended discussion upon any mere question of fact.

Every cause shall be deemed to be submitted to such Judges as may be absent at the time of the argument, unless objection to such submission by counsel arguing the cause be then made.

RULE IX.

Criminal causes.—Appeals in criminal causes brought after making up the calendar, or too late to be placed on said calendar, may be put upon the calendar at any time, and brought on for a hearing as preferred causes, upon a notice of ten days; and it shall be the duty of the clerk to place such causes on the calendar for the day for which they shall be noticed or upon which the cause shall be ordered by the court, or stipulated by the parties, to be heard.

RULE X.

Submission and reservation of causes.—Causes will not be received upon submission until reached in the regular call of the calendar. No reservation will be made of any of the first eight causes, unless on account of sickness, or an engagement elsewhere in the actual trial or argument of another cause commenced before the term of this court, or of other inevitable necessity, to be shown by affidavit. Other causes may be reserved upon reasonable cause shown, or by stipulation of parties filed with the clerk; but no cause shall be so reserved by stipulation after the same has been placed upon the day calendar.

RULES OF PRACTICE. Rules XI, XII

Causes reserved for a day certain by stipulation, when in order to be called, have priority among each other according to the time of filing the stipulations with the clerk, and shall follow next in order the undisposed of causes of the calendar for the day previous. Default may be taken in them.

No reserved cause, whether reserved generally or for a particular day, will be called before its number is reached on the regular call of the calendar. (Amended December 15, 1906.)

RULE XI.

Motions and appeals from orders.—Motions, appeals from final orders in special proceedings, from interlocutory judgments and from orders in actions and special proceedings, certified to this court by the Appellate Divisions of the Supreme Court, except orders granting a new trial, may be noticed for, and will be heard on, the first Monday of each session of the court, before taking up the general calendar. Notices of argument of appeals within this rule must contain the claim that the appeal is one entitled to be heard under Rule XI of the Court of Appeals.

Motions will be heard orally on the first Monday of a session only; but they may be submitted without oral argument on any Monday when the court is in session; provided they are submitted by both sides and the papers are filed with the clerk on or before the preceding Friday. If either party demands an oral argument of a motion noticed for any other than the first Monday of a session, the motion will go over to the first Monday of the succeeding session.

Where notice has been given of a motion, if no one shall appear to oppose, it will be granted as of course.

If a motion be not made on the day for which it has been noticed, the opposing party will be entitled, on applying to the court at the close of the motions for that day to a rule denying the motion, with costs. (Amended December 15, 1906.)

RULE XII.

Call of calendar.—Eight causes only will be called on any day, but after such call causes ready on both sides will be heard in their order. Any cause which is regularly called and passed, without postponement by the court for good cause shown at the time of the call, shall be stricken from the calendar.

Causes upon the calendar may be exchanged one for another, as of course, on filing with the clerk a note of the proposed exchange, with the numbers of the causes, signed by the respective attorneys or counsel. Upon all subsequent calendars each of said causes will take the place due to the date of the filing of the return in the other.

In like manner, a cause not upon the calendar in which an appeal to this court has been perfected and the return duly filed

Rules XIII-XV RULES OF PRACTICE.

with the clerk, may be exchanged, as of course, for another cause upon the calendar, on filing with the clerk a note of the proposed exchange, with the number of the cause on the calendar, and the date of filing return in the cause not upon the calendar, signed by the respective attorneys or counsel, and also a stipulation of the attorneys or counsel in the cause not on the calendar setting down the same for argument in place of the calendar cause when reached, with the same effect as if duly noticed. Upon all subsequent calendars, each of said causes will take the place due to the date of filing the return in the other. (Amended December 15, 1906.)

RULE XIII.

Time of argument.—In the argument of a cause not more than two hours shall be occupied by counsel on either side, except by the express permission of the court.

In the argument of an appeal within Rule XI not more than thirty minutes shall be occupied by the appellant's counsel, nor more than twenty-five minutes by the respondent's counsel, unless express permission be given by the court, and the cause placed at the foot of the order calendar. (Amended December 15, 1906.)

RULE XIV.

Preferred causes.—No causes are entitled to any preference upon the calendar except such as is given by law or the special order of the court.

Any party claiming a preference must so state in his notice of argument to the opposite party and to the clerk; and he must also state the ground of such preference, so as to show to which of the preferred classes the cause belongs.

A preferred cause being once passed loses its preference.

RULE XV.

Defaults.—Judgments of reversal by default will not be allowed. When a cause is called in its order on the calendar, if the appellant fails to appear and furnish the court with the papers required, and argue or submit his cause, judgment of affirmance by default will be ordered on motion of the respondent. If the appellant only appears, he may either argue or submit the cause.

When any cause shall be regularly called for argument, and no other disposition shall be made thereof, the appeal shall be dismissed without costs, and an order shall be entered accordingly, which shall be absolute unless upon application made and good cause shown, upon notice to the opposite party within ten days, if the court is in session, and if not on the first motion day of the next session, the court shall revoke said order and restore said appeal.

RULES OF PRACTICE. Rules XVI-XX

RULE XVI.

Remittitur.—The remittitur shall contain a copy of the judgment of this court and the return made by the clerk below, and shall be sealed with the seal and signed by the clerk of this court.

RULE XVII.

Affirmance by default.—When a judgment or order shall be affirmed by the default of the appellant, the remittitur shall not be sent to the court below, unless this court shall otherwise direct, until ten days after notice of the affirmance shall have been served by the attorney for the respondent on the attorney for the appellant and proof thereof filed with the clerk. Service of the notice shall be proved to the clerk by affidavit, or by the written admission of the attorney on whom it was served. (Amended December 15, 1906.)

RULE XVIII.

Enlarging time; revoking orders.—The time prescribed by these rules for doing any act may be enlarged by the court or by any of the Judges thereof; and any of the Judges may make orders to stay proceedings, which, when served with papers and notice of motion, shall stay the proceedings according to the terms of the order. Any order may be revoked or modified by the Judge who made it; or, in case of his absence or inability to act, by any of the other Judges.

RULE XIX.

Calendars.—When a new calendar is ordered by the court, the clerk shall place thereon all causes in which notices of argument, with proof or admission of service, have been filed in his office; and, also, if ordered by the court, all other causes in which the returns have been filed in his office; and the causes so put on the calendar by the direction of the court will be heard in their order as if regularly noticed.

RULE XX.

Motions for re-argument.—Motions for re-argument must be submitted on printed briefs, without oral argument, on notice to the adverse party, stating briefly the ground upon which a re-argument is asked, and the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the case, and to the authorities relied upon. (Amended December 15, 1906.)

RULES I-III RULES OF ADMISSION OF ATTORNEYS.

RULES OF THE COURT OF APPEALS FOR THE ADMISSION OF ATTORNEYS AND COUNSELORS-AT-LAW.*

(Adopted by the Court of Appeals, December 2, 1895. Amended April, 1908, and May 17, 1911. In effect July 1, 1911.)

RULE I.

General regulation as to admission.—No person shall be admitted to practice as an attorney or counselor in any court of record of the State except upon an order of the Appellate Division of the Supreme Court admitting him to the bar and licensing him to practice upon compliance with these rules.

RULE II.

Admission without examination.—The following classes of persons may in the discretion of the Appellate Division be admitted and licensed without examination:

1. Any person admitted to practice and who has practiced five years as a member of the bar in the highest law court in any other state or territory of the American Union or in the District of Columbia.

2. Any person admitted to practice and who has practiced five years in another country whose jurisprudence is based on the principles of the English common law.

3. Any American citizen domiciled in a foreign country whose jurisprudence is based on the principles of the English common law holding a diploma or degree which would entitle him to practice law in the courts of such foreign country if a citizen thereof.

Any person admitted under this rule must possess the other qualifications required by these rules and must produce a letter of recommendation from one of the judges of the highest law court of such other state or country, or furnish other satisfactory evidence of character and qualifications.

An attorney and counselor from another state or foreign jurisdiction may in the discretion of any court of record be admitted pro hac vice to participate in the trial or argument of any cause in which he may be employed.

RULE III.

Admission on examination.—Three classes of persons may be admitted to the bar upon examination:

1. Persons who are not graduates of a college or university;

2. Persons who are graduates of a college or university; and

3. Persons who have been admitted as attorneys and have practiced three years in another state or country.

In each class the applicant must prove by his own affidavit to the satisfaction of the State Board of Law Examiners that he is a citizen of the United States, twenty-one years of age, stating his age, and an actual and not a constructive resident of the State for not less than six months immediately preceding and that he has not been examined for admission to practice and been refused admission within four months, and that he has studied law in the manner and according to the conditions in these rules prescribed.

* Attention is called to Laws 1898, ch. 165, and Laws 1899, ch. 225, requiring the registration in the office of the clerk of the Court of Appeals of all persons admitted to practice as attorneys-at-law or as attorneys and counselors-at-law in the courts of record of the State.

RULES OF ADMISSION OF ATTORNEYS. Rule IV

Applicants in the first class (i. e., persons who are not graduates of a college or university) must have studied law for a period of four years. Such an applicant may pursue his course of law study wholly by serving a clerkship in the office of a practicing attorney; or partly by serving such clerkship and partly by attending a law school; but every such applicant must serve such clerkship for a period of at least one year continuously either before examination by the State Board of Law Examiners or after such examination and prior to admission to the bar.

Applicants in the second class (i. e., persons who are graduates of a college or university) must have studied law for a period of three years. Such an applicant may pursue his course of law study wholly by serving a clerkship in the office of a practicing attorney; or wholly by attending a law school; or partly by serving such clerkship and partly by attending a law school.

Applicants in the third class (i. e., persons who have been admitted as attorneys and have practiced three years in another state or country) must have studied law for a period of one year within this State and pursue such course of study either by serving a clerkship or by attendance upon a law school as the applicant may elect.

Candidates for admission to the bar under this rule (i. e., upon examination) may be admitted and licensed upon producing and filing with the court the certificate of the State Board of Law Examiners that the applicant has satisfactorily passed the examination prescribed by these rules and has complied with their provisions, and upon producing and filing with the court, in the case of applicants in the first class (i. e., persons who are not graduates of a college or university), evidence that he has served a regular clerkship of one year in this State with an attorney or attorneys in regular practice, either before or after having passed such examination. The applicant must also produce and file evidence that he is a person of good moral character which must be shown by the affidavits of two reputable persons of the town or city in which he resides, one of whom must be a practicing attorney of the Supreme Court. Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character and must set forth in detail the facts upon which such knowledge is based; but such affidavits shall not be conclusive and the court may make further examination and inquiry.

If the applicant be a graduate of a college, or university, he must have pursued the prescribed course of law study after his graduation, and, if he be a person admitted to the bar of another state or country, he must have pursued his prescribed period of law study after having remained as a practicing attorney in such other state or country for the period of three years.

RULE IV.

Regulations concerning preliminary studies.—All candidates for admission to the bar upon examination, except applicants in the third class mentioned in Rule III (i. e., persons who have been admitted and have practiced three years in another state or country), must have pursued a preliminary course of study evidenced by graduation from a college or university, or by passing a Regents' examination or the equivalent, as hereinafter prescribed:

Rule V RULES OF ADMISSION OF ATTORNEYS.

Applicants who are not graduates of a college, or university, subject to the limitations and requirements hereinafter, in this subdivision, expressed, or members of the bar as above described, before entering upon the clerkship or attendance at a law school herein prescribed shall have passed an examination conducted under the authority and in accordance with the ordinances and rules of the University of the State of New York, in English, three years; mathematics, two years; Latin, two years; science, one year; history, two years; or in their substantial equivalents as defined by the rules of the University, and shall have filed a certificate of such fact, signed by the Commissioner of Education, with the clerk of the Court of Appeals, whose duty it shall be to return to the person named therein a certified copy of the same, showing the date of such filing. The Regents may accept as the equivalent of and substitute for the examination in this rule prescribed, either, first, a certificate, properly authenticated, of having successfully completed a full year's course of study in any college, or university; second, a certificate, properly authenticated, of having satisfactorily completed a four years' course of study in any institution registered by the Regents as maintaining a satisfactory academic standard; or, third, a Regents' diploma.

All graduates of a college or university existing under the government or laws of any foreign country other than those where English is the language of the people, and all applicants who apply for law students' certificates upon equivalents or substitutes, as above provided, all or any part of which are earned or issued in said foreign countries, shall pass the Regents' examination in second year English. The Regents' certificate above prescribed shall be deemed to take effect as of the date of the completion of the Regents' examination, as the same shall appear upon said certificate.

RULE V.

Regulations concerning study at law schools.—The provisions of these rules for study at a law school must be fulfilled by good and regular attendance and successfully completing the prescribed course of instruction at an incorporated law school, or a law school connected with an incorporated college or university, having a law department organized with competent instructors and professors, in which instruction as hereinafter provided is regularly given.

Good and regular attendance upon and the successful completion of the prescribed course of instruction at a law school, the school year of which shall consist of not less than thirty-two school weeks, exclusive of vacations, in which not less than ten hours of attendance upon law lectures or recitations of such prescribed course, to be given or conducted by regular members of the faculty, are required in each week, shall be deemed a year's attendance under this rule.

The same period of time shall not be duplicated for different purposes; except that a student attending a law school, as herein provided, and who, during the vacations of such school, not exceeding three months in any one year, shall pursue his studies in the office of a practicing attorney, shall be allowed to count the time so occupied during such vacation or vacations as part of the clerkship in a law office specified in these rules.

RULES OF ADMISSION OF ATTORNEYS. Rules VI, VII

RULE VI.

Regulations concerning clerkship.—The provisions of these rules for studying law by the service of a regular clerkship must be fulfilled by serving such clerkship in the office of a practicing attorney of the Supreme Court in this State, after the candidate has attained the age of eighteen years.

It shall be the duty of attorneys, with whom a clerkship shall be commenced, to file a certificate of the same in the office of the clerk of the Court of Appeals, which certificate shall, in each case, state the date of the beginning of the period of clerkship, and such period shall be deemed to commence at the time of such filing and shall be computed by the calendar year.

In computing the period of clerkship a vacation actually taken, not exceeding two months in each year, shall be allowed as a part of such year.

RULE VII.

Proof to entitle candidate to examination.—The State Board of Law Examiners, before admitting an applicant to an examination, shall require proof that the preliminary conditions prescribed by these rules have been fulfilled; which proof shall be made as follows, viz.:

First. That the applicant is a college graduate, by the production of his diploma, or certificate of graduation, under the seal of the college.

Second. That he has been admitted to the bar of another State or country, by the production of his license, or certificate, executed by the proper authorities.

Third. In all cases where the service of a clerkship is required, that he has served a regular clerkship in the office of a practicing attorney of the Supreme Court in this State, after the age of eighteen years, by producing and filing with the Board a certified copy of the attorney's certificate, as filed in the office of the clerk of the Court of Appeals, and producing and filing an affidavit of the attorney or attorneys with whom such clerkship was served, showing the actual service of such a clerkship, the continuance and end thereof, and that not more than two months' vacation was taken in any one year. Both of said affidavits must be to the effect that during the entire period of such clerkship, except during the stated vacation time, the applicant was actually employed by said attorney as a regular law clerk and student in his law office, and under his direction and advice, engaged in the practical work of the office during the usual business hours of the day.

Fourth. The time of study allowed in a law school must be proved by the certificate of the teacher or president of the faculty, under whose instructions the person has studied, under the seal of the school, if such there be, in addition to the affidavit of the applicant, which must, also, state the age at which the applicant began his attendance at such law school. Said certificate and affidavit must, also, show that the law school prescribes the course of instruction contemplated by these rules, and each shall also contain the statement that said applicant took the prescribed course of instruction required at said school for the degree of Bachelor of Laws while in attendance thereat, and bona fide took and successfully passed all examinations in all the subjects required for said degree during such period of attendance, in

Rules VIII-X RULES OF ADMISSION OF ATTORNEYS.

each case specifying the subjects in which said applicant took and passed his examinations as aforesaid, which proof must be satisfactory to the Board of Examiners.

Fifth. That the applicant has passed the Regents' examination, or its equivalent must be proved by the production of a certified copy of the Regents' certificate filed in the office of the clerk of the Court of Appeals, as hereinbefore provided.

Sixth. When it satisfactorily appears that any diploma, affidavit, or certificate, required to be produced has been lost, or destroyed, without the fault of the applicant, or has been unjustly refused or withheld, or by the death or absence of the person or officer who should have made it, cannot be obtained, the Board of Law Examiners may accept such other proof of the requisite facts as they shall deem sufficient.

Seventh. A law student whose clerkship, or attendance at a law school has already begun, as shown by the records of the Court of Appeals, or of any incorporated law school, or law school established in connection with any college or university, may, at his option, file or produce, instead of the proofs required by these rules, those required by the Rules of the Court of Appeals in force June 1, 1908.

RULE VIII.

Regulations concerning examination.—The examination held by such State Board of Examiners may be conducted by oral or written questions and answers, or partly oral and partly written, but shall be as nearly uniform in the knowledge and capacity which they shall require as is reasonably possible. Every applicant shall be given and required to pass a satisfactory examination in the canons of ethics adopted by the American Bar Association and by the New York State Bar Association. An applicant who has failed to pass one examination cannot again be examined until at least four months after such failure.

The State Board of Law Examiners shall be paid as compensation, each, the sum of two thousand dollars per year, and, in addition, such further sum as the court may direct, and an annual sum not exceeding two thousand dollars per year shall be allowed for necessary disbursements of the Board. Every applicant for examination shall pay to the examiners a fee of fifteen dollars, which shall be applied upon the compensation and allowance above provided, and any surplus thereafter remaining shall be held by the treasurer of the State Board of Law Examiners and deposited in some bank, in good standing, in the city of Albany, to his credit and subject to his draft as such treasurer, when approved by the Chief Judge.

RULE IX.

Relief from excusable mistakes.—When the filing of a certificate, as required by these rules, has been omitted by excusable mistake or without fault, the court may order such filing as of the proper date.

RULE X.

Additional rules by the Appellate Division.—The Justices of the Appellate Division in each department may adopt for their several and respective departments such additional special rules for ascertaining the moral and general fitness of applicants as to such Justices may seem proper.

STATE BOARD OF LAW EXAMINERS

STATE OF NEW YORK—IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, Held at the Capitol, in the City of Albany, on the 17th Day of April, A. D. 1913. Present: Hon. Edgar M. Cullen, Chief Judge, Presiding.

IN THE MATTER OF THE STATE BOARD OF LAW EXAMINERS.

Objections having been formulated and presented to the court with respect to the methods of examinations pursued by the State Board of Law Examiners, and with respect to other matters in the administration of their office, and the same having been duly considered by the court, it is hereby ordered as follows, namely:

I. It is ordered that the publication of the book entitled "Bar Examinations and Courses of Study" be discontinued.

II. It is ordered that the papers containing the written answers given by rejected candidates, upon their examinations for admission to practice as attorneys and counselors at law in the courts of this State, be preserved for a period of four weeks from the date of the announcement by the Board of the results of the examinations, when they may be destroyed, and that of the examination papers of successful candidates one in twenty sets thereof be preserved for the period of three years and filed in the office of the clerk of the court.

III. The State Board of Law Examiners is instructed so to frame the questions propounded to candidates for admission to practice as to permit of a reasoned answer to a question. The Board is instructed in that respect to formulate questions, whether based upon decided cases or upon statutes, so as to ascertain the ability of the candidate to apply his knowledge of legal principles and of statutory rules, and to explain the method of their application by him, rather than to elicit answers the correctness of which will rest upon the candidate's power of memorization. The marking of a candidate should be measured by the reasoning power shown, and not wholly by mere correctness.

IV. It is further ordered that a copy of this order be printed with the rules for the admission of attorneys and counselors at law; that a copy be filed in the office of the Secretary of State and that a copy be transmitted to the presiding justice of the Appellate Division of the Supreme Court in each judicial department.

R. M. BARBER,
Clerk.



GENERAL RULES OF PRACTICE.



GENERAL RULES OF PRACTICE.

SUPREME COURT RULES.

Adopted in convention of the Justices of the Supreme Court assigned to the Appellate Division thereof, held at Albany, December, 1895, pursuant to Code of Civil Procedure, section 17; amended October 24, 1899; amended October 24, 1906; amended April 1, 1910.

Rule 1. Application for admission as attorneys.

Within ten days after the first day of January in each year, the Appellate Division in each department shall appoint a Committee on Character and Fitness of not less than three for the department, or may appoint a committee for each Judicial District within the department, to whom shall be referred all applications for admission to practice as attorney and counselor at law, such committee to continue in office until their successors are appointed. To the respective committees shall be referred all applications for admission to practice, either upon the certificate of the State Board of Law Examiners, or upon motion under Rule 2 of the Rules of the Court of Appeals for the admission of attorneys and counselors at law. The committee shall require the attendance before it, or a member thereof, of each applicant, with the affidavit of at least two practicing attorneys acquainted with such applicant, residing in the Judicial District in which the applicant resides, that he is of such character and general fitness as justifies admission to practice, and the affidavit must set forth in detail the facts upon which the affiant's knowledge of the applicant is based, and it shall be the duty of the committee to examine each applicant, and the committee must be satisfied from such examination, and other evidence that the applicant shall produce, that the applicant has such qualifications as to character and general fitness as in the opinion of the committee justify his admission to practice, and no person shall be admitted to practice except upon the production of a certificate from the committee to that effect, unless the court otherwise orders.

No applicant shall be entitled to receive such a certificate who is not able to speak and to write the English language intelligently, nor until he affirmatively establishes to the satisfaction of the committee that he possesses such a character as justifies his admission to the Bar and qualifies him to perform the duties of an attorney and counselor at law.

An applicant for admission to practice as an attorney and counselor at law on motion, under the provisions of Rule 2 of the Rules of the Court of Appeals for the admission of attorneys and counselors at law, must present to the court proof that he has been admitted to practice as an attorney and counselor

at law in the highest court of law in another state, or in a country whose jurisprudence is based upon the principles of the common law of England; a certificate, executed by the proper authorities, that he has been duly admitted to practice in such state or country; that he has actually remained in said state or country, and practiced in such court as attorney and counselor at law for at least three years; a certificate from a judge of such court that he has been duly admitted to practice and has actually continuously practiced as an attorney and counselor at law for a period of at least three years after he has been admitted, specifying the name of the place or places in which he has so practiced and that he has a good character as such attorney. Such certificate must be duly certified by the clerk of the court of which the judge is a member, and the seal of the court must be attached thereto. He must also prove that he is a citizen of the United States and has been an actual resident of the State of New York, or of an adjoining state, for at least six months prior to the making of the application, giving the place of his residence by street and number, if such there be, and the length of time he has been such resident. He shall also submit the affidavits of two persons who are residents of the judicial district in which he resides, one of whom must be an attorney and counselor at law, that he is of such character and general fitness as justifies admission to practice, and the affidavit must set forth in detail the facts upon which the affiant's knowledge of the applicant is based. In all cases the applicant must appear in person before the court on the motion for his admission, and also before the committee on character and fitness for the district in which the application is made. When the applicant resides in an adjoining state, and a motion is made to admit him to practice in this state without actual residence herein, in addition to the foregoing facts, the applicant must prove to the satisfaction of the court that he has opened and maintains an office in this state for the transaction of law business therein.

In all cases the applicant for admission must file with the clerk of the Appellate Division of the proper department the papers required for his admission as hereinbefore specified prior to or at the time of the motion for admission to practice. (Amended April 1, 1910, in effect Sept. 1, 1910.)

Rule 2. Papers, where filed; indorsements.

The papers, in cases pending in the Appellate Division, shall be filed with the clerk of such division of the department in which the case is pending. In all other cases where no provision is made by the Code, papers in the Supreme Court shall be filed in the office of the clerk of the county specified in the complaint as the place of trial. In Surrogate's Courts, in the office of Surrogate; in other courts of record, in the office of the respective clerks thereof. In case the place of trial be changed to another county, all subsequent papers shall be filed in the county to which such change is made. All papers served or filed, must be indorsed or subscribed with the name of the attorney or attorneys, or the name of the party if he appears in person, and his or their office address, or place of business.

Rule 3. Motion papers to be specified in order and filed; effect of failure to file; entry of order.

When any order is entered, all the papers, used or read on the motion on either side, shall be specified in the order, and shall be filed with the clerk, unless already on file or otherwise ordered by the court, or the order may be set aside as irregular, with costs. The clerk shall not enter such order unless the motion papers are filed, and unless the order is signed by the justice presiding at the court at which the motion was heard. When an opinion has been delivered by the court, it shall be filed with the order and shall be considered a part of the record upon which the order was made; and if the order does not state the grounds upon which it was made, the opinion may be considered to ascertain such grounds.

When the affidavits and papers upon a non-enumerated motion are required by law or by the rules of the court to be filed, and the order to be entered in a county other than that in which the motion is made, the clerk shall deliver to the party prevailing in the motion, unless the court shall otherwise direct, a certified copy of the rough minutes, showing what papers were used or read, together with the affidavits and papers used or read upon such motion, with a note of the decision thereon, or the order directed to be entered, properly certified. It shall be the duty of the party to whom such papers are delivered to cause the same to be filed, and the proper order entered in the proper county within ten days thereafter, or the order may be set aside as irregular, with costs. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 4. Undertaking and affidavit in proceedings for injunctions, attachment, order of arrest and writ to be filed.

Except where otherwise expressly provided by law, it shall be the duty of the attorney of the party required to give a bond or undertaking to forthwith file the same with the proper clerk; and in case such bonds and undertakings shall not be so filed, any party to the action or special proceeding, or other persons interested, shall be at liberty to move the court to vacate the proceedings or order as if no bond or undertaking had been given. It shall also be the duty of the attorney to file the petition or affidavit upon which an injunction, attachment, order of arrest, or writ, has been granted within ten days after the same shall have been served. In case of a failure so to file such petition or affidavit, the opposing party may move to vacate the order, warrant or writ, and the same shall be vacated by the court or judge granting the same, unless for proper cause shown time to file the same shall be extended.

Rule 5. Sureties, justification of bonds to be acknowledged.

Whenever a Justice or other officer approves of the security to be given in any case, or reports upon its sufficiency, it shall be his duty to require personal sureties to justify, or, if the security

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offered is by way of mortgage on real estate, to require proof of the value of such real estate. And all bonds and undertakings, and other securities in writing, shall be duly proved or acknowledged in like manner as deeds of real estate, before the same shall be received or filed.

In no case shall an attorney or counselor be surety on any undertaking or bond required by law, or by these rules, or by any order of a court or judge, in any action or proceeding, or be bail in any civil or criminal case, or proceeding.

Rule 6. Sheriff's return, how compelled.

At any time after the day when it is the duty of the sheriff, or other officer, to return, deliver, or file any process or other paper, by the provisions of the Code of Civil Procedure, or by these rules of the courts, any party entitled to have such act done, except where otherwise provided by law, may serve on the officer a notice to return, deliver, or file such process, or other paper as the case may be, within ten days, or show cause, at a Special Term to be designated in said notice, why an attachment should not issue against him.

Rule 7. Books to be kept by clerk of courts.

The clerk of the Appellate Division in each department shall keep:

1. A book, properly indexed, in which shall be entered the title of all actions and proceedings which are pending in that court, and all actions or special proceedings commenced in the Appellate Division with entries under each, showing the proceedings taken therein and the final disposition thereof.

2. A minute book, showing the proceedings of the court from day to day.

3. A remittitur book, containing the final order made upon the decision of each case, a certified copy of which shall be transmitted to the proper clerk as required by the Code of Civil Procedure.

4. A book, properly indexed, in which shall be recorded at large all bonds or undertakings filed in his office, with a statement of the action or special proceeding in which it is given, and a statement of any disposition or order made of or concerning it.

5. A book, properly indexed, which shall contain the name of each attorney admitted to practice, with the date of his admission, and a book, properly indexed, which shall contain the name of each person who has been refused admission or who has been disbarred or otherwise disciplined or censured by the court. The clerk of each department shall transmit to the clerk of the Court of Appeals and to the clerks of the other departments the names of all attorneys who have been admitted to practice, the names of all applicants who have been refused admission, and the names of all attorneys who have been dis-

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barred, disciplined or censured by the court. The clerk of each department is directed to enter in the proper book the name of each attorney who has been admitted to practice, with date of his admission, and the name of each person who has been refused admission or has been disciplined, with the date of such refusal of admission or discipline, received from the other departments of the state, together with the date when and department wherein the order was made. (Subd. added Apr. 1, 1910, in effect Sept. 1, 1910.)

The clerks of the other courts shall keep in their respective offices, in addition to the "judgment book" required to be kept by the Code of Civil Procedure:

1. A book, properly indexed, in which shall be entered the title of all civil actions and special proceedings, with proper entries under each denoting the papers filed and the orders made and the steps taken therein, with the dates of the several proceedings.

2. A book in which shall be entered at large each bond and undertaking filed in his office, with a statement showing when filed and a statement of any disposition or order made of or concerning it.

3. Such other books, properly indexed, as may be necessary to enter the minutes of the court, docket judgments, enter orders and all other necessary matters and proceedings, and such other books as the Appellate Division in each department shall direct.

Rule 8. Judgments, entering and docketing of.

Judgments shall only be entered, or docketed, in the offices of the clerks of the courts of this State, within the hours during which, by law, they are required to keep open their respective offices for the transaction of business, and at no other time.

Rule 9. Entry of appearance.

(Repealed Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 10. Change of attorneys.

An attorney may be changed by consent of the party and his attorney, or upon application of the client upon cause shown and upon such terms as shall be just, by the order of the court or a Judge thereof, and not otherwise.

Rule 11. Agreements between parties or attorneys to be in writing.

No private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel.

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Rule 12. Consents to payment of money out of court.

All consents providing for the payment of money out of court shall be acknowledged before an officer authorized to take the acknowledgment of deeds, accompanied with proof of the identity of the applicant from some person other than the applicant, before any order is granted thereon.

Rule 13. Orders of arrest, injunction or attachment.

Every order of arrest, as well as every injunction or attachment, shall briefly state the grounds on which it is granted.

Rule 14. Discovery of books, papers and documents.

Applications may be made in the manner provided by law to compel the production and discovery or inspection with copy of books, papers and documents relating to the merits of any civil action pending in court or of any defense of such action, in the following cases:

1. By the plaintiff, to compel the discovery of books, papers or documents in the possession or under the control of the defendant, which may be necessary to enable the plaintiff to frame his complaint or to answer any pleading of the defendant.

2. By the defendant, to compel the like discovery of books, papers or documents in the possession or under the control of the plaintiffs, which may be necessary to enable the defendant to answer any pleading of the plaintiffs.

3. Either party may be compelled to make discovery of any book, document, record, article or property in his possession or under his control, or in the possession of his agent or attorney, upon its appearing to the satisfaction of the court that such book, document, record, article or property is material to the decision of the action or special proceeding, or some motion or application therein, or is competent evidence in the case, or an inspection thereof is necessary to enable a party to prepare for trial.

Rule 15. Form of application for discovery of books.

The moving papers upon the application for such discovery or inspection shall state the facts and circumstances on which the same is claimed, and shall be verified by affidavit stating that the books, papers, articles, property, and documents whereof discovery or inspection is sought are not in the possession or under the control of the party applying therefor, but are in the possession or under the control of the party against whom discovery is sought or his agent or attorney. The party applying shall show to the satisfaction of the court or judge the materiality and necessity of the discovery or inspection sought, the particular information which he requires, and in the case of books and papers, that there are entries therein as to the matter of which he seeks a discovery or inspection.

Rule 16. Contents of order; stay of proceedings.

The order for granting the application shall specify the mode in which the discovery or inspection is to be made, which may be either by requiring the party to deliver sworn copies of the matters to be discovered, or to allow an inspection with copy, or by requiring him to produce and deposit the same with the clerk,

unless otherwise directed in the order. The order shall also specify the time within which the discovery or inspection is to be made, and when papers, articles or property are required to be deposited or inspected, the order shall specify the time the deposit or the opportunity for inspection shall continue.

The court or judge may direct that the order directing the discovery or inspection shall operate as a stay of all other proceedings in the cause, either in whole or in part, until such order shall have been complied with or vacated. (As amended October 24, 1890.)

Rule 17. Application for a subpoena to compel the attendance of a witness to obtain testimony under depositions taken within the State for use without the State, and proceedings thereon.

The petition prescribed by section 915 of the Code of Civil Procedure must state generally the nature of the action or proceeding in which the testimony is sought to be taken, and that the testimony of a witness is material to the issues presented in such action or proceeding, and shall set forth the substance of, or have annexed thereto, a copy of, the commission, order, notice, consent or other authority under which the deposition is taken. In case of an application for a subpoena to compel the production of books or papers, the petition shall specify the particular books or papers the production of which is sought, and show that such books or papers are in the possession of or under the control of the witness and are material upon the issues presented in the action or special proceeding in which the deposition of the witness is sought to be taken. Unless the court or Judge is satisfied that the application is made in good faith to obtain testimony within sections 914 and 915 of the Code of Civil Procedure, he shall deny the application. Where the subpoena directs the production of books or papers, it shall specify the particular books or papers to be produced, and shall specify whether the witness is required to deliver sworn copies of such books or papers to the commissioner, or to produce the original thereof and deposit the same with the commissioner. This subpoena must be served upon the witness at least two days, or in case of a subpoena requiring the production of books or papers, at least five days before the day on which the witness shall be commanded to appear. A party to an action or proceeding in which a deposition is sought to be taken, or a witness subpoenaed to attend and give his deposition may apply to the court to vacate or modify such subpoena.

Upon proof by affidavit that a person to whom a subpoena was issued has failed or refused to obey such subpoena; to be duly sworn or affirmed; to testify or answer a question or questions propounded to him; to produce a book or paper which he has been subpoenaed to produce, or to subscribe to his deposition when correctly taken down, a Justice of the Supreme Court or a County Judge shall grant an order requiring such person to show cause before the Supreme Court, at a time and place specified, why he should not appear; be sworn or affirmed; testify; answer a question or questions propounded; produce a book or paper; or subscribe to his deposition, as the case may be. Such affidavit shall also set forth the nature of the action or special proceeding in

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which the testimony is sought to be taken, and a copy of the pleadings or other papers defining the issues in such action or special proceeding, or the facts to be proved therein. Upon the return of such order to show cause, the Supreme Court shall upon such affidavit and upon the original petition, and upon such other facts as shall appear, determine whether such person should be required to appear; be sworn or affirmed; testify; answer the question or questions propounded; produce the book or paper, or subscribe to his deposition, as the case may be, and may prescribe such terms and conditions as shall seem proper. Upon proof of a failure or refusal on the part of any person to comply with any order of the court made upon such determination, the court or judge shall make an order requiring such a person to show cause before it or him at a time and place therein specified, why such person should not be punished for the offense as for a contempt. Upon the return of the order to show cause the questions which arise must be determined as upon a motion. If such failure or refusal is established to the satisfaction of the court or judge before whom the order to show cause is made returnable, the court or judge shall enforce the order and prescribe the punishment as in the case of a recalcitrant witness in the Supreme Court. (As amended October 24, 1899.)

Rule 18. Proof of service of summons by persons other than sheriff; in divorce cases.

Where personal service of the summons and of the complaint, or notice, if any accompany the same, shall be made by any other person than the sheriff, it shall be necessary for such person to state in his affidavit of service his age, or that he is more than twenty-one years of age; when and at what particular place, and in what manner he served the same; and that he knew the person served to be the person mentioned and described in the summons as defendant therein, and also to state in his affidavit that he left with defendant such copy, as well as delivered it to him. No such service shall be made by any person who is less than eighteen years of age.

In actions for divorce, or to annul a marriage, or for separate maintenance, the affidavit, in addition to the above requirements, shall state what knowledge the affiant had of the person served being the defendant and proper person to be served, and how he acquired such knowledge. The court may require the affiant to appear in court and be examined in respect thereto, and when service has been made by the sheriff, the court must require the officer who made the service to appear and be examined in like manner, unless there shall be presented with the certificate of service the affidavit of such officer, that he knew the person served to be the same person named as defendant in the summons, and shall also state the source of his knowledge.

Rule 19. Pleadings, to be folioed.

Every pleading, deposition, affidavit, case, bill, exceptions, report, paper, order or judgment exceeding two folios in length, shall be distinctly numbered and marked at each folio in the margin thereof, and all copies either for the parties or the court shall be numbered or marked in the margin, so as to conform to the original draft or entry and to each other, and shall be in-

dorsed with the title of the cause. All the pleadings and other proceedings and copies thereof shall be fairly and legibly written or printed, and if not so written or printed and folioed and indorsed as aforesaid, the clerk shall not file the same, nor will the court hear any motion or application founded thereon.

All pleadings and other papers in an action or special proceeding served on a party or an attorney, or filed with the clerk of the court, must comply with section 796 of the Code of Civil Procedure and must be written or printed in black characters; and no clerk of the court shall file or enter the same in his office unless it complies with this rule. The party upon whom the paper is served shall be deemed to have waived the objection for non-compliance with this rule unless within twenty-four hours after the receipt thereof he returns such papers to the party serving the same with a statement of the particular objection to its receipt; but this waiver shall not apply to papers required to be filed or delivered to the court.

It shall be the duty of the attorney by whom the copy pleadings shall be furnished for the use of a court on trial, to plainly designate on each pleading the part or parts thereof claimed to be admitted or controverted by the succeeding pleadings. (As amended October 24, 1899.)

Rule 20. Service and settlement of interrogatories.

Interrogatories to be annexed to a commission issued under article second of title three, chapter nine, of the Code of Civil Procedure shall be served within ten days after the entry of the order, allowing the commission. Cross-interrogatories shall be served within ten days after the service of the interrogatories, unless a different time is fixed therefor by the order allowing the commission. In case a party shall fail to serve such cross-interrogatories within the time limited therefor, he shall be deemed to have waived his right to propound cross-interrogatories to the witness to be examined under the commission. Either party may, within two days after the service of the cross-interrogatories or within two days after the time to serve cross-interrogatories has expired, serve upon the opposing party a notice of settlement of the interrogatories and cross-interrogatories before a Justice of the court or County Judge. The time at which such interrogatories or cross-interrogatories shall be noticed for settlement shall be not less than two nor more than ten days after the service of the notice. If neither party serves such a notice within the time limited therefor, the interrogatories and cross-interrogatories are to be deemed settled as served and shall be so allowed without notice. (As amended October 24, 1899.)

Rule 21. Non-enumerated motions; noticing of.

Non-enumerated motions, in the Supreme Court, except in the first and second districts, and motions noticed to be heard in Erie county, shall be noticed for the first day of the term or sitting of the court, accompanied with copies of the affidavits and papers on which the same shall be made, and the notice shall not be for a later day, unless sufficient cause be shown (and contained in the affidavits served), for not giving notice for the first day. In other courts such motions may be made on any day designed by the Judges thereof. In the Appellate Division such motions may be noticed for any motion day in the term.

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Rule 22. Motions to strike out irrelevant matter; notice of.

Motions to strike out of any pleading matter alleged to be irrelevant, redundant or scandalous, and motions to correct a pleading on the ground of its being "so indefinite or uncertain that the precise meaning or application is not apparent," must be noticed before demurring or answering the pleading and within twenty days from the service thereof. The time to make such motion shall not be extended unless notice of an application for such extension, stating the time and place thereof, of at least two days shall be given to the adverse party.

Rule 23. Affidavits of merits.

All motions for relief to which a party is not entitled as matter of right shall be made upon papers showing merits, and the good faith of the prosecution or defense, which may be shown by any proof that shall satisfy the court. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 24. Affidavit for order extending time.

No order extending a defendant's time to answer or demur, or the plaintiff's time to reply to a counterclaim, shall be granted, unless the party applying for such order presents to the judge to whom the application is made an affidavit of the attorney or counsel retained to defend the action that from the statement of the case made to him by the defendant he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, or to some part thereof, or an affidavit of the attorney or counsel for the plaintiff, that from the statement of the case made to him by the plaintiff he verily believes that the plaintiff has a good and substantial defense upon the merits to the cause of action set forth as a counterclaim, or to some part thereof, as the case may be. The affidavit shall also state the cause of action and the relief demanded in the complaint and, where a counterclaim has been interposed, the cause of action alleged as a counterclaim and the relief demanded in the answer; and whether any and what extension or extensions of time to answer, demur or reply by stipulation or order have been granted.

When the time to serve any pleading has been extended by stipulation or order for twenty days, no further time shall be granted by order, except upon two days' notice to the adverse party of the application for such order. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 25. Ex parte application to contain statement as to previous application.

Whenever application is made ex parte on affidavit to a Judge or court for an order, the affidavit shall state whether any previous application has been made for such order, and, if made, to what court or Judge, and what order or decision was made thereon, and what new facts, if any, are claimed to be shown. For failure to comply with this rule, any order made on such application may be revoked or set aside. This rule shall apply to proceedings supplementary to execution, and to every application

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for an order or judgment made in any action or special proceeding.

Rule 26. Application for judgment on failure to answer.

When the plaintiff in an action in the Supreme Court is entitled to judgment upon the failure of the defendant to answer the complaint, and the relief demanded requires application to be made to the court, such application may be made at any Special Term in the district embracing the county in which the action is triable, or, except in the first district, in an adjoining county; such application, except in the first judicial district, may also be made at a Trial Term in the county in which the action is triable. When a reference or writ of inquiry shall be ordered the same shall be executed in the county in which the action is triable, unless the court shall otherwise order. In the first judicial district, every motion or application for an order or judgment where notice is necessary, must be made to the Special Term for the hearing of motions, and where notice is not necessary, to the Special Term for the transaction of ex parte business, except where other provision is expressly made by law, or the general or special rules of practice. In the county of Kings all such applications shall be made at the Special Term for the hearing of motions. Any order or judgment granted in violation of this provision shall be vacated by the Special Term, at which the application should have been made, or by the Appellate Division of the Supreme Court; and no order or judgment granted in violation of this rule shall be entered by the clerk.

Rule 27. Orders granted on petitions, contents may be docketed.

Orders granted on petitions, or relating thereto, shall refer to such petitions by the names and descriptions of the petitioners and the date of the petitions, if the same be dated, without reciting or setting forth the tenor or substance thereof unnecessarily. Any order or judgment directing the payment of money, or affecting the title to property, if founded on petition, where no complaint is filed, may, at the request of any party interested, be enrolled and docketed, as other judgments.

Rule 28. Inquests, when taken.

(Repealed Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 29. Opening of counsel; examination of witnesses and summing up.

In the trial of civil causes, unless the justice presiding or the referee shall otherwise direct, each party shall open his case before any evidence is introduced, and, except by special permission of the court, no other opening by either party shall thereafter be permitted.

On the trial of issues of fact, one counsel only on each side shall examine or cross-examine a witness, who shall not repeat the answer or answers of such witness at the time he shall be under examination. One counsel only on each side shall sum up the cause, and he shall not occupy more than one hour, and the testimony, if taken down in writing, shall be written by some person other than the examining counsel; but the judge who holds

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the court may otherwise order, or dispense with this requirement.

While addressing the court, examining witnesses or summing up, counsel shall stand. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 30. Non-suit before referee; referee's report; testimony in references other than for trial of issues; exceptions, when filed.

On a hearing before a referee or referees, the plaintiff may submit to a non-suit or dismissal of his complaint, or may be non-suited, or his complaint may be dismissed, in like manner as upon a trial, at any time before the cause has been finally submitted to a referee or the referees for their decision; in which case the referee or referees shall report according to the fact, and judgment may thereupon be perfected by the defendant.

In references other than for the trial of the issues in an action, or for computing the amount due in foreclosure cases, the testimony of the witnesses shall be signed by them; the report of the referee shall be filed with the testimony, and a note of the day of the filing shall be entered by the clerk in the proper book, under the title of the cause or proceeding. At any time after the report is filed either party may bring on the action or proceeding at Special Term on notice to the parties interested therein. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 31. Motion for new trial, where made; case or exceptions, when necessary.

When an order grants or refuses a new trial, except on the exceptions taken during the trial, it shall specify the grounds upon which the motion was made and the ground or grounds upon which it was granted. In all actions where either party is entitled to have an issue or issues of fact settled for trial by a jury, either as a matter of right or by leave of the court if either party desires such a trial, the party must within twenty days after issue joined, give notice of motion that all the issues or one or more specific issues be so tried. If such motion is not made within such time, the right to a trial by jury is waived. With the notice of motion shall be served a copy of the questions of fact proposed to be submitted to the jury for trial, in proper form to be incorporated in the order; and the court or judge may settle the issues, or may refer it to a referee to settle them. Such issues must be settled in the form prescribed in sections 823 and 970 of the Code of Civil Procedure.

When any specific question of fact involved in an action or any question of fact not put in issue, is ordered to be tried by a jury, as a substitute for a feigned issue, and has been tried, or a reference other than of the whole issue has been ordered under the Code, and a trial had, if either party shall desire to apply for a new trial, on the ground of any error of the judge or referee, or on the ground that the verdict or report is against evidence (except when the judge directs such motion to be made upon his minutes at the same term of the court at which the issues are tried), a case or exceptions shall be made, or a case containing exceptions, as may be required; which case or exceptions must be served and settled in the manner prescribed by the rules of court for the settlement of cases

and exceptions in other cases. Such motions must be made, in the first instance, at Special Term. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 32. Cases, exceptions, when served; amendments; settlement, etc.

Whenever it shall be necessary to make a case, or a case and exceptions, or a case containing exceptions, the same shall be made, and a copy thereof served on the opposite party within the following times:

If the trial was before the court or referee, including trials by a jury of one or more specific questions of fact in an action triable by the court, within thirty days after service of a copy of the decision or report and of written notice of the entry of the judgment thereon.

In the Surrogate's Court, within thirty days after service of a copy of the decree or order and notice of the entry thereof.

If the trial were before a jury within thirty days after notice of the decision of a motion for a new trial, if such motion be made and be not decided at the time of the trial, or within thirty days after service of a copy of the judgment and notice of its entry.

The party served may, within ten days thereafter, propose amendments thereto, and serve a copy on the party proposing a case or exceptions, who may then, within four days thereafter, serve the opposite party with a notice that the case or exceptions with the proposed amendments will be submitted for settlement at a time and place to be specified in the notice, to the judge or referee before whom the cause was tried.

Whenever amendments are proposed to a case or exceptions, the party proposing such case or exceptions shall, before submitting the same to the judge or referee for settlement, mark upon the several amendments his allowance or disallowance thereof, and shall also plainly mark thereon and upon the stenographer's minutes the parts to which the proposed amendments are applicable, together with the number of the amendment. If the party proposing the amendments claims that the case should be made to conform to the minutes of the stenographer he must refer at the end of each amendment to the proper page of such minutes. The judge or referee shall thereupon correct and settle the case. The time for settling the case must be specified in the notice, and it shall not be less than four nor more than ten days after the service of such notice. The lines of the case shall be so numbered that each copy shall correspond. The surrogate, on appeal from his court, may by order allow further time for the doing of any of the acts above provided to be done on such appeals.

Cases reserved for argument and special verdicts shall be settled in the same manner. The parties may agree on the facts proven to be inserted in the case, instead of the testimony on the approval of the judge.

No order extending the time to serve a case, or a case containing exceptions, or the time within which amendments thereto may be served, shall be made unless the party applying for such order serve a notice of two days upon the adverse parties of his intention to apply therefor, stating the time and place for making such application. (As amended October 24, 1899.)

Rules 33-35 GENERAL RULES OF PRACTICE.

Rule 33. Failure to make a case.

If the party shall omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made, and the parties shall omit, within the several times above limited, the one party to propose amendments, and the other to notify an appearance before the judge, or referee, they shall respectively be deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed.

Rule 34. Case and bill of exceptions; contents; resettlement; printing exhibits.

A bill of exceptions shall contain only so much of the evidence as may be necessary to present the questions of law upon which exceptions were taken on the trial; and it shall be the duty of the judge upon settlements to strike out all the evidence and other matters which shall have been unnecessarily inserted.

A case or exceptions shall not contain the evidence in *haec verba*, or by question and answer, unless ordered by the judge or referee by or before whom the same shall be settled. But the facts of the case, together with the rulings on the trial, shall be stated in a narrative form, except that where it is claimed by either party that any particular testimony should be given in *haec verba*, the judge or referee who settles the case shall determine whether or not a proper presentation of the case for review requires such portion of the evidence to be so stated in *haec verba*, whereupon the case shall be made accordingly. With the proposed case the appellant may serve his stipulation that he desires to review only the conclusion of the jury, court or referee upon certain specified questions of fact; in which case the case as settled shall contain all the evidence bearing upon such questions of fact and so much of the evidence as may be necessary to present the questions of law raised by exceptions taken at the trial; and it shall be the duty of the judge or referee settling the case to strike out all other evidence and to certify that all the evidence relating to the questions of fact which the appellant desires to raise has been included in the case as settled; and upon appeal the Appellate Division shall not review any question of fact not specified in such stipulation.

If any case or bill of exceptions does not conform to this rule, the court before which the same shall be brought for review may order the same back for resettlement.

Exhibits shall not be printed at length unless the judge or referee so direct.

When, upon non-enumerated motions, voluminous documents have been used which are material only as to the fact of their existence, or as to a small part of their contents, the parties may, by stipulation, or the court or judge below may, upon notice, settle a statement respecting the same, or the parts thereof to be returned upon the appeal from the order, to be used in place of the original documents. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 35. Case to be signed; service of copy.

(Repealed Apr. 1, 1910, in effect Sept. 1, 1910.)

GENERAL RULES OF PRACTICE. Rules 36, 37

Rule 36. Neglect to bring issue of fact to trial; causes where defendant is under arrest preferred.

Whenever an issue of fact, in any action pending in any court has been joined, and the plaintiff therein shall fail to bring the same to trial according to the course and practice of the court, the defendant, at any time after younger issues shall have been tried in their regular order, may move at Special Term for the dismissal of the complaint with costs.

If it be made to appear to the court that the neglect of the plaintiff to bring the action to trial has not been unreasonable, the court may permit the plaintiff, on such terms as may be just, to bring the said action to trial at a future term.

Whenever in any action an issue shall have been joined, if the defendant be imprisoned under an order of arrest, in the action, or if the property of the defendant be held under attachment, the trial of the action shall be preferred. Every cause placed upon the calendar of the Trial Term or Special Term for the trial of equity cases shall be moved for argument or trial when reached in its order, and shall not be reserved or put over except by the consent of the court unless otherwise permitted by special rule; and, if passed without being so reserved or put over, it shall be entered on all subsequent calendars as of date when passed, and no term fee shall be taxed thereon for any subsequent term. (As amended October 24, 1899.)

Rule 37. Notice for argument and of motions; order to show cause, where returnable; effect of order staying proceedings when made within ten days of Trial Term; irregularities to be stated; judgment by default in divorce cases.

All questions for argument, and all motions made at Special or Trial Terms shall be brought before the court on notice, of not less than eight days, unless a shorter time is prescribed by a judge or court, under section 780 of the Code, by an order to show cause, except that where the attorneys for the respective parties reside or have their offices in the same city or village, such notice may be a notice of five days; if the opposite party shall not appear to oppose, the party making the motion shall be entitled to the order or judgment moved for, on proof of due service of the notice or order and papers required to be served by him, unless the court shall otherwise direct. If the party making the motion shall not appear, the court shall deny the motion on the filing of the copy, notice of motion, or order to show cause.

Such order to show cause shall in no case be granted unless a special and sufficient reason for requiring a shorter notice than eight days shall be stated in the papers presented, nor unless in a case where the attorneys for the respective parties reside or have their offices in the same city or village, a special and sufficient reason for requiring a shorter notice than five days shall be stated in the papers presented, and the party shall, in his affidavit, state the present condition of the action, and whether at issue, and, if not yet tried, the time appointed for holding the next Special or Trial Term where the action is triable. An order to show cause shall also (except in the first judicial district) be returnable only before the judge who grants it, or at a Special Term appointed to be held in the district in which the action is triable.

No order, except in the first judicial district, served after the action shall have been noticed for trial, if served within ten days of the Trial Term, shall have the effect to stay the proceedings in the action, unless made at the term where such action is to be tried, or by the judge who is appointed or is to hold such Trial Term, or unless such stay is contained in an order to show cause returnable on the first day of such term, in which case it shall not operate to prevent the subpoenaing of witnesses or placing the cause on the calendar.

When the motion is for irregularity, the notice or order shall specify the irregularity complained of.

This rule, so far as it permits a judgment by default, or by the consent of the adverse party, shall not extend to an action for a divorce, or limited separation, or to annul a marriage.

In the first judicial district, all motions must be noticed to be heard at and all orders to show cause must be returnable at the Special Term for hearing of litigated motions, except in cases where the special rules of the first judicial district shall require such motion to be made at some other term of the court.

If a notice of motion is served ten days before the return day thereof, it may, immediately after the prayer for relief and before the signature, contain the following statement: "Answering affidavits must be served five days before the return day," in which case answering affidavits, in order to be used upon the motion, must be so served. The moving party, upon receiving such answering affidavits, may serve affidavits in reply at least two days before the hearing. Such replying affidavits shall be limited strictly to matters in reply. Affidavits in answer and reply cannot be read upon the motion if not so served, unless the court in its discretion, for good cause shown, may otherwise order. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 38. Enumerated motions; non-enumerated motions, what are; contested motions, when not heard at circuit.

Enumerated motions are motions arising on special verdict, issues of law, cases, exceptions, appeals from judgments sustaining or overruling demurrers, appeals from judgment or order granting or refusing a new trial in an inferior court, appeals by virtue of sections 1346 and 1349 of the Code, agreed cases submitted under section 1279 of the Code, and appeals from final orders and decrees of Surrogate's Courts, and matters provided for by sections 2085-2099 and 2138 of the Code.

Non-enumerated motions include all other questions submitted to the court, and shall be heard at Special Term except when otherwise directed by law.

Contested motions shall not be noticed or brought to a hearing at any Special Term held at the same time and place with a Trial Term, except in actions upon the calendar for trial at such term, and in which the hearing of the motion is necessary to the disposal of the cause unless otherwise ordered by the Justice holding the court; and except, also, that in counties in which no Special Term distinct from a Trial Term is appointed to be held, motions in actions triable in any such county may be noticed and brought on at the time of holding the Trial and Special Term in the county in which such actions are triable.

GENERAL RULES OF PRACTICE. Rules 39, 40

Rule 39. Notes of issue, when to be filed; separate calendar for non-enumerated motions, preferred cases; cases not reserved; when passed, place on subsequent calendars.

At the first term of the Appellate Division of the Supreme Court in each department, and at such other times as the court shall from time to time direct, the clerk shall make up a calendar which shall consist of cases pending and undisposed of as follows:

Notes of issue for the Appellate Division shall be filed eight days before the commencement of the court at which the cause may be noticed. The clerk shall prepare a calendar for the Appellate Division and, except in the first department, cause the same to be printed for each of the Justices holding the court. Appeals shall be placed on the calendar, according to the date of the service of the notice of appeal; and all subsequent enumerated appeals in the same cause shall be put on the calendar as of the date of the first appeal; and other cases as of the time when the question to be reviewed arose. Appeals in non-enumerated motions shall also be placed upon a separate calendar. Cases entitled to preference shall be placed separately on the calendar.

The Appellate Division of each department shall adopt rules regulating the hearing of causes and of calendar practice in such department not inconsistent with the Code of Civil Procedure.

Judgment of reversal by default will not be allowed. Where the cause is called in its order on the calendar, if the appellant fails to appear and furnish the court with the papers required, and argue or submit his cause, judgment of affirmance by default will be ordered on motion of the respondent. If the appellant only appears he may either argue or submit the case. If neither party appears, the case will be passed and placed at the foot of the calendar. When any cause shall be twice passed, the clerk shall enter an order of course dismissing the appeal or the proceedings, or denying the motion for a new trial—but the court may, upon motion, vacate the order and restore the cause.

Rule 40. Enumerated motions; what papers to be furnished, and by whom; points to contain a statement of facts.

The papers to be furnished on enumerated motions at Special Term shall be a copy of the pleadings, when the question arises on the pleadings, or any part thereof, a copy of the special verdict, return or other papers on which the question arises. The party whose duty it is to furnish the papers shall serve a copy on the opposite party, except upon the trial of issues of law, at least five days before the time for which the matter may be noticed for argument. If the party whose duty it is to furnish the papers shall neglect to do so, the opposite party shall be entitled to move, on affidavit and on four days' notice of motion that the cause be struck from the calendar (whichever party may have noticed it for argument), and that the judgment be rendered in his favor.

The papers shall be furnished by the plaintiff when the question arises on special verdict, and by the party demurring on the trial of issues of law, and in all other cases by the party making the motion. Each party shall prefix to his points a concise statement of the facts of the case, with reference to the folios; and if such statement is not furnished, no discussion of the facts by the party omitting such statement will be permitted. (As amended October 24, 1899.)

Rule 41. Papers to be furnished, on appeal, by appellant; printed copies of case and points; appeals from non-enumerated motions.

In all cases to be heard in the Appellate Division, except appeals from non-enumerated motions, the papers shall be furnished by the appellant or the moving party, and in cases agreed upon, under section 1279 of the Code, by the plaintiff.

The party whose duty it is to furnish the papers shall cause a printed copy of the requisite papers to be filed in the office of the clerk of the Appellate Division within twenty days after an appeal has been taken, or the order made for the hearing of a cause therein, or the agreed case filed in the clerk's office pursuant to section 1279 of the Code; but if it shall be necessary to make a case or case and exceptions after the appeal has been taken or the order made for the hearing in the Appellate Division, the printed papers, including the case as settled and signed by the judge before whom the case was tried, shall be filed within twenty days after the settlement of the case; and the party whose duty it is to furnish the papers shall serve within said twenty days upon his adversary three printed copies of such papers.

Such papers shall consist of a notice of appeal, if an appeal has been taken; a copy of the judgment-roll, or the decree in the court below, and the papers upon which it was entered; if no judgment was entered, the pleadings, minutes of trial, and the order sending the case to the Appellate Division or the order appealed from, or the papers required by section 1280 of the Code of Civil Procedure. To these papers shall be attached the case or case and exceptions if it is to be used in the Appellate Division. All the foregoing papers shall be certified by the proper clerk, or be stipulated by the parties to be true copies of the original. There shall be prefixed to these papers a statement showing the time of the beginning of the action or special proceeding, and of the service of the respective pleadings; the names of the original parties in full; and any change in the parties, if such has taken place. There shall be added to them the opinion of the court below, or an affidavit that no opinion was given, or, if given, that a copy could not be procured. The foregoing papers shall constitute the record in the Appellate Division. If the papers shall not be filed and served as herein provided by the party whose duty it is to do so, his opponent may move the court on three days' notice, on any motion day, for an order dismissing the appeal, or for a judgment in his favor, as the case may be.

The papers in all appeals from non-enumerated motions shall consist of printed copies of the papers which were used in the court below, and are specified in the order, certified by the proper clerk, or stipulated by the parties to be true copies of the original, and of the whole thereof. There shall be added to them the opinion of the court below, or an affidavit that no opinion was given, or, if given, that a copy could not be procured.

They shall be filed with the clerk within fifteen days after the appeal is taken and at the same time the appellant shall serve upon his adversary three printed copies thereof.

If the appellant fails to file and serve the papers as aforesaid,

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the respondent may move, on any motion day, upon three days' notice, to dismiss the appeal.

If the judge from whose order the appeal is taken orders that it shall not be necessary to insert in the printed papers upon which the appeal is to be taken such exhibits or other voluminous documents as are not necessary for a consideration of the questions raised by the appeal, the clerk shall then certify that the printed papers are true copies of the originals and of the whole thereof specified in the order except those omitted by order of the court. (As amended Oct. 24, 1890, and Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 42. Briefs and points to be exchanged by the parties.

The Appellate Division in any department may make such rules in relation to the exchange of briefs and the delivery of papers and briefs to the justices thereof as they may deem expedient in all cases, whether enumerated or non-enumerated.

Rule 43. Cases and points to be printed and indexed; number to be delivered to the court; citations from official reports.

The cases and points, and all other papers furnished in the Appellate Division in calendar cases, shall be printed on white writing paper, with a margin on the outer edge of the leaf not less than one and a half inch wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and a half inches wide. The folio, numbering from the commencement to the end of the papers, shall be printed on the outer margin of the page.

The cases and points in each case shall be uniform in size and in the type of this rule.

All cases cited on the briefs from the courts of this state shall be cited from the reports of the official reporters, if such cases shall have been reported in full in the official reports.

At the beginning of the argument of any appeal, the party whose duty it is to furnish the papers shall deliver to the clerk thirteen copies thereof, and each party shall deliver to the clerk thirteen copies of his briefs and points. The clerk shall deliver one copy of the papers and briefs to each justice, two to the official reporter, and shall transmit one to the librarian of the State Law Library, one to the clerk of each of the other departments, and shall dispose of the remainder as directed by the court. The Appellate Division in any department may require further copies of the papers and briefs to be delivered in their discretion.

The printed papers on appeal shall contain an index in the front thereof. The index of the exhibits shall concisely indicate the contents or nature of each exhibit and the folio of the case at which it is admitted in evidence and at which it is printed in the record. Said index shall also contain a reference to the folios at which a motion for a dismissal of the complaint or the direction of a verdict is contained; and to the certificate that the case contains all the evidence. At the top of each page of the case or bill of exceptions must be printed the name of the witness then testifying and of the party calling him, and indicating whether the examination is direct, cross or redirect. Each affidavit or other paper printed upon an appeal from an order

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shall be preceded by a description thereof that must specify on whose behalf it was read; and the name of the affiant shall be printed at the top of each page containing an affidavit. On an appeal from an order granting or denying a motion to strike out parts of a pleading as irrelevant, redundant or scandalous, or to make a pleading more definite and certain, the portion of the pleading to which the motion relates must be printed in italics. (Amended Oct. 24, 1905, and Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 44. Non-enumerated motions, when heard; default, how taken.

Non-enumerated motions in the Appellate Division and appeals from orders will be heard upon such days as are designated by the special rule of the Appellate Division in each Department.

If a non-enumerated motion noticed to be heard at the Appellate Division shall not be made upon the day for which it is noticed, the party attending pursuant to notice to oppose the same, may, at the close of that order of business, unless the court shall otherwise order, take an order against the party giving the notice, denying the motion, with costs. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 45. Additional allowance.

Applications for an additional allowance can only be made to the court before which the trial is had or the judgment rendered, and shall in all cases be made before final costs are adjusted.

Rule 46. Motion to amend justice's return on appeal, when to be noticed.

On appeal from a justice's judgment, where a County Court has not jurisdiction, by reason of relationship, etc., a notice of motion for an order to compel the justice to amend his return may be given in twenty days after the date of the certificate of the county judge, and not after that time.

Rule 47. Counsel, time allowed.

At the hearing of causes in the Appellate Division or at Special Term, not more than one counsel shall be heard on each side, and then not more than one hour each, except when the court shall otherwise order.

On appeals from orders and on non-enumerated motions, but one counsel on each side shall be heard, and not more than thirty minutes each, unless the court shall otherwise order.

The Appellate Division in any department may make such further or different regulations upon these subjects as it may deem proper.

Rule 48. Stay of proceedings, for change of venue; affidavits, on motion to change venue.

No order to stay proceedings for the purpose of moving to change the place of trial shall be granted unless it shall appear from the papers that the defendant has used due diligence in preparing the motion for the earliest practical day after issue joined. Such order shall not stay the plaintiff from taking any

GENERAL RULES OF PRACTICE. Rules 49-51

step, except subpoenaing witnesses for the trial, without a special clause to that effect.

On motions to change the place of trial, the moving party shall state the nature of the controversy and show how his witnesses are material, and the grounds of his belief that the testimony of such witnesses will be favorable to his contention, and shall also show where the cause of action arose, and such facts shall be taken into consideration by the court in fixing the place of trial. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 49. Guardians ad litem.

No person shall be appointed guardian ad litem, either on the application of the infant or otherwise, unless he be the general guardian of such infant, or is fully competent to understand and protect the rights of the infant, and has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party. And no person shall be appointed such guardian who is not of sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct in the defense or prosecution of the suit, and such ability shall be shown by affidavit stating facts in respect thereto. And no person shall be appointed guardian ad litem who is nominated by the adverse party.

Rule 50. Guardian ad litem, duties, compensation; affidavit to entitle guardian to compensation.

It shall be the duty of every attorney or officer of the court to act as the guardian of any infant defendant, in any suit or proceeding against him, whenever appointed for that purpose by an order of this court. And it shall be the duty of such guardian to examine into the circumstances of the case, so far as to enable him to make the proper defense, when necessary for the protection of the rights of the infant; and he shall be entitled to such compensation for his services as the court may deem reasonable. But no order allowing compensation to guardians ad litem shall be made, except upon an affidavit to be made by such guardian, if an attorney of the court, or if the guardian be not an attorney, then an affidavit to be made by an attorney of the court who has acted in the matter in behalf of such guardian, showing that he has examined into the circumstances of the case, and has, to the best of his ability, made himself acquainted with the rights of his ward, and that such guardian has taken all the steps necessary for the protection of such rights, to the best of his knowledge, and as he believes, stating what has been done by him for the purpose of ascertaining the rights of the ward.

Rule 51. Guardian, bond of, before receiving property.

No guardian ad litem for an infant party shall as such guardian receive any money or property belonging to such infant, or which may be awarded to him in the suit (except such costs and expenses as may be allowed by the court to the guardian), unless he has given an undertaking executed by a surety company authorized to do business in this state, in double the amount of such money or property, or a bond secured by a mortgage on improved and unincumbered real property.

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Neither shall the general guardian of an infant receiving any part of the proceeds of a sale of real property belonging to an infant sold under a decree, judgment or order of the court until the guardian has given such further security for the faithful discharge of his trust as the court may direct. In case, however, such proceeds shall exceed the sum of five hundred dollars the court shall require the guardian to give a bond, in the penalty of double the amount to be paid to the guardian, such bond to be that of a surety company authorized to do business in this state or secured by mortgage on improved and unincumbered real property worth the amount of the penalty of the bond. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 52. General guardian, appointment of.

Except in cases otherwise provided for by law, for the purpose of having a general guardian appointed, the infant, if of the age of fourteen years or upward, or some relative or friend, if the infant is under fourteen, may present a petition to the court, stating the age and residence of the infant, and the name and residence of the person proposed or nominated as guardian, and the relationship, if any, which said person bears to the infant, and the nature, situation and value of the infant's estate.

Rule 53. Age of infant and amount of property to be ascertained by court.

Upon presenting the petition, the court shall, by inspection or otherwise, ascertain the age of the infant, and if of the age of fourteen years or upward shall examine him as to his voluntary nomination of a suitable and proper person as guardian; if under fourteen, shall ascertain who is entitled to the guardianship, and shall name a competent and proper person as guardian. The court shall also ascertain the amount of the personal property, and the gross amount of value of the rents and profits of the real estate of the infant during his minority, and shall also ascertain the sufficiency of the security offered by the guardian.

Rule 54. Bond of a general guardian.

The security to be given by the general guardian of an infant shall be a bond in the penalty of double the amount of the personal estate of his ward and of a gross amount or value of the rents or profits of the real estate during his minority. The bond shall be executed by the guardian, together with at least two sufficient sureties, each of whom shall be worth the amount specified in the penalty of the bond over and above all debts. If, however, the total amount of the personal estate of an infant and of the gross amount or value of the rents or profits of the real estate during his minority shall exceed twenty-five hundred dollars, then the bond must be the bond of a surety company authorized to do business in this State, or the general guardian may give a bond secured by a mortgage on improved and unincumbered real property of the value of the penalty of the bond.

The court in its discretion may vary the security where from special circumstances it may be found for the interest of the infant, and may direct the principal of the estate and any part thereof to be invested in the stocks of the state of New York or of the United States, or deposited with any trust company

which shall have been designated as a depository for such moneys, or invested in bond and mortgage on unincumbered and improved property of at least double the value of the amount invested, to be shown to the satisfaction of the court, for the benefit of the infants, and that the interest or income thereof only be received by the guardian. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 55. Sale of real estate of infants, lunatics, etc.; contents of petition.

The petition in proceedings to sell, mortgage or lease real estate belonging to an infant or lunatic, idiot or habitual drunkard, shall state, besides the particular grounds for a sale, mortgage or lease of the property, and the other matters required by the Code, the age and residence of the infant lunatic, idiot or habitual drunkard, and the name and residence of the person proposed as a special guardian or committee, the relationship, if any, which he bears to the infant, lunatic, idiot or habitual drunkard, and the security proposed to be given; and also whether any previous application has been made, and, if so, the time thereof, and what disposition was made of the same.

Rule 56. Referee's report on petition to sell, etc.

The referee appointed on such petition must report as to whether a sale, mortgage or lease of the premises (or any and what portion thereof), would be beneficial to the infant, lunatic, idiot or habitual drunkard, and the particular reason therefor, and whether the infant, lunatic, idiot or habitual drunkard is in absolute need of having some and what portion of the proceeds of such sale, mortgage or lease, for a purpose provided in section 2348 of the Code, in addition to what he might earn by his own exertions; and such referee shall also ascertain and report the value of the property or interest to be disposed of, specifically, as to each separate lot or parcel, and whether there is any person entitled to dower or a life estate, or estate for years, in the premises, and the terms and conditions on which it should be sold.

And the referee's report shall give such further facts as are necessary or proper on the application.

The facts in relation to the value of the property or interest to be disposed of required to be ascertained and reported upon by the referee must be proven on such reference by evidence of at least two disinterested persons, in addition to that of the petitioner, and the report shall not refer to the petition or any other papers for a statement of fact. (As amended October 24, 1899.)

Rule 57. Bond of special guardian.

The security required on a sale of the real estate of an infant shall be a bond of the guardian, with two sufficient sureties, in the sum of double the value of the premises, including the interest on such value during the minority of the infant, each of which sureties shall be worth the penalty of the bond over and above all debts, which bond shall be duly acknowledged and accompanied with affidavits of justification made by the sureties. In case, however, the value of the premises including the interest

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on such value during the minority of the infant, shall exceed the sum of five hundred dollars, the court must require the guardian to give a bond of a surety company authorized to do business in this state or a bond secured by a mortgage on improved and unincumbered real property of the value of the penalty of the bond. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 58. Proceeds of sale must be brought into court; costs.

If the proceeds of the sale exceed \$500, and the guardian has not given security by mortgage upon real estate, he shall bring the proceeds into court, or invest the same under the direction of the court, for the use of the infant; and the guardian shall only be entitled to receive so much of the interest or income thereof, from time to time, as may be necessary for the support and maintenance of the infant, without the order of the court. If the infant's interest in the property does not exceed \$1,000, the whole costs, including disbursements, shall not exceed twenty-five dollars, and referee's fees not exceeding ten dollars. Where several infants are interested in the same premises as tenants in common, the application in behalf of all shall be joined in the same petition, although they may have several general guardians; and there shall be but one reference to ascertain the propriety of a sale as to all, and but one bill of costs shall be allowed.

Rule 59. When proceeds of sale to be paid to general guardian; petition therefor.

No money arising from the sale of the real estate of an infant shall be paid over to his general guardian, except so much thereof, or of the interest or income, from time to time, as may be necessary for his support or maintenance, unless such guardian shall give a bond in the penalty of double the amount to be paid to him with sufficient surety to be approved by the court. In case, however, such money shall exceed the sum of five hundred dollars the court must require the guardian to give a bond of a surety company authorized to do business in this state or a bond secured by a mortgage on improved and unincumbered real property of a value of the penalty of the bond.

No order shall be made for the payment of any such moneys to any person, except upon petition, accompanied by a certified copy of the order, in pursuance of which the money was brought into court, together with a statement of the county treasurer, city chamberlain, or other depository of the money, showing the present state and amount of the fund, separating the principal and interest, and showing the amount of each; and the court may take such proof of the truth of the matters stated in the petition as shall be deemed proper, or may refer the same to a suitable referee to take proof and report thereon. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 60. Reference on failure to answer on mortgage foreclosure; judgment.

If, in an action to foreclose a mortgage, the defendant fails to answer within the time allowed for that purpose, or the right of the plaintiff, as stated in the complaint, is admitted by the answer, the plaintiff may have an order referring it to some

suitable person as referee, to compute the amount due to the plaintiff, and to such of the defendants as are prior incumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, if the whole amount secured by the mortgage has not become due. If the defendant is an infant, and has put in a general answer by his guardian, or if any of the defendants are absentees the order of reference shall also direct the person to whom it is referred to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent, on oath, as to any payments which have been made, and to compute the amount due on the mortgage, preparatory to the application for judgment of foreclosure and sale.

When no answer is put in by the defendant, within the time allowed for that purpose, or any answer denying any material facts of the complaint, the plaintiff, after the cause is in readiness for trial, as to all the defendants, may apply for judgment, at any Special Term, upon due notice to such of the defendants as have appeared in the action, and without putting the cause on the calendar.

The plaintiff, in such case, when he moves for judgment, must show, by affidavit or otherwise, whether any of the defendants who have not appeared are absentees; and, if so, he must produce the report as to the proof of the facts and circumstances stated in the complaint, and of the examination of the plaintiff or his agent, on oath, as to any payments which have been made. And in all foreclosure cases the plaintiff, when he moves for judgment, must show by affidavit, or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pendency of the action, containing the names of the parties thereto, the object of the action, and a description of the property in that county affected thereby, the date of the mortgage, and the parties thereto, and the time and place of recording the same, has been filed at least twenty days before such application for judgment, and at or after the time of filing of the complaint, as required by law.

Rule 61. Judgment for sale on foreclosure, what to contain; disposition of surplus money; referee.

In every judgment for the sale of mortgaged premises, the description and particular boundaries of the property to be sold, so far, at least, as the same can be ascertained from the mortgage, shall be inserted. And, unless otherwise specially ordered by the court, the judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action, as provided by sections 1626 and 1776 of the Code, and which may be sold separately without material injury to the parties interested, be sold by or under the direction of the sheriff of the county, or a referee, and that the plaintiff, or any other party, may become a purchaser on such sale; that the sheriff or referee execute a deed to the purchaser; that out of the proceeds of the sale, unless otherwise directed, he pay the expenses of the sale, as provided in section 1676 aforesaid, and that he pay to the plaintiff, or his attorney, the amount of his debt, interest and costs, or so much as the purchase money will

Rules 62, 63 GENERAL RULES OF PRACTICE.

pay of the same and that he take the receipt of the plaintiff, or his attorney, for the amount so paid, and file the same with his report of sale, and that the purchaser at such sale be let into possession of the premises on production of the deed.

All surplus moneys arising from the sale of mortgaged premises, under any judgment, shall be paid by the sheriff or referee making the sale within five days after the same shall be received and be ascertainable, in the city of New York to the chamberlain of the said city, and in other counties to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court, and every judgment in foreclosure shall contain such directions, except where other provisions are specially made by the court. No report of a sale shall be filed or confirmed, unless accompanied with a proper voucher for the surplus moneys, and showing that they have been paid over, deposited or disposed of in pursuance of the judgment. The referee to be appointed in foreclosure cases, to compute the amount due, or to sell mortgaged premises, shall be selected by the court, and the court shall not appoint as such referee a person nominated by the party to the action or his counsel.

Rule 62. Sale of lands in the counties of New York, Kings or the city of Buffalo, under judgment or order.

Where lands in the county of New York or the county of Kings are sold under a decree, order or judgment of any court, they shall be sold at public auction, between eleven o'clock in the forenoon and three o'clock in the afternoon, unless otherwise specifically directed.

Notice of such sale must be given, and the sale must be had, as prescribed in section 1678 of the Code.

Such sales in the county of New York, unless otherwise specifically directed, shall take place at the Exchange Sales Rooms, now located at Nos. 14 and 16 Vezey street in the city of New York.

The Appellate Division of the Supreme Court in the First Department is authorized to change the place at which said sales shall be made, may make rules and regulations in relation thereto and may designate the auctioneers or persons who shall make the same.

Such sales in the city of Buffalo shall on and after May 1st, 1896, take place at the Real Estate Exchange rooms, between the hours of nine and eleven in the forenoon, and two and three o'clock in the afternoon, unless the court ordering the sales shall otherwise direct. Such sales shall, however, be made subject to such regulations as the justices of the Supreme Court of the Eighth District shall establish. (As amended October 24, 1899.)

Rule 63. Mortgage and assignments to be filed or recorded before conveyance.

Whenever a sheriff or referee sells mortgaged premises under a decree or order, or judgment of the court, it shall be the duty of the plaintiff, before a deed is executed to the purchaser, to file such mortgage and any assignment thereof in the office of the clerk, unless such mortgage and assignments have been duly proved or acknowledged, so as to entitle the same to be recorded; in which case, if it has not been already done, it shall be the duty of the plaintiff to cause the same to be recorded at fall

length in the county or counties where the lands so sold are situated, before a deed is executed to the purchaser on the sale; the expense of which filing or recording, and the entry thereof shall be allowed in the taxation of costs; and, if filed with the clerk, he shall enter in the minutes the filing of such mortgage and assignments, and the time of filing. But this rule shall not extend to any case where the mortgage or assignments appear, by the pleadings or proof in the suit commenced thereon, to have been lost or destroyed.

Rule 64. Application for surplus moneys; reference; searches; unsatisfied liens.

On filing the report of the sale, any party to the suit, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk where the report of sale is filed a notice, stating that he is entitled to such surplus moneys or some part thereof, and the nature and extent of his claim, may have an order of reference to ascertain and report the amount due to him, or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; to the end that, on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just. The referee shall, in all cases, be selected by the court. The owner of the equity of redemption, and every party who appeared in the cause, or who shall have filed a notice of claim with the clerk, previous to the entry of the order of reference, shall be entitled to service of a notice of the application for the reference, and to attend on such reference, and to the usual notices of subsequent proceedings relative to such surplus. But if such claimant or such owner has not appeared, or made his claim by an attorney of this court, the notice may be served by putting the same into the post-office, directed to the claimant at his place of residence, as stated in the notice of his claim, and upon the owner in such manner as the court may direct. All official searches for conveyances or incumbrances, made in the progress of the cause, shall be filed with the judgment roll, and notice of the hearing shall be given to any person having or appearing to have an unsatisfied lien on the moneys in such manner as the court shall direct; and the party moving for the reference shall show, by affidavit, what unsatisfied liens appear by such official searches, and whether any, and what other unsatisfied liens are known to him to exist.

Rule 65. Partition to embrace all lands in common.

Where several tracts or parcels of land lying within this state are owned by the same persons in common, no separate action for the partition of a part thereof shall be brought without the consent of all the parties interested therein; or without the special order of the court made on notice to all parties who have appeared in the action, to be obtained before application for the relief demanded in the complaint; and, if brought without such a consent or order, the share of the plaintiff may be charged with the whole cost of proceeding; and where infants are interested, the complaint shall state whether or not the parties own any other lands in common. (Amended Apr. 1, 1910, in effect Sept. 1 1910.)

Rules 66-69 GENERAL RULES OF PRACTICE.

Rule 66. Reference as to title of premises.

Where the rights and interests of the several parties, as stated in the complaint, are not denied or controverted, if any of the defendants are infants or absentees, or unknown, the plaintiff, on an affidavit of the fact, and notice to such of the parties as have appeared, may apply at a Special Term, for an order of reference, to take proof of the plaintiff's title and interest in the premises, and of the several matters set forth in the complaint; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances under which the same are held. Such referee and the referee appointed to sell shall in all cases be selected by the court. (As amended October 24, 1905.)

Rule 67. Notice of stay of sale in partition or foreclosure.

No order to stay a sale under judgment in partition or for the foreclosure of a mortgage shall be granted or made by a judge out of court, except upon a notice of at least two days to the plaintiff's attorney.

Rule 68. Money in court paid to county treasurer; deposit by treasurer.

(Repealed Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 69. Order for payment out of court; accounts with trust companies; draft to be countersigned by justice; what to be stated in draft.

All orders directing the payment of money out of court shall direct the payment to be made to the person entitled to receive the same, and all checks or drafts for the payment of money out of court shall be drawn payable to the order of the person entitled to the moneys; and shall specify in what particular suit or on what account the money is to be paid out, and the time when the order authorizing such payment was made. No order in any pending action, for the payment of money out of court, shall be made, except on regular notice or order to show cause, duly served on the attorneys of all the parties who have appeared therein, or filed notice of claim thereto. When moneys are deposited by the order of the court in any trust company, the entry of such deposit in the books of the company shall contain a short reference to the title of the cause or matter in which such deposit is directed to be made, and shall specify also the time from which the interest or accumulation on such deposit is to commence, where it does not commence from the date of such deposit. The secretary of the company shall, on or before the first day of February in each year, transmit to the Appellate Division of the Supreme Court in the department in which the trust company is located a statement of the accounts in each department, showing the amount, on the last preceding first day of January, including the interest or accumulation on the sum deposited to the credit of each cause or matter.

In every draft upon the trust company by the county treasurer or chamberlain, for moneys deposited with the said company, or for the interest or accumulation on such moneys, the title of the cause or matter on account of which the draft is

made, and the date of the order authorizing such draft shall be stated, and the draft shall be made payable to the order of the person or persons entitled to the money. Any attorney or other person procuring an order for the payment of money out of court, shall obtain two certified copies of the order, both to be countersigned by the judge granting the same; one copy shall be filed with the county treasurer and the other shall accompany the draft drawn upon the depository and be filed with it, and the several banks and other depositories having trust funds of the court on deposit, are forbidden to pay out any of such funds without the production and filing of such certified and countersigned copy order. This provision is not intended to dispense with any of the requirements of this rule, as to the form of the draft, nor to apply to a case where periodical payments are directed to be made, as provided for by the last sentence of this rule, after the first payment from such fund shall have been made under an order of the court, in the manner herein specified. Where periodical payments are directed to be made out of a fund deposited with such company, the delivery to the secretary of the company of one copy of the order authorizing the several payments shall be sufficient to authorize the payment of subsequent drafts in pursuance of such order. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

Rule 70. Gross sum in payment of life-estate.

Whenever a party, as a tenant for life, or by the curtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in permanent securities, such party shall be charged with the expense of investing such sum, and of receiving and paying over the interest or income thereof; but if such party is willing, and consents to accept a gross sum in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of five per cent. on the principal sum, during the probable life of such person, according to the Carlisle Table of Mortality. (As amended October 24, 1905.)

Rule 71. Fees on inquisition of lunacy; special order of the court; when necessary, to pay costs.

On the execution of a commission of lunacy, etc., the commissioners, for every day they are necessarily employed in hearing the testimony and taking the inquisition, shall be entitled to an allowance to be fixed by the court, not exceeding ten dollars for each day to each of such commissioners.

Where the costs and expenses exceed \$250, besides witness fees and allowances to commissioners, the committee shall not be at liberty to pay the same out of the estate in his hands, without a special order of the court upon notice to all parties who have appeared in such proceedings, directing such payment.

Rule 72. Divorce or separation, action for; reference on default; averments in complaint; plaintiff to be examined on oath.

When an action is brought to obtain a divorce or separation, or to declare a marriage contract void, the court shall in no case order the reference to a referee nominated by either party nor

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to a referee agreed upon by the parties, nor without proof by affidavit conformable to the rules relating to the manner and proof of the service of the summons and complaint. Notice of appearance and retainer shall not be sufficient to excuse such proof.

When the action is for a divorce on the ground of adultery, unless it be averred in the complaint that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff; that five years have not elapsed since the discovery of the fact that such adultery had been committed, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery; and, also, where, at the time of the offense charged, the defendant was living in adulterous intercourse with the person with whom the offense is alleged to have been committed; that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff, and the complaint containing such averments be verified by the oath of the plaintiff in the manner prescribed by the Code, judgment shall not be rendered for the relief demanded until the plaintiff's affidavit be produced stating the above facts.

In an action for a divorce or for the annulment of a marriage, where the defendant fails to answer, no reference shall be granted to take proof of the facts stated in the complaint, but before a judgment shall be granted the proof of such facts must be made to the court in open court and a copy of the evidence taken before the court shall be written out and filed with the judgment roll. The court may, however, in case the evidence is such that the public interest requires that the examination of the witnesses should not be public, exclude all persons from the court room except the parties to the action and their counsel and the witnesses, and shall order such evidence, when filed with the clerk, sealed up and exhibited only to the parties to the action or some one specially interested upon order of the court.

Rule 73. Divorce, judgment by default, when granted.

Before judgment by default shall be granted in an action to annul a marriage on the ground that the party was under the age of legal consent, proof must be made showing that the parties thereto have not freely cohabited for any time as husband and wife, after the plaintiff had attained the age of consent. If the action is brought to annul the marriage, on the ground that the plaintiff's consent was obtained by force or fraud, the plaintiff must show that there has been no voluntary cohabitation between the parties as man and wife; and if it is brought to annul a marriage on the ground that the plaintiff was a lunatic, proof must be produced showing that the lunacy still continues; or that the parties have not cohabited as husband and wife after the plaintiff was restored to his reason.

Rule 74. Divorce, answer in action.

The defendant in the answer may set up the adultery of the plaintiff, or any other matter which would be a bar to a divorce, separation, or the annulling of a marriage contract; and if an issue is taken thereon, it shall be tried at the same time and in the same manner as other issues of fact in the cause.

Rule 75. Legitimacy of children on divorce.

On a complaint filed by a husband for a divorce, if he wishes to question the legitimacy of any of the children of his wife; the allegation that they are or that he believes them to be illegitimate, shall be distinctly made in the complaint. If, upon default, proofs shall be taken upon the question of legitimacy as well as upon the other matters stated in the complaint, and if the issue is tried by a jury, an issue on the question of legitimacy of the children shall be awarded and tried at the same time.

Rule 76. Judgment declaring marriage void, or granting a divorce not to be by default; copy of pleading or testimony not to be furnished; judgment to be entered by court.

No judgment annulling a marriage contract, or granting a divorce, or for a separation or limited divorce, shall be made of course by the default of the defendant; or in the consequence of any neglect to appear at the hearing of the cause, or by consent. Every such case shall be heard after the trial of the issue, or upon the coming in of the proofs at a Special Term of the court; but where no person appears on the part of the defendant, the details of evidence in adultery causes shall not be read in public, but shall be submitted in open court. No officer of any court, with whom the proceedings in an adultery cause are filed, on or before whom the testimony is taken, nor any clerk of such officer, either before or after the termination of this suit, shall permit a copy of any of the pleadings or testimony, or of the substance of the details thereof, to be taken by any other person than a party or the attorney or counsel of a party, who has appeared in the cause, without a special order of the court.

No judgment in an action for a divorce shall be entered except upon the special direction of the court.

Rule 77. Receiver of debtor's estate; powers and duties; costs.

Every receiver of the property and effects of the debtor shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of a debtor, where it is necessary or proper for him to do so; and he may apply for and obtain an order of course that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver, and pay their rents to him. He shall also be permitted to make leases, from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor without the special order of the court, until after judgment in the cause. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands. But he may, by leave of the court, sell such desperate debts, and all other doubtful claims to personal property, at public auction, giving at least ten days' public notice of the time and place of such sale.

Rule 78: Suits by receiver; costs.

Whenever a receiver, appointed under proceedings supplementary to execution, shall apply for leave to bring an action, he shall present and file with his application the written request

of the creditor in whose behalf he was appointed, that such action be brought; or else he shall give a bond with sufficient security and properly acknowledged and approved by the court, to the person against whom the action is to be brought, conditioned for the payment of any costs which may be recovered against such receiver. And leave to bring action shall not be granted except on such written request or on the giving of such security.

In all other cases where a receiver applies to the court for leave to bring an action, he shall show in such application that he has sufficient property in his actual possession to secure the person against whom the action is to be brought for any costs which he may recover against such receiver; otherwise the court may require the receiver to give such bond conditioned for the payment of costs, and with such security as is above mentioned.

Rule 79. Who may be referee, and duties of.

Except in a case provided for by section 1011 of the Code of Civil Procedure, no person, unless he is an attorney of the court in good standing, shall be appointed sole referee for any purpose in any pending action or proceeding. Nor shall any person be appointed a referee who is the partner or clerk of the attorney, or counsel, of the party in whose behalf such application for such appointment is made, or who is in any way connected in business with such attorney or counsel, or who occupies the same office with such attorney or counsel. All moneys received by a referee appointed to sell real property shall be forthwith deposited by the referee in his own name as referee in a bank or trust company authorized to receive on deposit court funds; and if there be no such depository in the city or town in which the referee resides, then he shall deposit such moneys forthwith in a depository located in an adjoining city or town, or with the County Treasurer of the county in which the action or special proceeding is pending; and such moneys so deposited shall not be withdrawn, except upon the order of the court. (Amended Apr. 1, 1910, in effect Sept. 1, 1910.)

The following form has been approved by the justices of the Supreme Court in the First Department.

To comply with the Amended Rules of Practice in foreclosure cases the judgment should contain immediately following the direction to sell and in substitution for the provisions now in use the following provisions:

Under the direction of, Esq., who is hereby appointed referee for that purpose; that said referee give public notice of the time and place of such sale according to law and the course and practice of this court; that the plaintiff or any other party to this action may become the purchaser or purchasers on such sale; that said referee execute to the purchaser or purchasers on such sale a deed of the premises sold; that such referee on receiving the proceeds of sale forthwith pay therefrom the taxes, assessments and water rents which are or may become liens on the premises at the time of sale. That said referee then deposit the balances of such proceeds of sale in* and shall thereafter make the following payments, and his checks drawn for that purpose shall be paid by the said depository!

First.—The sum of \$50 to the said referee for his fees herein.

Second.—Advertising expenses as shown on the bills presented and certified by the said referee to be correct, and duplicate copies of which shall be left with said depository.

Third.—Said referee shall also pay to the plaintiff the sum of dollars, adjudged to the plaintiff for his costs and

disbursements in this action, with interest thereon from the date hereof, together with an additional allowance of dollars hereby awarded to the plaintiff, in addition to costs, with interest thereon from the date thereof; and also dollars, the said amount so reported due as aforesaid, together with the legal interest thereon from the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same.

Fourth.—If such referee intends to apply for a further allowance for his fees, he may leave upon deposit such amount as will cover such additional allowance, to await the further order of the court thereon, after application duly made.

Rule 80. Sequestration of property of corporation; where motion for receiver may be made; removal of receiver.

All motions for the sequestration of the property of corporations, or for the appointment of receivers thereof, must be made in the judicial district in which the principal place of business of said corporations, respectively, is situated, except that in actions brought by the Attorney-General in behalf of the people of this state, when it shall be made to appear that such sequestration is a necessary incident to the action, and that no receiver has already been appointed, a motion for the appointment of one may be made in any county within the judicial district in which such action is triable. No motion can be made, or other proceeding had for the removal of a receiver, elsewhere than in the judicial district in which the order for his appointment was made. And where a receiver has been appointed, his appointment shall be extended to any subsequent suit or proceeding relating to the same estate or property in which a receiver is necessary.

Rule 81. Power of receiver to employ counsel.

No receiver shall have power to employ more than one counsel, except under special circumstances and in particular cases requiring the employment of additional counsel, and in such cases only upon special application to the court, showing such circumstances by his petition or affidavit, and on notice to the party or person on whose behalf or application he was appointed. This rule shall apply to all receivers, present and future; and no allowance shall be made to any receiver for expenses paid, or made, or incurred in violation of this rule.

Rule 82. Examination of a party before trial.

When an examination is required under sections 870, 871, 872 of the Code of Civil Procedure, the affidavit shall specify the facts and circumstances which show, in conformity with subdivision 4 of section 872, that the examination of the person is material and necessary.

Rule 83. Courts may make further rules.

The Appellate Division in each department, and the various courts of record, may make such further rules in regard to the transaction of business before them respectively, not inconsistent with the foregoing rules, as they in their discretion may deem necessary.

Rule 84. Practice in cases not covered by these rules.

In cases where no provision is made by statute or by these rules the proceedings shall be according to the customary practice as it formerly existed in the Court of Chancery or Supreme Court, in cases not provided for by statute or by the written rules of those courts.

CARLISLE TABLE OF MORTALITY.

Table showing the value of an annuity of \$1 on a single life, according to the Carlisle Table of Mortality, at 5 per cent. interest, referred to in General Rule No. 70.

Age.	Number of years' purchase the annuity is worth.	Age.	Number of years' purchase the annuity is worth.	Age.	Number of years' purchase the annuity is worth.
0.....	12.083	35.....	14.127	70.....	6.336
1.....	13.995	36.....	13.987	71.....	6.015
2.....	14.983	37.....	13.843	72.....	5.711
3.....	15.824	38.....	13.694	73.....	5.434
4.....	16.271	39.....	13.541	74.....	5.190
5.....	16.590	40.....	13.380	75.....	4.989
6.....	16.735	41.....	13.244	76.....	4.792
7.....	16.790	42.....	13.101	77.....	4.609
8.....	16.786	43.....	12.956	78.....	4.422
9.....	16.742	44.....	12.805	79.....	4.210
10.....	16.669	45.....	12.648	80.....	4.014
11.....	16.581	46.....	12.480	81.....	3.799
12.....	16.495	47.....	12.301	82.....	3.606
13.....	16.406	48.....	12.107	83.....	3.406
14.....	16.316	49.....	11.892	84.....	3.211
15.....	16.227	50.....	11.660	85.....	3.009
16.....	16.145	51.....	11.409	86.....	2.830
17.....	16.067	52.....	11.154	87.....	2.685
18.....	15.988	53.....	10.892	88.....	2.567
19.....	15.905	54.....	10.624	89.....	2.495
20.....	15.818	55.....	10.347	90.....	2.339
21.....	15.727	56.....	10.063	91.....	2.321
22.....	15.629	57.....	9.771	92.....	2.412
23.....	15.526	58.....	9.478	93.....	2.517
24.....	15.417	59.....	9.199	94.....	2.560
25.....	15.304	60.....	8.940	95.....	2.596
26.....	15.188	61.....	8.712	96.....	2.555
27.....	15.065	62.....	8.487	97.....	2.428
28.....	14.942	63.....	8.258	98.....	2.278
29.....	14.827	64.....	8.016	99.....	2.045
30.....	14.723	65.....	7.765	100.....	1.624
31.....	14.617	66.....	7.503	101.....	1.192
32.....	14.506	67.....	7.227	102.....	0.753
33.....	14.387	68.....	6.941	103.....	0.317
34.....	15.260	69.....	6.643		

RULES FOR COMPUTING THE VALUE OF THE LIFE ESTATE OR ANNUITY.

Calculate the interest at 5 per cent. for one year upon the sum to the income of which the person is entitled. Multiply this interest by the number of years' purchase set opposite the person's age in the table, and the product is the gross value of the life-estate of such person in said sum.

EXAMPLES.

Suppose a widow's age is 37, and she is entitled to dower in real estate worth \$350.75. One-third of this is \$116.91 $\frac{2}{3}$. Interest on \$116.91 for one year at 5 per cent. (as fixed by the 70th Rule) is \$5.85. The number of years' purchase which an annuity of \$1 is worth at the age of 37, as appears by the table, is thirteen years and $\frac{843}{1,000}$ parts of a year, which multiplied by \$5.85, the income for one year, gives \$80.98 and a fraction as the gross value of her right of dower.

Suppose a man whose age is 50 is tenant by the curtesy in the whole of an estate worth \$9,000. The annual interest on the sum at 5 per cent. is \$450. The number of years' purchase which an annuity of \$1 is worth at the age of 50, as per table, is 11.660 parts of a year, which multiplied by \$450, the value of one year, gives \$5,247 as the gross value of his life estate in the premises, or the proceeds thereof.

NOTE.—The values in this table are calculated on the supposition that the annuities are payable yearly, first payment due one year hence. These values, with those for joint and survivorship life interest, may be found in "Commutation Tables for Joint Annuities and Survivorship Assurances Based on the Carlisle Mortality, by David Chisholm." London, Charles & Edwin Layton, 1858.



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CODE OF CIVIL PROCEDURE



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THE
Code of Civil Procedure
of the
STATE OF NEW YORK.

AN ACT

**Relating to Courts, Officers of Justice, and
Civil Proceedings.**

PASSED June 2, 1876; three-fifths being present.

*The People of the State of New York, represented in Senate
and Assembly, do enact as follows.*

CHAPTER I.

**General Provisions relating to Courts, and the Mem-
bers and Officers thereof.**

TITLE I.—The Courts of the State; their General Powers and Attributes,
and General Regulations pertaining to the Exercise thereof.

TITLE II.—Provisions of General Application, relating to the Judges, and cer-
tain other Officers of the Courts.

TITLE I.

**The courts of the State; their general powers and attributes,
and general regulations pertaining to the exercise thereof.**

- Article** 1. Enumeration and classification.
2. General powers and attributes of the courts.
3. Miscellaneous provisions relating to the sittings of the courts.

ARTICLE FIRST.

Enumeration and classification.

- Sec.** 1. Courts.
2. Courts of record enumerated.
3. Courts not of record.
4. General provisions as to jurisdiction, etc.

§ 1. [Am'd, 1909.] **Courts.**

The courts referred to in this act, are enumerated in sections two and three of the judiciary law.

Amended by L. 1909, ch. 65, § 3. See note 26 of notes of Board of Statutory Consolidation at end of Code.

§§ 2-3. [Repealed by L. 1900, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 2-3.]

§ 4. [Am'd, 1877.] General provision as to jurisdiction, etc.

Each of those courts shall continue to exercise the jurisdiction and powers now vested in it by law, according to the course and practice of the court, except as otherwise prescribed in this act.

Co. Proc. § 10, and part of § 469.

ARTICLE SECOND.*General powers and attributes of the courts.*

- Sec. 5. The sitting of courts to be public.
 6. Courts not to sit on Sunday, except in special cases
 7. General powers of courts of record.
 8. Criminal contempts defined.
 9. Punishment for criminal contempts.
 10. Such contempts in view of court; how punished, etc.
 11. Requisites of commitment.
 12. Preceding sections limited
 13. Indictment, if offence is indictable.
 14. Contempts; punishable civilly.
 15. No punishment for non-payment of interlocutory costs.
 16. Id.; money due upon a contract.
 17. Rules of courts of record, how made and revised.
 18. Rules to be published.
 19. Courts to order calendar printed.
 20. Expense to be a county charge.
 21. Certain papers may be destroyed.
 22. Writs, etc., in name of the people, and in English; abbreviations.
 23. Id.; teste and return.
 24. Id.; to be subscribed or indorsed; when error, etc., not to vitiate.
 25. No discontinuance by reason of vacancy, etc.
 26. In New-York and Brooklyn, continuance of proceedings commenced before judges.
 27. Provisions respecting the seals of courts.
 28. Seals of counties.
 29. [Repealed.]
 30. New seals.

§ 5-6. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 4-5.]

§ 7. General powers of courts of record.

A court of record has power:

1. To issue a subpoena, requiring the attendance of a person found in the State, to testify in a cause pending in that court; subject, however, to the limitations prescribed by law, with respect to the portion of the State in which the process of a local court of record may be served.

2. To administer an oath to a witness, in the exercise of the powers and duties of the court.

3. To devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.

2 R. S. 276, § 1 (3 R. S., 5th ed., 468; 2 Edm. 287).

§ 8-12. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 750-752, 754.]

§ 13. [Repealed by L. 1909, ch. 88. See Penal Law, § 602.]

§ 14. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 753.]

§ 15-16. [Repealed by L. 1909, ch. 14. See Consolidated Laws, tit. Civil Rights Law, §§ 20-21.]

§§ 17-19. [Repealed by L. 1900, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 52, 90, 93-95, 154, 193, 328 and 329.]

§ 20. [Repealed by L. 1900, chs. 16 and 58. See Consolidated Laws, tits. County Law, § 240, State Finance Law, § 46.]

§ 21. [Repealed by L. 1900, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 87.]

§ 22. Writs, etc., in name of the people, and in English; abbreviations.

Except where it is otherwise specially prescribed by law, a writ or other process must be in the name of the people of the State, and each writ, process, record, pleading or other proceeding in a court, or before an officer, must be in the English language, and, unless it is oral, made out on paper or parchment, in a fair legible character, in words at length, and not abbreviated. But the proper and known names of process, and technical words, may be expressed in appropriate language, as now is, and heretofore has been customary; such abbreviations as are now commonly employed in the English language may be used; and numbers may be expressed by Arabic figures, or Roman numerals, in the customary manner.

2 R. S. 273, §§ 8 and 9 (3 R. S., 5th ed., 467; 2 Edm. 283), consolidated.

§ 23. Id.; teste and return.

A writ or other process issued out of a court of record, must be tested, except where it is otherwise specially prescribed by law, in the name of a judge of the court, on any day; must be returnable within the time prescribed by law; or, if no time is prescribed by law, within the time fixed by the court, and therein specified for that purpose; and when returnable, must, together with the return thereto, be filed with the clerk, unless otherwise specially prescribed by law.

2 R. S. 279, § 9; L. 1847, ch. 280, § 57; L. 1847, ch. 470, § 43.

§ 24. Id.; to be subscribed or indorsed; when error, etc., not to vitiate.

A writ or other process, issued out of a court of record, must, before the delivery thereof to an officer to be executed, be subscribed or indorsed with the name of the officer by whom, or by whose direction it was granted, or the attorney for the party, or the person at whose instance it was issued. A writ or other process thus subscribed or indorsed, is not void or voidable, by reason of having no seal or a wrong seal thereon, or of any mistake or omission in the teste thereof, or in the name of the clerk, unless it was issued by special order of the court.

Id.

§ 25. [Am'd, 1877.] No discontinuance by reason of vacancy, etc.

An action or special proceeding, civil or criminal, in a court of record, is not discontinued by a vacancy or change in the judges of the court, or by the re-election or re-appointment of a judge; but it must be continued, heard and determined, by the court, as constituted at the time of the hearing or determination. After a judge is out of office, he may settle a case or exceptions, or make

any return of proceedings, had before him while he was in office, and may be compelled so to do, by the court in which the action or special proceeding is pending.

2 R. S. 277, § 2.

§ 26. [Am'd, 1910.] When one judge may continue proceedings commenced before another.

In the counties within the first and second judicial districts, a special proceeding instituted before a judge of a court of record, or a proceeding commenced before a judge of the court, out of court, in an action or special proceeding pending in a court of record may be continued from time to time, before one or more other judges of the same court, with like effect, as if it had been instituted or commenced before the judge, who last hears the same. (See § 771, post.)

Am'd, L. 1910, ch. 562. In effect Sept. 1, 1910.

§ 27. [Repealed by L. 1909, chs. 35 and 65. See Consolidated Laws, tit. Judiciary Law, §§ 28, 158 and 194, County Law, § 245; and also Code Civ. Pro., § 2507.]

§ 28. [Repealed by L. 1909, ch. 16. See Consolidated Laws, tit. County Law, § 245.]

§ 29. [Repealed by L. 1892, ch. 677.]

§ 30. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 29, County Law, § 245.]

ARTICLE THIRD.

Miscellaneous provisions relating to the sittings of the court.

- Sec. 31. Rooms, fuel, etc., how furnished.
 32. No liquors, etc., to be sold in court-house.
 33. Penalty.
 34. Adournment of court to a future day.
 35. Adjournment of term, judge not appearing.
 36. When court to be adjourned to a day certain.
 37. Causes tried elsewhere than at court-house.
 38. Governor may change place for holding courts of record.
 39. Such appointment, etc., to be recorded and published.
 40. Judge may change place for holding court of record.
 41. Adjournment of term to another place when parties so stipulate.
 42. Place for holding courts in city of New-York, how changed.
 43. When court-house is unfit to hold court, another place to be appointed.
 44. No action or special proceeding abated, etc., by failure or adjournment of court.
 45. Trial once commenced may be continued beyond term.

§ 31. [Repealed by L. 1909, ch. 16. See Consolidated Laws, tit. County Law, § 42. See also New York charter, § 62.]

§§ 32-33. [Repealed by L. 1909, ch. 88. See Penal Law, § 1790.]

§ 34. [Am'd, 1895, 1909.] **Trial of causes at adjourned term.**

Causes may be noticed for trial for any term of a court of record adjourned as provided in section seven of the judiciary law, as if it was held by original appointment.

Amended by L. 1895, ch. 946, and L. 1909, ch. 65. Former section repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 7, 534, 540. See note 27 of notes of Board of Statutory Consolidation at end of code.

§§ 35-36. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 6.]

§ 37. **Causes tried elsewhere than at court-house.**

The parties to an action or special proceeding, pending in a court of record, may, with the consent of the judge who is to try or hear it, without a jury, stipulate in writing, that it shall be tried or heard and determined, elsewhere than at the court-house. The stipulation must specify the place of trial or hearing, and must be filed in the office of the clerk; and the trial or hearing must be brought on upon the usual notice, unless otherwise provided in the stipulation.

L. 1847, ch. 470, § 41. See § 239.

§ 38. **Governor may change place for holding courts of record.**

If the governor deems it requisite, by reason of war, pestilence, or other public calamity, or the danger thereof, that the next ensuing term, or the next ensuing adjourned sitting, of the court

of appeals, or that the next ensuing term of any other court of record, appointed to be held elsewhere than in the city of New-York, should be held at a place, other than that where it is appointed to be held, he may, by proclamation, appoint a different place within its district for the holding thereof; and at any time thereafter he may revoke the appointment, and appoint another place, or leave the term to be held at the place where it would have been held, but for his appointment.

2 R. S. 290, § 87. This section has not been expressly repealed but has been embodied in the Judiciary Law. See Consolidated Laws, tit. Judiciary Law, § 8.

§ 39. Such appointments, etc., to be recorded and published.

Such an appointment or revocation must be under the hand of the governor, and filed in the office of the secretary of State; it must be published in such newspapers and for such time, as the governor directs.

Id., § 88. Partly repealed by L. 1909, ch. 58. See Consolidated Laws, tit. State Finance Law, § 46. Balance of section not expressly repealed but is embodied in Judiciary Law, § 8.

§ 40. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 9.]

§ 41. [Am'd, 1891, 1909.] Adjournment of term to another place when parties so stipulate.

A court of record may in its discretion, where the parties to an action file a stipulation that the same be tried at a place within the county where said action is triable, other than the court-house, adjourn the term to such place for the trial of said action. Notice of such an adjournment must be given, as the court directs by the order.

L. 1883, ch. 159, first clause of § 5 (4 Edm. 532); and L. 1866, ch. 174, § 2 (6 Edm. 705); consolidated and am'd; L. 1891, ch. 159. Amended by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 10. See note 28 of notes of Board of Statutory Consolidation at end of code.

§ 42-43. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 11-12.]

§ 44. No action or special proceeding abated, etc., by failure or adjournment of court.

When a term of * court fails or is adjourned, or the time or place of holding the same is changed, as prescribed in this chapter, an action, special proceeding, writ, process, recognizance, or other proceeding, civil or criminal, returnable, or to be heard or tried, at that term, is not abated, discontinued, or rendered void thereby; but all persons are bound to appear, and all proceedings must be had, at the time and place to which the term is adjourned or changed, or, if it fails, at the next term, with like effect as if the term was held, as originally appointed.

2 R. S. 204, § 22; 2 R. S. 277, §§ 3, 5 and 6; 2 R. S. 291, § 91; L. 1832, ch. 159, § 3 (4 Edm. 532); L. 1847, ch. 280, § 28 (4 Edm. 564); L. 1866, ch. 174, § 3 (6 Edm. 706).

* The word "a" omitted by error in engrossing.

§ 45. Trial once commenced may be continued beyond term.

Where the trial or hearing of an issue of fact, joined in an action or special proceeding, civil or criminal, has been commenced at a term of a court of record, it may notwithstanding the expiration of the time appointed for the term to continue, be continued to the completion thereof; including, if the cause is tried by a jury, all proceedings taken therein until the actual discharge of the jury; or, if it is tried by the court without a jury, until it is finally submitted for a decision upon the merits.

L. 1875, ch. 3, § 1, am'd. This section supersedes L. 1846, ch. 2; and L. 1859, ch. 209, § 1 (5 Edm. 248).

TITLE II.

Provisions of general application, relating to the judges, and certain other officers of the courts.

[Article headings of ch. 1, tit. 2, repealed by L. 1909, ch. 35, § 4.]

- Sec. 46. Judge not to sit when he is a party, etc., or has not heard argument.
47. Judge not to be interested in costs.
48. Disability of judge in certain appeals.
49. Judge or judge's partner not to practice in his court.
50. Judge's partner or clerk not to practice before him; judge not to practice in a cause which has been before him.
51. Judge not to take fees for advice in certain cases.
52. Substitution of one officer for another in special proceeding.
53. Proceedings before substituted officer.
54. Judge to file certificate of age, etc.
55. Party may appear in person or by attorney.
56. Examination and admission of attorneys.
57. Rules, how changed.
58. Exemptions to graduates of certain law schools.
59. Attorney's oath of office, and certificate of admission.
60. Service of paper upon attorney residing in adjoining state.
61. Clerks, etc., not to practice.
62. Id.; as to sheriff, etc.
63. None but attorneys to practice in New-York city.
64. Penalty for violation, or suffering violation of last section.
65. Death or disability of attorney: proceedings thereupon.
66. Attorney of counsel's compensation.
67. Suspension from practice.
68. Must be on notice.
69. Removal or suspension, how to operate.
70. Punishment for deceit, etc.
71. Id.; for wilful delay of action.
72. Attorney not to lend his name.
73. Attorney not to buy claim.
74. Certain loans prohibited.
75. Penalty.
76. Limitation of preceding sections.
77. Same rule when party prosecutes in person.
78. Partner of district-attorney, etc., not to defend prosecutions.
79. Attorney not to defend when he has been public prosecutor.
80. Penalty.
81. Limitation of provisions.
82. Qualifications of stenographer.
83. General duty of stenographer; notes, when to be filed.
84. Notes, how preserved; when written out.
85. Stenographers to furnish gratuitously copies of proceedings to judge.
86. To furnish like copies to parties, district-attorney, attorney-general, or presiding judge; compensation.
87. These sections applicable to assistant-stenographers.
88. Supervisors to provide for compensation, etc., of stenographers.
89. Clerks of appellate division and special deputy clerks.
90. Clerk in New-York or Kings, not to be referee, etc.
91. Clerks for courts of record.
92. When sheriff, constable, etc., to act as crier.
93. Custody, charge and control of the seals, books, files, records, papers, etc.
94. Interpreter for courts of record in Kings and Queens counties.
95. Attendants and messengers, how appointed in Kings, Queens and Richmond counties.
96. Duties of persons appointed under last section.
97. Sheriff, when directed, to notify constables, etc., to attend courts.
98. Id., when not directed.
99. Penalty for neglect of officer to attend court.

§ 46-50. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 15-18, 20-22, 471.]

§ 51. [This section not expressly repealed by the judiciary law but has been embodied in section 19 thereof.]

Am'd L. 1914
Ch. 134 § 52. [Am'd. 1899.] Substitution of one officer for another in special proceeding.

In case of the death, sickness, resignation, removal from office, absence from the county, or other disability of an officer before whom or in whose court a special proceeding has been instituted, where no express provision is made by law for the continuance thereof, it may be continued before the officer's successor, or any other officer residing in the same county, before whom it might have been originally instituted; or, if there is no such officer in the same county or in case such officer be disqualified, then before an officer in an adjoining county, who would originally have had jurisdiction of the subject matter, if it had occurred or existed in the latter county; and in case such special proceeding be pending in a county court and the county judge of the county be disqualified to hear and decide the same, then in such case all further proceedings therein may be had in the county court of any adjoining county, which court shall have jurisdiction to hear, try and determine the same and to enforce its order.

2 R. S. 284, § 51 (3 R. S., 5th ed., 475; 2 Edm. 295); L. 1899, ch. 378. In effect Sept. 1, 1899.

Ch. 134 § 53. Proceedings before substituted officer.

At the time and place specified in a notice or order, for a party to appear, or for any other proceeding to be taken, or at the time and place specified in the notice to be given, as prescribed in this section, the officer substituted as prescribed in the last section, or in any other provision of law, to continue a special proceeding instituted before another, may act, with respect to the special proceeding, as if it had been originally instituted before him. But a proceeding shall not be taken before a substituted officer, at a time or place, other than that specified in the original notice or order, until notice of the substitution, and of the time and place appointed for the proceeding to be taken, has been given, either by personal service or by publication, in such manner and for such time as the substituted officer directs, to each party who may be effected* thereby, and who has not appeared before either officer. Where, after a hearing has been commenced, it is adjourned to the next judicial day, each day to which it is so adjourned, is regarded, for the purposes of this section, as the day specified in the original notice or order, or in the notice to appear before the substituted officer, as the case requires.

2 R. S. 284, §§ 52 and 53, consolidated and am'd.

§ 54. [Repealed by L. 1900, chs. 23 and 35. See Consolidated Laws, tits. Executive Law, § 29, Judiciary Law, § 23.]

§ 55. Party may appear in person or by attorney.

A party to a civil action, who is of full age, may prosecute or defend the same in person or by attorney, at his election, unless he has been judicially declared to be incompetent to manage his affairs. Each provision of this act, relating to the conduct of a action, wherein the attorney for the party is mentioned, include

* Error in engrossing for "affected."

a party prosecuting or defending in person, unless otherwise specially prescribed therein, or unless that construction is manifestly repugnant to the context. If a party has an attorney in the action, he cannot appear to act in person, where an attorney may appear or act either by special provision of law, or by the course and practice of the court.

§ 56. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 53, 56, 58, 460-465, 467.]

§ 57. [Repealed by L. 1909, chs. 23 and 35. See Consolidated Laws, tit. Executive Law, § 30, Judiciary Law, § 53.]

§ 58-59 [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 53, 264, 466.]

§ 60. [Am'd, 1909.] Service of paper upon attorney residing in adjoining state.

Service of a paper, which might be made upon him at his residence, if he was a resident of the State, may be made upon a person regularly admitted to practice as an attorney and counselor, in the courts of record of this State, whose office for the transaction of law business is within the State, but who resides in an adjoining State, by depositing the paper in a post-office in the city or town where his office is located, properly inclosed in a postpaid wrapper, directed to him at his office. A service thus made is equivalent to personal service upon him.

L. 1866, ch. 175, § 1 (6 Edm. 706). Amended by L. 1909, ch. 35. Also partly repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 470. See note 29 of notes of Board of Statutory Consolidation at end of code.

§ 61-62. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 250, 473.]

§ 63-64. [Repealed by L. 1909, ch. 35. See Penal Law, §§ 271, 272, 1876.]

§ 65. [Am'd, 1913.] Death or disability of an attorney; proceedings thereupon.

If an attorney dies, is removed or suspended, or otherwise becomes disabled to act, at any time before judgment in an action, no further proceeding shall be taken in the action against the party for whom he appeared, until thirty days after notice to appoint another attorney has been given to that party, either personally, or in such manner as the court directs. If after such notice, given as herein provided, no attorney appears for the party notified within the time specified in this section, the party serving the notice may proceed with the cause, and take a dismissal of the complaint, or a verdict, decision or judgment, as the case requires, and it is not necessary to give any further notice.

2 E. S. 287, § 67 (3 E. S., 5th ed., 477; 2 Edm. 296). Am'd L. 1913, ch. 741. In effect May 26, 1913.

§ 66-67. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 88, 474-475, 477.]

§ 68. [Partly repealed by L. 1909, ch. 35. But see Consolidated Laws, tit. Judiciary Law, §§ 88 and 476, which embody the whole of this section.]

§ 69. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 478.]

§§ 70-71. [Repealed by L. 1909, ch. 88. See Penal Law, § 273.]

§ 72. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 479.]

§§ 73-81. [Repealed by L. 1909, ch. 88. See Penal Law, §§ 274-276, 278, 279.]

§ 82. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 290-291, 293-294.]

§ 83. [Repealed by L. 1909, chs. 35 and 65. See Consolidated Laws, tit. Judiciary Law, §§ 14, 24, 295-297, 301; and see Code Civ. Pro., § 1323-a.]

§§ 84-87. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 292, 298-300, 302-304.]

§ 88. [Repealed by L. 1909, ch. 16. See Consolidated Laws, tit. County Law, § 12.]

§ 89. [Repealed by L. 1909, chs. 16 and 35. See Consolidated Laws, tits. County Law, § 109, Judiciary Law, §§ 101, 156, 159, 264, 280, 281.]

§§ 90-93. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 30, 169, 199, 251, 365-366, 406.]

§ 94. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 107, 200, 384, 386.]

§ 95. [Repealed by L. 1909, chs. 35-65. See Consolidated Laws, tit. Judiciary Law, §§ 168, 200; and also Code Civ. Pro., § 2512.]

§§ 96-99. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 250, 349, 351, 354, 160, 170, 201, 231-233, 279, 403, 405, 443, 407, and also Code Civ. Pro., § 2512.]

CHAPTER II.

Powers, Duties, and Liabilities of a Sheriff, or other Ministerial Officer, in the Execution of the Process or Other Mandate of a Court or Judge, in a Civil Case.

TITLE I.—Provisions relating to the Execution of Civil Mandates generally.

TITLE II.—Provisions relating to the Execution, by a Sheriff, of a Mandate against the Person.

TITLE III.—Application of the foregoing Provisions to the Proceedings of a Coroner.

TITLE IV.—Powers, Duties and Liabilities of an Incoming and Outgoing Sheriff, respectively, Touching the Matters included in this Chapter.

TITLE I.

Provisions relating to the execution of civil mandates generally.

Sec. 100. Sheriff to furnish certain minute.

101. Copy of process, etc., to be delivered when served.

102. Sheriff to execute process, etc.; may return by mail.

103. Liability for neglect in special proceedings.

104. Sheriff may command the power of the county, to overcome resistance.

105. Names of resisters to be certified.

106. Punishment for refusing to assist.

107. Governor may order out military.

108. Trial of claim of title by third person, to property seized by sheriff.

109. Expenses, how paid.

§ 100. Sheriff to furnish certain minute.

A sheriff, to whom a mandate of any description, is delivered to be executed, must, without compensation, give to the person delivering the same, if required, a minute in writing, signed by the sheriff, specifying the names of the parties, the general nature of the mandate, and the day and hour of receiving the same.

2 R. S. 440, § 75 (3 R. S., 5th ed., 738; 2 Edm. 458), am'd.

§ 101. [Am'd, 1877.] Copy of process, etc., to be delivered when served.

A sheriff or other officer, serving a mandate, must, upon the request of the person served, deliver to him a copy thereof, without compensation.

Id., § 76.

§ 102. [Am'd, 1877.] Sheriff to execute process, etc.; may return by mail.

A sheriff, or other officer, to whom a mandate is directed and delivered, must execute the same according to the command thereof, and make return thereon of his proceedings, under his hand. For a violation of this provision, he is liable to the party aggrieved, for the damages sustained by him: in addition to any fine, or other punishment or proceeding, authorized by law. A mandate directed and delivered to a sheriff may be returned, by

depositing the same in the post-office, properly inclosed in a post-paid wrapper, addressed to the clerk, at the place where his office is situated; unless the officer, making the return in the name of the sheriff, resides in the place where the clerk's office is situated.

2 R. S. 440, § 77; L. 1850, ch. 225, § 3 (4 Edm. 699).

§ 103. [Am'd, 1877.] Liability for neglect in special proceedings.

A sheriff, or other officer, to whom is delivered for service or execution, a mandate, authorized by law to be issued, by a judge or other officer, in a special proceeding, who wilfully neglects to execute the same, may be fined by the judge, in a sum not exceeding twenty-five dollars, and is liable to the party aggrieved for his damages sustained thereby.

2 R. S. 551, § 3 (2 Edm. 571).

§§ 104-105. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 400-401.]

§ 106. [Repealed by L. 1909, ch. 88. See Penal Law, § 1848.]

§ 107. [Repealed by Military Law, L. 1909, ch. 41. Superseded by L. 1898, ch. 212, § 86, which was likewise repealed by Military Law, L. 1909, ch. 41.]

§ 108. [Am'd, 1895.] Trial of claim of title by third person, to property seized by sheriff.

Where it is specially prescribed by law, that a sheriff must, or may, in his discretion, impanel a jury to try the validity of a claim of title to or of the right of possession of goods or effects seized by him by virtue of a mandate in an action, interposed by a person not a party to the action, the trial must be conducted in the following manner, except as otherwise specially prescribed by law.

1. The sheriff must from time to time notify as many persons to attend as it is necessary in order to form a jury of twelve persons qualified to serve as trial jurors in the county court of the county, or in the city and county of New York, in the supreme court, to try the validity of the claim.

2. Upon the trial, witnesses may be examined in behalf of the claimant and of the party at whose instance the property claimed was taken by the sheriff. For the purpose of compelling a witness to attend and testify, the sheriff, upon the application of either party to the inquisition, must issue a subpoena, as prescribed in section 854 of this act, and with like effect; except that a warrant to apprehend or commit a witness, in a case specified in section 855 or section 856 of this act may be issued by a judge of the court in which the action is brought, or by the county judge.

3. The sheriff or under sheriff must preside upon the trial. A witness, produced by either party, must be sworn by the presiding officer, and examined orally in the presence of the jury. A witness who testifies falsely upon such an examination is guilty of perjury in a like case and is punishable in like manner as upon the trial of a civil action.

L. 1895, ch. 946.

§ 109. [Am'd, 1895.] Expenses, how paid.

Upon such a trial there are no costs; but the fees of the sheriff, jurors and witnesses must be taxed, by a judge of the court or the county judge of the county, and must be paid as follows:

1. If the jury by their verdict find the title or the right of possession to the property claimed to be in the claimant, by the party at whose instance the property was taken by the sheriff.

2. If they find adversely to the claimant with respect to all the property claimed, by the claimant.

3. If they find the title or right of possession to only a part of the property claimed, to be in the claimant; each party must pay his own witnesses' fees, and the sheriff's and jurors' fees must be paid, one-half by each party to the inquisition.

Before notifying the jurors, the sheriff may, in his discretion, require each of the parties to the controversy to deposit with him such reasonable sum, as may be necessary to cover his legal fees, and the jurors' fees. The sheriff must return to each party the balance of the sum so deposited by him, after deducting his fees, lawfully chargeable to that party, as prescribed in this section.

L. 1895, ch. 946. See 2 R. S. 4, § 12; §§ 657-8, 1418-9.

TITLE II.

Provisions relating to the execution, by a sheriff, of a mandate against the person.

- Article 1. Arresting, conveying to jail, and committing a prisoner.
 2. Jails; jail discipline; and regulations concerning the confinement and care of prisoners.
 3. Temporary jails, and temporary removal of prisoners from jail.
 4. Jail liberties; escapes.
 5. Action upon and assignment of a bond for jail liberties.

ARTICLE FIRST.

Arresting, conveying to jail, and committing a prisoner.

- Sec. 110. Prisoner, how kept; support of.
 111. Imprisonment on execution.
 112. Id.; in other counties.
 113. Charges for food, etc., when prohibited.
 114. Also for waiting for prisoner.
 115. Rates of charges for lodging, etc.
 116. Prisoner may send for necessities.
 117. Charges for rent, etc., prohibited.
 118. Prisoner, how conveyed to jail through another county.
 119. Officer or prisoner not liable to arrest.

§ 110. [Am'd, 1909.] Prisoner, how kept; support of.

A person arrested, by virtue of an order of arrest, in an action or special proceeding brought in a court of record; or of an execution issued upon a judgment rendered in a court of record; or surrendered in exoneration of his bail; must be safely kept in custody, in the manner prescribed by law, and, except as otherwise prescribed in the next section and in subdivision nineteen of section two hundred and forty of the county law, at his own expense, until he satisfies the judgment rendered against him, or is discharged according to law.

2 R. S. 376, §§ 76 and 77 (3 R. S., 5th ed., 659; 2 Edm. 391), consolidated and extended. Amended by L. 1909, ch. 65, § 3. See note 30 of notes of Board of Statutory Consolidation at end of code.

§ 111. [Am'd, 1886.] Imprisonment on execution.

No person shall be imprisoned within the prison walls of any jail for a longer period than three months under an execution or any other mandate against the person to enforce the recovery of a sum of money less than five hundred dollars in amount or under a commitment upon a fine for contempt of court in the non-payment of alimony or counsel fees in a divorce case where the amount so to be paid is less than the sum of five hundred dollars; and where the amount in either of said cases is five hundred dollars or over, such imprisonment shall not continue for a longer period than six months. It shall be the duty of the sheriff in whose custody any such person is held to discharge such person at the expiration of said respective periods without any formal application being made therefor. No person shall be imprisoned within the jail liberties of any jail for a longer period than six months upon any execution or other mandate against the person, and no action shall be commenced against the sheriff upon a bond given for the jail liberties by such person to secure the bene-

fit of such liberties, as provided in articles fourth and fifth of this title for an escape made after the expiration of six months' imprisonment as aforesaid. Notwithstanding such a discharge in either of the above cases, the judgment creditor in the execution, or the person at whose instance the said mandate was issued, has the same remedy against the property of the person imprisoned which he had before such execution or mandate was issued; but the prisoner shall not be again imprisoned upon a like process issued in the same action or arrested in any action upon any judgment under which the same may have been granted. Except in a case hereinbefore specified nothing in this section shall effect a commitment for contempt of court.

L. 1886, ch. 672. See §§ 157, 1404, 2202, 3033.

§ 112. [Repealed by L. 1909, ch. 16. See Consolidated Laws, tit. County Law, § 240.]

§§ 113-117. [Repealed by L. 1909, ch. 47. See Consolidated Laws, tit. Prison Law, §§ 340-344.]

§ 118. **Prisoner, how conveyed to jail through another county.**

A sheriff or other officer, who has lawfully arrested a prisoner, may convey his prisoner through one or more other counties, in the ordinary route of travel, from the place where the prisoner was arrested, to the place where he is to be delivered or confined.

2 R. S. 426, § 6.

§ 119. [Repealed by L. 1909, ch. 14. See Consolidated Laws, tit. Civil Rights Law, § 22.]

ARTICLE SECOND.***Jails; jail discipline; and regulations concerning the confinement and care of prisoners.***

- Sec. 120. Jail in New York city.
121. Jails in other counties.
122. Either of several jails may be used.
123. Civil and criminal prisoners to be kept separate.
124. Males and females to be kept separate.
125. Penalties.
126. Jail physician.
127. Issue of new execution when sick prisoner escapes.
128. Sale of liquor in jails.
129. Permit, when granted.
130. Penalties for violation.
131. Service of papers on prisoner.
132. Sheriff to permit access for that purpose.
133. Prisoners under United States process.
134. Sheriff answerable for their custody.

§ 120. [Repealed by L. 1909, ch. 47. See Consolidated Laws, tit. Prison Law, § 420.]

§ 121. [Repealed by L. 1909, ch. 16. See Consolidated Laws, tit. County Law, §§ 90, 183.]

§§ 122-124. [Repealed by L. 1909, ch. 47. See Consolidated Laws, tit. Prison Law, §§ 345-347.]

§ 125. [Partly repealed by L. 1900, ch. 88, § 2501. But see Penal Law, § 1875, which embodies the whole of this section.]

§ 126. [Except part relating to county of New York repealed by L. 1900, ch. 47. See Consolidated Laws, tit. Prison Law, § 348. For remainder of section see Greater New York Charter.]

§ 127. [Am'd, 1895, 1909.] **Issue of new execution when sick prisoner escapes.**

If a prisoner actually escapes, while going to, remaining at, or returning from a hospital to which he has been ordered removed pursuant to section three hundred and fifty-five of the prison law, a new execution may be issued against his person, if he was in custody by virtue of an execution; or, if he was in custody by virtue of an order of arrest, a new order of arrest may be granted, upon proof by affidavit of the facts specified in this section, without other proof and without an undertaking.

L. 1895, ch. 946. Amended by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 47. See Consolidated Laws, tit. Prison Law, § 355. See note 31 of notes of Board of Statutory Consolidation at end of code.

§§ 128-129. [Repealed by L. 1909, ch. 47. See Consolidated Laws, tit. Prison Law, §§ 349-350.]

§ 130. [Repealed by L. 1909, ch. 88. See Penal Law, § 1791.]

§ 131. Service of papers on prisoner.

A sheriff or jailor, upon whom a paper in an action or special proceeding, directed to a prisoner in his custody, is lawfully served, or to whom such a paper is delivered for a prisoner, must, within two days thereafter, deliver the same to the prisoner, with a note thereon of the time of the service thereof upon, or the receipt thereof by him. For a neglect or violation of this section, the sheriff or jailor, guilty thereof, is liable to the prisoner for all damage occasioned thereby.

Id., § 32, am'd. See post, § 799.

§ 132. Sheriff to permit access for that purpose.

Subject to reasonable regulations, which the sheriff may establish for that purpose, a sheriff, jailor, or other officer, who has the custody of a prisoner, must permit such access to him as is necessary, for the personal service of a paper in an action or special proceeding, to which the prisoner is a party, and which must be personally served.

§ 133. Prisoners under United States process.

A sheriff must receive into his jail and keep a prisoner, committed to the same, by virtue of civil process issued by a court of record, instituted under the authority of the United States, until he is discharged by the due course of the laws of the United States, in the same manner as if he was committed by virtue of a mandate in a civil action, issued from a court of the State. The sheriff may receive, to his own use, the money payable by the United States for the use of the jail.

2 R. S. 443, § 96 (3 R. S., 5th ed., 743; 2 Edm. 462).

§ 134. Sheriff answerable for their custody.

A sheriff or jailor, to whose jail a prisoner is committed, as prescribed in the last section, is answerable for his safe keeping, in the courts of the United States, according to the laws thereof.

Id., § 97.

ARTICLE THIRD.

Temporary jails, and temporary removal of prisoners from jail.

- Sec. 135. When jail becomes unfit, etc., another to be designated.
 136. Designation, how annulled.
 137. Copy of designation to be served on the sheriff, etc.
 138. Prisoners already upon jail liberties when other jail designated.
 139. Jail liberties to prisoner, who becomes entitled thereto, before removal.
 140. Id.; to prisoners removed.
 141. When designation to be revoked, etc.
 142. Copy of revocation to be served on sheriff; sheriff's duty thereon.
 143. Removal of prisoners in case of fire.
 144. What officer to act in case of absence, etc.

§§ 135-137. [Repealed by L. 1909, ch. 47. See Consolidated Laws, tit. Prison Law, §§ 351-353.]

§ 138. [Am'd, 1909.] **Prisoners already upon jail liberties when other jail designated.**

If a prisoner has been admitted to the liberties of the jail of the county, for which a designation is made pursuant to section three hundred and fifty-one of the prison law, he must, notwithstanding, remain within those liberties, but he may be removed by the sheriff, to whom he has given bond for the liberties, to the jail or other place so designated, and confined therein, in a case where the sheriff might confine him in the jail of his own county.

2 R. S. 428, 430, § 18. Amended by L. 1909, ch. 65, § 3. See note 32 of notes of Board of Statutory Consolidation at end of code.

§ 139. **Jail liberties to prisoner, who becomes entitled thereto, before removal.**

If a person, who is arrested, before or after the designation, by the sheriff of the county for which the designation is made, becomes entitled, after the designation, and before his removal, to the liberties of the jail, he must be admitted to the liberties of the jail of that county, as if the designation had not been made; but he may be removed by the sheriff to the jail, or other place, so designated, and confined therein, in a case where the sheriff might confine him in the jail of his own county.

Id., § 19, am'd.

§ 140. [Am'd, 1909.] **Id.; to prisoners removed.**

If a person confined in or removed to the jail of a contiguous county, designated as prescribed in article thirteen of the Prison Law, becomes entitled to the liberties of the jail, the sheriff of that county must admit him to the jail liberties, as if he had been originally arrested by that sheriff, on a mandate directed to him.

Id., § 20. Amended by L. 1909, ch. 65, § 3, and ch. 240, § 84. See note 32 of notes of Board of Statutory Consolidation at end of code.

§ 141. [Am'd, 1909.] When designation to be revoked.

When a jail is erected for the county, for whose use the designation pursuant to section three hundred and fifty-one of the prison law was made, or its jail is rendered fit and safe for the confinement of prisoners, or the reason for the designation of another jail or place has otherwise ceased to be operative, the designation must be revoked, as prescribed in this article and section three hundred and fifty-two of the prison law.

Id., § 21. Amended by L. 1909, ch. 65, § 3, and ch. 240, § 84. See note 32 of notes of Board of Statutory Consolidation at end of code.

§ 142. Copy of revocation to be served on sheriff; sheriff's duty thereon.

The county clerk must immediately serve a copy of the revocation, duly certified by him under his official seal, upon the sheriff of the same county; who must remove the prisoners belonging to his custody, and confined without his county, to his proper jail. If a prisoner has been admitted to the jail liberties in the other county, he must also be removed; and he is entitled to the liberties of the jail of the county, to which he is removed, without a new bond, as if he had been originally admitted to the jail liberties in that county; and the bond given by him applies accordingly to those liberties.

Id., § 29, am'd.

§§ 143-144. [Repealed by L. 1909, ch. 47. See Consolidated Laws, tit. Prison Law, §§ 354, 356.]

ARTICLE FOURTH.

Jail liberties; escapes.

Sec. 145. Jail liberties in certain counties.

146. Id.; in other counties.

147. Id.; how laid out.

148. Copy to be kept posted in jail.

149. Who admitted to liberties.

150. Undertaking to be executed by prisoner.

151. For whom undertaking to be held.

152. Prisoner to be committed when surety is insufficient.

153. Surrender of prisoner by his sureties.

154. How surrender made.

155. What deemed and what not deemed an escape.

156. When court may order indicted prisoner to be produced.

157. Prisoners committed for contempt.

158. Sheriff's liability for escape.

159. Penalty for connivance at escape by a sheriff, etc.

§§ 145-148. [Repealed by L. 1909, ch. 47, See Consolidated Laws, tit. Prison Law, §§ 357-360.]

§ 149. [Am'd, 1886, 1904.] **Who admitted to liberties.**

A person in the custody of a sheriff, by virtue of an order of arrest; or of an execution in a civil action; or in consequence of a surrender in exoneration of his bail; is entitled to be admitted to the liberties of the jail, upon delivering to the sheriff an approved undertaking as prescribed in the next section.

Id., § 40; L. 1886, ch. 648. See ante, § 15. L. 1904, ch. 384. In effect April 26, 1904.

§ 150. [Am'd, 1886, 1904.] **Undertaking to be executed by prisoner.**

The undertaking must be executed by the prisoner, and one or more sufficient sureties, residents, and householders or freeholders of the county, in a penalty at least twice the sum, in which the sheriff was required to hold the defendant to bail, if he is in custody under an order of arrest, or has been surrendered in exoneration of his bail, before judgment; or directed to be collected by the execution, if he is in custody under an execution; or remaining uncollected upon a judgment against him, if he has been surrendered after judgment; conditioned, that the person so in custody shall remain a prisoner, and shall not, at any time, or in any manner, escape or go without the liberties of the jail, until discharged by due course of law. Upon the giving and the approval by the court or a judge thereof, or a county judge, of such an undertaking, the prisoner shall be released from the custody of the sheriff and the sheriff shall thereupon be exonerated from liability. But after the allowance of the undertaking as hereinafter prescribed, the same, must be delivered by the clerk, on request, to the party at whose instance the prisoner was in custody. Within two days after the approval by the court, judge, or county judge, the undertaking must be filed by the sheriff with the clerk, and a copy delivered to the party at whose instance the prisoner was in custody, or to his attorney, who shall within three days thereafter serve upon the surety or sureties, or the attorney for the prisoner, a

notice that he does not accept him, or them, as bail; otherwise he is deemed to have accepted them. Within three days after the receipt of such notice, the surety or sureties, or the attorney for the prisoner, may serve upon the party, or attorney for the party, at whose instance the prisoner was in custody, notice of justification of the same or other bail before the court* a judge thereof, or a county judge, at a specified time and place; the time to be not less than five days nor more than ten days thereafter, and the place to be within the county where one of the bail resides or where the defendant was arrested. Except as otherwise expressly prescribed in this article, the provisions regulating the substitution of new sureties or a new undertaking, and the examination and qualification of the new sureties, and the allowance of the undertaking after justification, contained in article third of title first of chapter seventh of this act, shall govern. If the bail shall not be allowed, the court, judge or county judge shall remand the prisoner to the custody of the sheriff.

Id., §§ 41 and 42; L. 1886, ch. 64b; L. 1904, ch. 384. As to deposit, see § 573. In effect April 26, 1904.

§ 151. [Am'd, 1886, 1904.] From whom undertaking to be held.

An undertaking so taken is held for the indemnity of the party at whose instance the prisoner executing it is confined.

2 R. S. 434, § 43; L. 1904, ch. 384. In effect April 26, 1904.

§ 152. [Am'd, 1886.] Prisoner to be committed when surety is insufficient.

If the party at whose instance the prisoner is in custody discovers that a surety therein is insufficient, he may, upon proof of the fact, by affidavit or otherwise, apply to the court or to a judge thereof, on whose process or mandate such prisoner is in custody, or to the county judge of the county where such prisoner is confined, and the court, or a judge thereof, or such county judge, may make an order committing such prisoner to close confinement in the jail until another undertaking with good and sufficient sureties is offered.

Id., § 44; L. 1886, ch. 64b.

§ 153. [Am'd, 1886.] Surrender of prisoner by his sureties.

One or more of the sureties, in an undertaking given for the liberties of a jail, may surrender the principal, at any time before judgment is rendered against them in an action on the undertaking; but they are not exonerated thereby, from a liability incurred before making the surrender.

2 R. S. 434, § 45, am'd; L. 1886, ch. 64b.

§ 154. [Am'd, 1886.] How surrender made.

The surrender must be made as follows: The surety or sureties making it must take the principal to the keeper of the jail, who must, upon his or their written requisition to that effect, take the principal into his custody, and indorse upon the undertaking given for the liberties, an acknowledgment of the surrender; and also,

* So in original.

if required, give the surety or sureties a certificate, acknowledging the surrender.

Id., § 46; L. 1886, ch. 648.

§ 155. [Am'd, 1886.] What deemed and what not deemed an escape.

The going at large, within the liberties of the jail in which he is in custody, of a prisoner who has executed such an undertaking, or of a prisoner who would be entitled to the liberties upon executing such an undertaking, is not an escape. But the going at large, beyond the liberties, by a prisoner, without the assent of the party at whose instance he is in custody, is an escape; and the sheriff in whose custody he was, or his sureties, has the same authority to pursue and retake him, as if he had escaped from the jail. Such an escape forfeits the undertaking for the liberties, if any; subject to the provisions of the next article of this title.

Id., § 47; L. 1886, ch. 648.

§ 156. [Am'd, 1877.] When court may order indicted prisoner to be produced.

Where a person, who has been indicted for a criminal offence, is held by a sheriff, by virtue of a mandate in a civil action or special proceeding, the court, in which the indictment is pending may make an order, requiring the sheriff to bring him before the court; whereupon the court may make such disposition of the prisoner, as to it seems proper. The sheriff's fees and expenses, in so doing, are a county charge of the county wherein the court is sitting.

L. 1871, ch. 208, § 1 (9 Edm. 67).

§ 157. Prisoner committed for contempt.

A prisoner, committed to jail upon process for contempt, or committed for misconduct in a case prescribed by law, must be actually confined and detained within the jail, until he is discharged by due course of law, or is removed to another jail or place of confinement, in a case prescribed by law. A sheriff or keeper of a jail, who suffers such a prisoner to go or be at large out of his jail; except by virtue of a writ of habeas corpus, or by the special direction of the court committing him, or in a case specially prescribed by law; is liable to the party aggrieved, for his damages sustained thereby, and is guilty of a misdemeanor. If the commitment was for the non-payment of a sum of money, the amount thereof, with interest, is the measure of damages.

2 R. S. 437, § 61, am'd.

§ 158. [Am'd, 1886, 1904.] Sheriff's liability for escape.

Where a prisoner, in a sheriff's custody, goes or is at large beyond the liberties of the jail, without the assent of the party at whose instance he is in custody, the sheriff is answerable therefor, until an undertaking provided for in section one hundred and fifty of this article has been given and approved, as follows:

1. If the prisoner was in custody by virtue of an order of arrest, or in consequence of a surrender in exoneration of his bail, before judgment, the sheriff is answerable to the extent of the damages sustained by the plaintiff.

2. If the prisoner was in custody by virtue of any other mandate, or in consequence of a surrender in exoneration of his bail, after judgment, the sheriff is answerable for the debt, damages, or sum of money, for which the prisoner was committed.

3. Upon the giving and approval of the undertaking in this article mentioned, no action for an escape shall be maintained against the sheriff.

2 R. S. 487, §§ 62 and 63; L. 1886, ch. 648; L. 1904, ch. 384. In effect April 26, 1904.

§ 159. [Repealed by L. 1909, ch. 88. See Penal Law, § 1839.]

ARTICLE FIFTH.

Action upon and assignment of a bond for jail liberties.

- Sec. 160.** Defence in action by sheriff on bond.
 161. Judgment against sheriff to be evidence against sureties, etc.
 162. Summary judgment for sheriff.
 163. Requisites of application therefor.
 164. Such judgment when stayed. *Id.*; when vacated.
 165. Judgment against sheriff is evidence of damages.
 166. Assignment of undertaking.
 167. Recovery of damages for breach of condition.
 168. Effect of commencement of action as a bar.
 169. Defence to action.
 170. Stay of proceedings against sheriff, how authorized.
 171. Defence of sheriff in action for escape.

§ 160. [Am'd, 1886.] Defence in action by sheriff on undertaking.

In an action brought on an undertaking for the jail liberties, it is a defence, that the prisoner voluntarily returned to the liberties of the jail from which he escaped, or was recaptured by, or surrendered to the sheriff, from whose custody he escaped, before the commencement of the action. The defendants may make that or any other defence to the action, which might be made by the sheriff, to an action against him for the escape.

2 R. S. 435, § 48; L. 1886, ch. 648.

§ 161. Judgment against sheriff to be evidence against sureties, etc.

But if judgment has been rendered against the sheriff, in an action brought for the escape, and due notice of the pendency of the action was given to the prisoner and his sureties, to enable them to defend the same, the judgment against the sheriff is conclusive evidence of his right to recover against the prisoner and his sureties, to whom the notice was given, as to any matter which was or might have been controverted, in the action against the sheriff.

Id., § 49.

§ 162. [Am'd, 1886.] Summary judgment for sheriff.

In an action brought by a sheriff on an undertaking for the jail liberties, if it appears to the court, upon a motion made in behalf of the sheriff, that judgment has been rendered against him, for the escape of the prisoner, and that due notice of the pendency of the action against him, was given to the prisoner and his sureties, to enable them to defend the same, the court must order a summary judgment for the plaintiff; and judgment must be entered accordingly, with costs.

Id., § 50; L. 1886, ch. 648.

§ 163. Requisites of application therefor.

But to entitle a sheriff to move for such a judgment, he must have served a copy of his complaint, and given twenty days' notice of the motion.

Id., § 51.

§ 164. Such judgment when stayed. *Id.*; when vacated.

If it appears, on the hearing of the motion, that the defendants have a meritorious defence, which was not controverted in the action against the sheriff and which by law could not have been so controverted, the court may stay proceedings on the judgment,

with such limitations and upon such terms, as it deems just, until a trial in the action; but the judgment must stand as a security for the sheriff. If the defence is established, the court must vacate the judgment, and render judgment for the defendant.

2 R. S. 435, §§ 52 and 53, am'd.

§ 165. [Am'd, 1886.] Judgment against sheriff is evidence of damages.

In an action brought by a sheriff on an undertaking for the jail liberties, a judgment against him for the escape of the prisoner, is evidence of the damages sustained by him, as if it had been collected; and he may recover his reasonable attorney's and counsel fees, and other expenses, in defending the action against him, as part of his damages.

Id., § 54; L. 1886, ch. 648.

§ 166. [Am'd, 1886.] Assignment of undertaking.

If an undertaking for the jail liberties is forfeited before the same is duly allowed, the party at whose instance the prisoner was confined, or, in case of his death, his executor or administrator, may elect to bring an action on the undertaking.

Id., § 55; L. 1886, ch. 648.

§ 167. [Am'd, 1886, 1904.] Recovery of damages for breach of condition.

The person so electing may maintain an action on the undertaking, where an action might have been heretofore maintained by the sheriff, and he may recover the same damages for the breach of the condition, which he might heretofore have recovered in an action against the sheriff for the escape.

Id., § 56; L. 1886, ch. 648; L. 1904, ch. 384. In effect April 26, 1904.

§ 168. [Am'd, 1886.] Effect of commencement of action as a bar.

The commencement of such an action shall be deemed an election and is a bar to an action, by or on behalf of such person, against the sheriff or other officer accepting such an undertaking, for an escape by the prisoner executing the undertaking, amounting to a breach of the condition thereof, unless the escape was with the assent of the sheriff or other officer.

Id., § 57; L. 1886, ch. 648.

§ 169. [Am'd, 1886, 1904.] Defence to actions.

In an action brought as provided for in the last three sections, the defendant may make any defence, which he might heretofore have made, if the action was brought by the sheriff.

Id., § 58; L. 1886, ch. 648; L. 1904, ch. 384. In effect April 26, 1904.

§ 170. [Am'd, 1886.] Stay of proceedings against sheriff, how authorized.

If the person so entitled to bring an action on the undertaking for the jail liberties, in lieu of making such election, brings an action against the sheriff for the escape, the court may, except where the escape was made with the sheriff's assent, stay proceedings upon a judgment recovered against the sheriff, with such limitations and upon such terms as it deems just, until he has

had a reasonable time to prosecute the undertaking, and collect a judgment recovered thereon.

Id., §§ 59 and 60; L. 1886, ch. 648.

§ 171. [Am'd, 1904.] Defence of sheriff in action for escape.

In an action against a sheriff or other officer, for the escape of a prisoner, it is a defense, that the escape was without the assent of the defendant, and that at the commencement of the action, he had the prisoner within the liberties, either by his voluntary return or by recapture, or that an undertaking required to be given by sections one hundred and forty-nine and one hundred and fifty of this act, was given and approved.

2 R. S. 435, § 64; L. 1904, ch. 384. In effect April 28, 1904.

TITLE III.

Application of the foregoing provisions to the proceedings of a coroner.

Sec. 172. Duties of coroner when sheriff is a party.

173. Any one of the coroners may act.

174. Arrest of sheriff by coroner.

175. Sheriff; how confined.

176. Place of confinement to be deemed a jail.

177. Sheriff how admitted to jail liberties; liability of coroner for escape.

178. Coroner may prosecute, etc., bond for liberties.

179. Duties of coroner where sheriff is plaintiff.

180. Such prisoner entitled to jail liberties, etc.

181. Escape of such prisoner.

181a. Duties of county treasurer in Erie county.

§ 172. Duties of coroner when sheriff is a party.

In an action or special proceeding, to which the sheriff of a county is a party, a coroner of the same county has all the power, and is subject to all the duties of a sheriff, in a cause to which the sheriff is not a party; except as otherwise specially prescribed by law.

2 R. S. 441, § 84 (3 R. S., 5th ed., 741; 2 Edm. 460).

§ 173. Any one of the coroners may act.

A mandate in a civil action or special proceeding which must or may be executed by the coroners, or by a coroner of a county, must be directed either to a particular coroner, or generally to the coroners of that county. Where such a mandate is directed generally to the coroners of a county, or requires them to do any act, it may be executed, and a return thereto may be made and signed, by one of them; but such an act or return does not affect the others.

Id., part of § 84, and § 85.

§ 174. [Am'd, 1886.] Arrest of sheriff by coroner.

Where a mandate, requiring the arrest of the sheriff of the county, is directed to a coroner, he must execute the same in the manner prescribed by law, with respect to the execution of a similar mandate by a sheriff; and he is authorized to take an undertaking on the arrest, or an undertaking for the jail liberties, in a like case, and in like manner, and with like effect, as where such an undertaking may be taken by a sheriff.

Id., § 86; L. 1886, ch. 648.

§ 175. Sheriff; how confined.

Where the actual confinement of a sheriff by a coroner, on a mandate, is required or authorized by law, he must be confined by the coroner, in a house situated within the liberties of the jail of the county, other than the sheriff's house, or the jail, in the same manner as a sheriff is required by law to confine a prisoner in the jail.

Id., § 87.

§ 176. Place of confinement to be deemed a jail.

That house thereupon becomes the jail of the county, for the use of the coroner; and each provision of law relating to the jail, or to an escape from the jail, applies thereto, while the sheriff is confined therein.

Id., §§ 88 and 89.

§ 177. [Am'd, 1886.] Sheriff how admitted to jail liberties; liability of coroner for escape.

A sheriff so arrested must be admitted to the liberties of the jail of the county, in a like case, and upon executing a like undertaking to the coroner, as prescribed by law for a prisoner in the sheriff's custody. For an escape of the sheriff from the liberties, the coroner is liable, in the same manner, and to the same extent, as a sheriff for a similar escape; and he may make the same defence as a sheriff.

2 R. S. 441, § 90; L. 1886, ch. 648.

§ 178. [Am'd, 1886.] Rights of coroner to prosecute, upon undertaking.

The coroner may prosecute an undertaking for the liberties taken by him, and is entitled to all the rights, and subject to all the liabilities, prescribed by law with respect to a similar undertaking taken by a sheriff. The undertaking may be assigned by him, to the party at whose instance the sheriff was arrested; and the same proceedings may be had thereupon, as upon an undertaking taken and assigned by a sheriff in a similar case.

Id., § 91; L. 1886, ch. 648.

§ 179. Duties of coroner where sheriff is plaintiff.

A person arrested by a coroner, in an action or special proceeding, in which the sheriff of the county is plaintiff, must be confined in the jail of the county, in a case where such a confinement is required or authorized by law; but the coroner is not liable for an escape of the prisoner from the jail, after he has been confined therein. A person so confined must be kept and treated, in all respects, like a prisoner confined by the sheriff.

Id., § 92, and part of § 93.

§ 180. [Am'd, 1886.] Such prisoner entitled to jail liberties, etc.

A person so arrested by a coroner is entitled to be discharged, or to the liberties of the jail, as the case requires, upon giving an undertaking to the coroner, in the like manner, and in a like case, in which a person arrested by a sheriff would be entitled to be so discharged, or to the liberties. The undertaking so given must be in all respects similar to that required to be given to a sheriff; and it has the like effect, and may be assigned and proceeded upon in like manner.

Id., part of § 93, and § 94; L. 1886, ch. 648.

§ 181. Escape of such prisoner.

A coroner is answerable for an escape of a prisoner, admitted by him to the liberties of the jail, in the same manner and to the same extent, as a sheriff, and may interpose a like defence.

Id., § 95.

§ 181-a. [Added, 1902.] Duties of county treasurer in Erie county.

In the county of Erie the powers imposed and the duties conferred upon coroners by the provisions of this title shall be exercised and performed by the county treasurer of such county, and such county treasurer shall, in the exercise and performance thereof, be subject to the same liabilities and responsibilities as are prescribed in this title in the case of coroners.

L. 1902, ch. 575 In effect April 14, 1902.

TITLE IV.

Powers, duties, and liabilities of an incoming and outgoing sheriff, respectively, touching the matters included in this chapter.

- Sec. 182. Certificate to be furnished to new sheriff.
- 183. Powers of former sheriff; when to cease.
- 184. Jail, process, etc., to be delivered to new sheriff.
- 185. Former sheriff to execute instrument.
- 186. Former sheriff to execute certain process.
- 187. Certain orders to be delivered to and returned by new sheriff.
- 188. Delivery of prisoners, process, etc., how enforced.
- 189. Under-sheriff, etc., when to comply with foregoing provisions.

§§ 182-189. [Repealed by L. 1909, ch. 16. See Consolidated Laws, tit. County Law, § 195.]

CHAPTER III.

Civil Jurisdiction of the Principal Courts of Record;
Organization, Members, and Officers thereof; Dis-
tribution and Dispatch of Business therein.

TITLE I.—The Court of Appeals.

TITLE II.—The Supreme Court.

TITLE III.—The Court of Claims.

TITLE IV.—The City Court of the City of New-York.

TITLE V.—The County Courts.

TITLE I.

The court of appeals.

- Article 1. Jurisdiction, and mode of exercising the same; general powers; terms and sittings.
 2. The clerk of the court.
 3. The State reporter; publication and distribution of the reports.

ARTICLE FIRST.

*Jurisdiction, and mode of exercising the same general powers;
terms and sittings.*

- Sec. 190. The jurisdiction of the court of appeals in civil actions.
 191. Limitations, exceptions and conditions.
 192. [Repealed.]
 193. Court may make rules.
 194. Remittitur; when judgment absolute to be rendered, and proceedings thereupon.
 195. Second and subsequent appeals.
 196. Times and places of holding terms.
 197. Court may be held in any building; adjournments.
 198. Officers to be appointed by court.

§ 190. [Am'd, 1895.] The jurisdiction of the court of appeals in civil actions.

The court of appeals has exclusive jurisdiction to review upon appeal every actual determination made prior to the last day of December, eighteen hundred and ninety-five, at a general term of the supreme court, or by either of the superior city courts, as then constituted, in all cases in which, under the provisions of law existing on said day, appeals might be taken to the court of appeals. From and after the last day of December, eighteen hundred and ninety-five, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the appellate division of the supreme court in either of the following cases, and no others:

1. Appeals may be taken as of right to said court, from judgments or orders finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them. (See § 194.)

2. Appeals may also be taken from determinations of the appellate division of the supreme court in any department where the appellate division allows the same, and certifies that one or more

questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the court of appeals shall certify to the appellate division its determination upon such questions.

Co. Proc., § 11, and L. 1895, ch. 946.

§ 191. [Am'd, 1895, 1896, 1898, 1900.] Limitations, exceptions and conditions.

The jurisdiction conferred by the last section is subject to the following limitations, exceptions and conditions:

1. No appeal shall be taken to said court, in any civil action or proceeding commenced in any court other than the supreme court, court of claims, county court, or a surrogate's court, unless the appellate division of the supreme court allows the appeal by an order made at the term which rendered the determination, or at the next term after judgment is entered thereupon and shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. (See § 2261.)

2. No appeal shall be taken to said court from a judgment of affirmance hereafter rendered in an action to recover damages for a personal injury, or to recover damages for injuries resulting in death, or in an action to set aside a judgment, sale, transfer, conveyance, assignment or written instrument, as in fraud of the rights of creditors, or in an action to recover wages, salary or compensation for services, including expenses incidental thereto, or damages for breach of any contract therefor, or in an action upon an individual bond or individual undertaking on appeal, when the decision of the appellate division of the supreme court is unanimous, unless such appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or unless in case of its refusal to so certify, an appeal is allowed by a judge of the court of appeals. (See § 791, subd. 12; § 1310.)

3. The jurisdiction of the court is limited to a review of questions of law.

4. No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals. (See § 1337.)

L. 1895, ch. 946; L. 1896, ch. 539; L. 1898, ch. 574; L. 1900, ch. 592. In effect Sept. 1, 1900.

§ 192. [Repealed Jan. 1, 1896. L. 1895, ch. 946.]

§ 193. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 51, 53.]

§ 194. Remittitur; when judgment absolute to be rendered, and proceedings thereupon.

The judgment or order of the court of appeals must be remitted to the court below, to be enforced according to law. Upon an appeal from an order granting a new trial, on a case or exceptions, if the court of appeals determines that no error was committed in granting the new trial, it must render judgment absolute upon the right of the appellant; and after its judgment has been remitted to the court below, an assessment of damages, or any other proceeding, requisite to render the judgment effectual, may be had in the latter court.

Co. Proc., parts of §§ 11 and 12.

§ 195. Second and subsequent appeals.

Upon a second and each subsequent appeal, including a case where a former appeal has been dismissed for a defect or irregularity, the time of filing the return, upon the first appeal, determines the place of the cause upon the calendar.

Id., part of § 13. See post, §§ 789-793.

§§ 196-198. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 54, 57.]

ARTICLE SECOND.*The clerk of the court.*

Sec. 199. Clerk of the court of appeals to give bond; rooms for his office.

200. To appoint a deputy. Powers of deputy.

201. May employ assistants in his office. Special deputy.

202. Clerks for judges of the court of appeals.

203. Offices for judge of the court of appeals.

204-208. [Repealed.]

§ 199-202. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 58, 62, 256-259, 262; Public Buildings Law, § 3.]

§ 203. [Repealed by L. 1909, chs. 16 and 35. See Consolidated Laws, tits. County Law, § 12, Judiciary Law, § 55.]

§ 204-208. [Repealed; Laws 1894, ch. 135.]

ARTICLE THIRD.*The State reporter; publication and distribution of the reports.*

Sec. 209. State reporter is the reporter of the court of appeals.

210. His duty.

211. Reporter not to be interested in publication; contracts for publication.

212. Copyright of reports.

213. Secretary of State to distribute reports.

214. Unreported decisions, etc., to be delivered by reporter to successor.

215. Opinions, etc., not to be delivered, except, etc.

216. Certain opinions to be deposited with clerk.

§§ 209-211. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 60-61, 430, 431, 433.]

§ 212. [Repealed by L. 1909, chs. 23 and 35. See Consolidated Laws, tits. Executive Law, § 31, Judiciary Law, § 435.]

§ 213. [Repealed by L. 1909, ch. 23. See Consolidated Laws, tit. Executive Law, § 32.]

§§ 214-216. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 256, 432, 434.]

TITLE II.

The supreme court, including special and trial terms.

Article 1. Jurisdiction and powers; designation of terms; distribution of business among the terms and judges; attendants upon the sittings; miscellaneous provisions.

2. The supreme court reporter.

3. Stenographers.

ARTICLE FIRST.

Jurisdiction and powers; designation of terms; distribution of business among the terms and judges; attendants upon the sittings; miscellaneous provisions.

§ 217. General jurisdiction of supreme court.

218. Supreme court may change place of trial of actions pending in other courts.

219. Judicial departments.

220. Jurisdiction of appellate division and powers of justices thereof.

221. Clerks, attendants and stenographers.

222. Governor may revoke designation.

223. Designation, etc., to be filed with secretary of State.

224. [Repealed.]

225. Times and places of holding terms of appellate division; how appointed.

226. Appointment to be published.

227. [Repealed.]

228. When associate justice to preside.

229. Hearing of appeals when title to public office is involved.

230. Number of justices necessary for a decision.

231. Reargument, etc., when cause to be heard in another department.

232. Appointments of terms of the supreme court.

233. Publication of appointments.

234. Governor may appoint extraordinary terms; justices to hold them.

235. Powers of justices of the supreme court.

236. [Repealed.]

237. Governor to designate justices to hold courts in certain cases.

238. Place of holding the terms.

239. Trial of action at chambers after adjournment of special term.

240. [Repealed.]

241. What judges may perform duties of justice at chambers.

242. Officers required to attend a term of the appellate division; sheriff's duty.

243. Fees of such officers; how paid.

§ 217. General jurisdiction of supreme court.

The general jurisdiction in law and equity, which the supreme court of the State possesses, under the provisions of the constitution, includes all the jurisdiction, which was possessed and exercised by the supreme court of the colony of New York, at any time, and by the court of chancery in England, on the 4th day of July, 1776; with the exceptions, additions, and limitations, created and imposed by the constitution and laws of the State. Subject to those exceptions and limitations, the supreme court of the State has all the powers and authority of each of those courts, and exercises the same in like manner.

1 R. S. 173, § 36; id. 196, § 1; and L. 1847, ch. 280, § 16.

§ 218. [Am'd, 1895.] Supreme court may change place of trial of actions pending in other courts.

The supreme court, upon the application of either party, may, and, in a proper case, must make an order, directing that an issue of fact, joined in an action or special proceeding, pending in any other court of record, except the city court of the city of New York, or a county court, to be tried at a term of the su-

preme court in another county, on such terms, and under such regulations as it deems just; and thereupon the issue must be tried accordingly. After the trial, the clerk of the county, in which it has taken place, must certify the minutes thereof; which must be filed with the clerk of the court, in which the action or special proceeding is pending. The subsequent proceedings in the last mentioned court must be the same, as if the issue had been tried therein.

L. 1895, ch. 946.

§ 219. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 70.]

§ 220. [Am'd, 1895, 1909.] **Jurisdiction of Appellate Division and powers of justices thereof.**

No justice of the appellate division shall exercise any of the powers of a justice of the supreme court, other than those of a justice out of court, and those pertaining to the appellate division or to the hearing and decision of motions submitted by consent of counsel.* From and after the last day of December, eighteen hundred and ninety-five, the appellate division shall have the jurisdiction now exercised by the supreme court at its general terms, and by the general terms of the court of common pleas for the city and county of New York, the superior court of the city of New York, the superior court of Buffalo and the city court of Brooklyn, and such additional jurisdiction as may be conferred by the legislature.

Am'd by L. 1909, ch. 85. Also partly repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 71, 72, 77, 81, 82, 85, 90. See note 33 of notes of Board of Statutory Consolidation at end of code.

§§ 221-223. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 72-73, 101, 106, 109, 111, 267, 268, 270, 271, 307, 347.]

§ 224. [Repealed Jan. 1, 1896; L. 1895, ch. 946, § 2.]

§ 225. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 78.]

§ 226. [Repealed by L. 1909, chs. 23, 35 and 58. See Consolidated Laws, tits. Executive Law, § 33, Judiciary Law, § 79, State Finance Law, § 46.]

§ 227. [Repealed Jan. 1, 1896; L. 1895, ch. 946.]

§ 228. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 80.]

§ 229. [Added, 1896, 1909.] **Hearing of appeals when title to public office is involved.**

An appeal from a judgment or decree in any case in which the question of the title to a public office is directly or collaterally at issue or in any manner involved, may be placed on the calendar

* But see Const., art. VI, § 2, as am'd in 1905.

and noticed for hearing on any day in the appellate division of the supreme court, in the first department, or in the court of appeals, and shall be heard on said day.

L. 1896, ch. 560. Amended by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 148. See note 34 of notes of Board of Statutory Consolidation at end of code.

§ 230. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 81.]

§ 231. [Am'd, 1895, 1900.] **Reargument, et cetera, when** *am'd. 1918*
cause to be heard in another department. *6 R. 553*

Where in any case four justices of the appellate division in any department are not qualified to sit therein, or where the justices qualified to hear the appeal are equally divided, the court must direct the same to be sent to another department to be specified in the order to be there heard and determined. Where in any case when an appeal to the appellate division of any department comes on for argument, and the justice before whom the action was tried or who granted the order appealed from, is a member of such appellate division, the appellant may make an application to such appellate division for, and the court may grant, an order directing that such appeal be sent to an adjoining department to be specified in the order, to be there heard and determined.

L. 1895, ch. 946; L. 1900, ch. 209. In effect Sept. 1, 1900.

§ 232. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 28, 29, 84, 96, 148-150.]

§ 233. [Repealed by L. 1909, chs. 23, 35 and 58. See Consolidated Laws, tits. Executive Law, § 33, Judiciary Law, § 151, State Finance Law, § 46.]

§ 234. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 79, 153.]

§ 235. [Am'd, 1895, 1900, 1909.] **Powers of justices of the supreme court.**

Any justice of the supreme court has power to hold a special or trial term of the supreme court for the whole or any portion of the term; and to act upon any business, which regularly comes before the term in which he is sitting, except where he is personally disqualified from sitting, in a particular action or special proceeding. Each justice must, at all reasonable times, when not engaged in holding court, transact such judicial business as may be done out of court.

L. 1895, ch. 946; L. 1900, ch. 384. Amended by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 155. See note 35 of notes of Board of Statutory Consolidation at end of code.

§ 236. [Repealed Jan. 1, 1896; L. 1895, ch. 946.]

§§ 237-238. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 86, 152.]

§ 239. [Am'd, 1909.] Trial of action at chambers after adjournment of special term.

An action triable by the supreme court, without a jury, which was upon the calendar of the term before it was adjourned as provided in section one hundred and forty-eight of judiciary law, may be tried at a term so adjourned, and held at chambers, by consent of both parties, but not otherwise.

Co. Proc., part of § 24. Amended by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 148, 276, 364, 404. See note 36 of notes of Board of Statutory Consolidation at end of code.

§ 240. [Repealed Jan. 1, 1896; L. 1895, ch. 946.]

§ 241. [Added, 1910.] What judges may perform duties of justices at chambers.

A county judge within his county possesses, and upon proper application must exercise, the power conferred by law in general language upon an officer authorized to perform the duties of a justice of the supreme court at chambers or out of court.

Added by L. 1910, ch. 575. In effect June 22, 1910.

This section takes the place of the same section which was repealed by Judiciary Law (L. 1909, ch. 35), § 800.

ARTICLE SECOND.

The Supreme court reporter.

- Sec. 244. Meeting for appointment.
- 245. Special meeting for appointment or removal.
- 246. Duties of reporter; opinions to be furnished.
- 247. Publication of reports; contracts therefor.
- 248. Papers and opinions to be furnished to the reporter.
- 249. Copyright; distribution by secretary of state.
- 250. Salary and expenses.

§ 244-248. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 90-92, 264, 437-443.]

§ 249. [Repealed by L. 1909, chs. 23 and 35. See Consolidated Laws, tits. Executive Law, §§ 31-32, Judiciary Law, § 444.]

§ 250. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 445.]

ARTICLE THIRD.

Stenographers.

- Sec. 251. Stenographers.
 252-253. [Repealed.]
 254. Stenographers in Kings county.
 255. His assistant.
 256. Stenographers in other counties of second judicial district and also in the ninth judicial district.
 257. Their salaries; how paid.
 258. Stenographers for certain judicial districts.
 259. Their salaries; how paid.
 260. Their expenses; how paid.
 261. [Repealed.]
 262. Temporary stenographer.

§ 251. [Am'd, 1895.] *Stenographers.*

If the justice presiding requires a copy of any proceedings written out at length from stenographic notes, he may make an order, directing one-half of the stenographer's fees therefor, to be paid by each of the parties to the action or special proceeding, at the rate of ten cents for each folio so written out, and may enforce payment thereof. Any such copy shall be accessible to, and may be examined by, any of the counsel in the cause. If there are two or more parties on the same side, the order may direct either of them to pay the sum payable by their side, for the stenographer's fees; or it may apportion the payment thereof among them, as the justice deems just.

L. 1893, ch. 946.

§ 252. [Repealed Jan. 1, 1896; L. 1895, ch. 946.]

§ 253. [Repealed Jan. 1, 1896; L. 1895, ch. 946.]

§§ 254-260. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 161, 164, 309, 312-314, 316.]

§ 261. [Repealed Jan. 1, 1891; Laws 1890, ch. 426.]

§ 262. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 162, 163.]

TITLE III.

ARTICLE ONE.

Board of Claims.

Added 1897. In effect March 9, 1897. L. 1897, ch. 36.

- Sec. 263. Board of claims.
 264. Jurisdiction.
 265. Rules and procedure.
 266. Officers.
 267. Seal of court.
 268. Sessions, duty of sheriff.
 269. Judgments.
 270. Duty of attorney-general and superintendent of public works.
 271. Record of proceedings; report.
 272. Expense of procuring testimony on commission.
 273. Annual report to comptroller.
 274. Costs not to be taxed.
 275. Appeals.
 276. Time and manner of taking appeal.
 277. Case on appeal.
 278. Preference on appeals.
 279. Salary of commissioners of claims.
 280. Salaries of officers of board of claims.
 281. Interpleader, consolidation and new parties.
 282-314. [Repealed.]

§ 263. [Am'd, 1904, 1906, 1911.] Board of claims. *Am'd L. 1910 Ch. 1*

The board of claims is continued and shall hereafter be so known and shall consist of three commissioners who shall be appointed by the governor, by and with the advice and consent of the senate. There shall be appointed three commissioners, one to succeed each of the judges of the court of claims now serving, as shall be designated by the governor, and one of such commissioners shall be appointed for a term to end December first, nineteen hundred and twelve; one for a term to end December first, nineteen hundred and fourteen, and one for a term to end December first, nineteen hundred and sixteen, and on the expiration of such terms, successors shall be appointed for terms of six years. A commissioner shall serve until his successor takes office. An appointment for a term shortened by reason of a predecessor holding over, shall be for the residue of the term only. Whenever a commissioner shall die, resign, be removed or become disqualified, a successor shall be appointed for the remainder only of the term. The judges of the court of claims now serving shall be and be known as commissioners of claims and shall constitute said board until their successors shall take office, but for sixty days thereafter shall determine questions, claims and matters which shall have been finally submitted to and heard by said court or board before their successors shall take office, but their offices shall be deemed vacant for the purpose of devolving all other powers and jurisdiction upon their successors. Appointees shall be so selected that the board shall be composed of commissioners, one at least of whom shall have been an attorney and counselor-at-law of at least ten years' experience in practice. No commissioner shall hold his office after reaching the age of sixty-five years, and

a commissioner shall not hold any other office or public trust nor serve as a member of any political committee. Two commissioners shall constitute a quorum for the transaction of business. One of the commissioners selected from the members of the bar, when designated by the governor in writing filed in the office of the secretary of state, shall be chairman of the board to serve until a new designation shall be made. Said judges now serving and constituted as commissioners as aforesaid, shall for their services rendered during said sixty days receive compensation at the rate of five hundred dollars per month. Except as herein otherwise provided, the commissioners appointed under this section shall have jurisdiction to hear and determine all matters pending in the board of claims at the time they shall take office, and all matters pending in the court of claims at the time when this section, as amended takes effect, shall be heard and determined by the board of claims. Whenever in this act or in any other statute reference is made to the court of claims or any officer thereof, the same shall be deemed to refer to and mean the board of claims or an officer thereof, but the board of claims shall not be or be deemed a court of record. All provisions of this article applicable to the court of claims, its jurisdiction and procedure, shall hereafter apply to said board, prescribe its jurisdiction and govern its procedure, except that the determination of the board upon a claim shall be and be known as a determination instead of a judgment, but it shall have the same force and effect and be subjected to the same procedure as provided in this article for a judgment.

L. 1904, ch. 16; L. 1906, ch. 602; L. 1911, ch. 856, in effect July 31, 1911.

amplified
ch. 1
§ 264. [Am'd, 1905, 1906, 1908, 1912.] Jurisdiction.

The board of claims possesses all of the powers and jurisdiction of the former court of claims. It also has jurisdiction to hear and determine a private claim against the state, including a claim of an executor or administrator of a decedent who left him or her surviving a husband, wife or next of kin, for damages for a wrongful act, neglect or default, on the part of the state by which the decedent's death was caused, which shall have accrued within two years before the filing of such claim and the state hereby consents, in all such claims, to have its liability determined. It may also hear and determine any claim on the part of the state against the claimant, or against his assignor at the time of the assignment; and must render judgment for such sum as should be paid by or to the state. But the board has no jurisdiction of a claim submitted by law to any other tribunal or officer for audit or determination except where the claim is founded upon express contract and such claim, or some part thereof, has been rejected by such tribunal or officer. In no case shall any liability be implied against the state, and no award shall be made on any claim against the state except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity. No claim other than for the appropriation of land shall be maintained against the state unless the claimant shall within six months after such claim shall have accrued, file in the office of the clerk of the board of claims and with the attorney-general a written notice of intention to file a claim against the state, stating the time when, and the place where such claim arose and in detail the nature of the same, which notice shall be signed and verified

by the claimant before an officer authorized to administer oaths. The attorney-general may require any person filing such a notice of claim for any cause whatever against the state to be sworn before him or one of his deputies designated by him for that purpose within the county of the claimant's residence, relating to such claim, and when so sworn, to answer orally as to any facts relative to the justness of such claim. Willful false swearing before the attorney-general or deputy attorney-general is perjury and punishable as such. Provided further, that nothing herein contained shall be construed to allow the board to hear any claim which as between citizens of the state would be barred by lapse of time or of any claim heretofore accrued and of which the said court or board has had jurisdiction and which was barred by lapse of time at the date when this section, as amended, takes effect. Provided further, that the board shall have jurisdiction, and may hear and determine all claims accrued and actually filed at any time prior to the time that this section, as amended, takes effect, and filed within two years from the time they accrued, though no notice of intention to file was given, as required by this section, if such claims when filed were not barred by lapse of time and the court or board had jurisdiction and authority to hear and determine the same except for the lack of such notice; and such jurisdiction shall attach without refiling or previous notice.

Am'd by L. 1905, ch. 370; L. 1906, ch. 692; L. 1908, ch. 519; L. 1912, ch. 545, in effect Sept. 1, 1912.

§ 265. [Am'd, 1906.] Rules and procedure. *and L. 1915 (4.1)*

The court may establish rules for its government, and the regulation of practice therein; prescribe the forms and methods of procedure before it, vacate or modify judgments, and grant new trials, and except as otherwise provided in said rules and regulations, or the code of civil procedure, the practice shall be the same as in the supreme court.

L. 1906, ch. 692. In effect Oct. 1, 1906.

§ 266. [Am'd, 1906, 1909, 1911.] Officers. *and L. 1915*

The board of claims shall appoint, and may at pleasure remove a clerk, a deputy clerk, and a stenographer and they shall perform such duties as the board may prescribe. Before entering upon the duties of his office, the clerk shall make and file in the office of the comptroller, a bond for the faithful performance of his duties in an amount and with sufficient sureties to be approved by at least two of the commissioners, which approval shall be indorsed on said bond.

L. 1906, ch. 692; L. 1909, ch. 560; L. 1911, ch. 456, in effect July 31, 1911.

§ 267. Seal of court.

The court shall adopt and procure an official seal, with suitable device and inscription. A description of such seal, with an impression thereof, shall be filed in the office of the secretary of state. The expenses of procuring such seal shall be paid out of the contingent fund of the court.

am'd 1915
ch. 100

§ 268. [Am'd, 1906, 1911.] *Sessions, duty of sheriff.*

The board shall hold at least eight sessions each year, and unless otherwise ordered by the board shall be held as follows: On the fourth Monday of January at the capitol in Albany; on the third Monday of February at the city of Syracuse; on the fourth Monday of March at the city of Utica; on the fourth Monday of April at the capitol at Albany; on the fourth Monday of May at the city of Rochester; on the third Monday of June at the city of Buffalo; on the fourth Monday of September at the capitol in Albany; on the fourth Monday of November at the capitol at Albany, and it may also hold adjourned or special sessions, at such other times and places in the state as it may determine. It may also hold a session and take testimony where the claimant resides or where the claim is alleged to have arisen, or in the vicinity, and may view any premises affected by the proceedings, and in case of any appropriation of land by the state, the value of which shall exceed five hundred dollars, it shall be the duty of the board to view the premises affected by the appropriation. The sheriff of any county, except Albany, shall furnish for the use of the board suitable rooms in the court house of his county for any session ordered to be held thereat and the sheriff of any county shall if required attend said session. His fees for attendance shall be paid out of the contingent fund of the board, at the same rate as for attending a term of the supreme court, in that county.

L. 1906, ch. 692; L. 1911, ch. 856, in effect July 31, 1911.

§ 269. [Am'd 1901, 1908.] *Judgments.*

The determination of the court upon a claim shall be by a judgment to be entered in a book to be kept by the clerk for that purpose, and signed and certified by him. Within ten days after the entry of the judgment, the clerk shall serve a certified copy thereof on the claimant or his attorney and also upon the attorney-general. If the claim arises in a case where the state seeks to appropriate or has appropriated land for a public use, the judgment shall contain a description of such land. A transcript of a judgment in favor of the state, certified by the clerk of the court, may be filed and docketed in the clerk's office of any county; and upon being so docketed shall become and be a lien upon the property of the claimant in that county, to the same extent and enforceable by execution in the same manner, as a judgment of the supreme court. A final judgment against the claimant on any claim prosecuted as provided in this article shall forever bar any further claim or demand against the state arising out of the matters involved in the controversy. Interest shall be allowed on each judgment of the court of claims from the date thereof until the twentieth day after the comptroller is authorized to issue his warrant for the payment thereof or until payment, if payment be made sooner. But no such judgment shall be paid until there shall be filed with the comptroller a copy thereof duly certified by the clerk of the court of claims together with a certificate of the attorney-general that no appeal from such judgment has been or will be taken by the state, and a release and waiver by the attorney for the claimant of any lien for services upon said claimant's cause of action, claim, award, verdict, report, decision or judgment in favor of said claimant, which said attorney may have thereon under and by

virtue of section four hundred and seventy-five of the judiciary law; and where damages are awarded for the permanent appropriation of land for a public use, there shall also be filed with the comptroller, a satisfactory abstract of title and certificate of search as to incumbrances, showing the person demanding such damages to be legally entitled thereto. The provisions of this section as to limitation of interest shall not apply, however, to judgments paid from the various trust funds or sinking funds of the state, which funds shall be entitled to interest until the twentieth day after an appropriation is available for the reimbursement thereof or until payment, if payment be sooner made.

Am'd by L. 1901, ch. 440; L. 1900, ch. 65, § 3. See note 37 of notes of Board of Statutory Consolidation at end of code.

§ 270. [Am'd 1905.] Duty of attorney-general and superintendent of public works.

The attorney-general shall represent the state in all proceedings relating to claims. In all cases of canal claims a copy of each such claim and of notice of claim which is or may hereafter be required to be filed with the court of claims shall be filed with the superintendent of public works who on request from the attorney-general, shall furnish such assistance as he may require in subpoenaing witnesses and preparing the cases for trial. The attorney-general may designate a clerk in his office to assist in the preparation of cases for trial and to attend a term of the court. And no claims brought against the state on account of the canal shall be settled or compromised for any amount without the written consent thereto by the superintendent of public works or his duly authorized representative.

L. 1905, ch. 370. In effect May 4, 1905.

§ 271. Record of proceedings; report.

The court shall keep a record of its proceedings, and, at the commencement of each session of the legislature, and at such other times during the session as it may deem proper, or as the senate or assembly may request, report to the legislature the claims upon which it has finally acted, with a statement of the judgment rendered in each case.

§ 272. Expense of procuring testimony on commission.

When testimony is taken on commission at the instance of the claimant, the expense thereof including the fees of the commissioner, shall be paid by the claimant; and when taken at the instance of the state, such fees and all expenses incurred by the attorney-general shall be paid out of the contingent fund of the court.

§ 273. Annual report to comptroller.

On the first day of January in each year, the clerk shall report, to the comptroller, under oath, a detailed statement of his disbursements made under the direction of the court from its contingent fund during the preceding year.

§ 274. [Am'd 1909.] Costs not to be taxed.

Costs, witnesses' fees and disbursements shall not be taxed, nor shall counsel or attorneys' fees be allowed by the court to any

party. The said court of claims, whenever the appraised value of the premises appropriated shall be less than two hundred dollars, shall in their award make a reasonable allowance for the expense of procuring the abstract of title and certificate of search as to incumbrances, which the statutes require shall be furnished the comptroller before payment of any damages which may be awarded for the permanent appropriation of land or water.

Am'd by L. 1906, ch. 65, § 3. New matter is L. 1884, ch. 336, § 3. See note 37a of notes of Board of Statutory Consolidation at end of code.

§ 275. Appeals.

Either party may appeal from an order or judgment of the court of claims to the appellate division of the supreme court of the third department. The appeal from a judgment may be taken upon questions of law or of fact, or both, or for an alleged excess or insufficiency of the judgment. Upon such appeal, the court may affirm, reverse, or modify the judgment, or dismiss the appeal, or grant a new trial. The provisions of this code relating to appeals in the supreme court apply, so far as practicable, to appeals from orders or judgments of the court of claims, except as modified in this article.

§ 276. Time and manner of taking appeal.

An appeal must be taken within thirty days after the entry and service of the order, or the service by the clerk of a certified copy of the judgment, by serving upon the claimant or his attorney, or upon the attorney-general, and upon the clerk, in like manner as in the supreme court, a written notice to the effect that the appellant appeals from the order or from the judgment or from a specified part thereof, and briefly stating the grounds of the appeal.

§ 277. Case on appeal.

With the notice of appeal from a judgment, the appellant shall serve upon the adverse party a case containing so much of the evidence as the appellant may deem necessary to present the questions raised by the appeal. Within ten days after the service of the case, the respondent may propose and serve amendments thereto, and the case may be settled upon five days' notice by any judge of the court. Notice of the settlement may be served by either party, within ten days after service of the proposed amendments. The court or a judge thereof may extend the time for serving a case or amendments.

§ 278. Preference on appeals.

An appeal taken after the calendar for a term of the appellate court is prepared may be placed thereon upon the application of the attorney-general at any time during the then current term, and brought on for hearing as a preferred cause upon a notice of fourteen days.

and ch. 1 **§ 279. [Am'd, 1906, 1910, 1911.] Salary of commissioners of claims.**

Each commissioner of claims shall receive an annual compensation at the rate of six thousand dollars, payable monthly, and the sum of fifteen hundred dollars annually, but no more, on

account of personal expenses in the discharge of his official duties, and to be payable monthly.

L. 1908, ch. 692; L. 1910, ch. 684; L. 1911, ch. 856, in effect July 31, 1911.

§ 280. [Am'd, 1907, 1911.] Salaries of officers of board of claims. *and L. 1915*
and L. 1915

Each officer of the board of claims shall receive an annual salary, payable monthly, and other compensation as follows:

1. The clerk, three thousand dollars.
2. The deputy clerk, two thousand five hundred dollars.
3. The stenographer, two thousand five hundred dollars and five cents a folio for copies of minutes and testimony furnished at the request of the claimant.

4. The clerk or deputy clerk and stenographer shall be paid their actual expenses while in the discharge of their respective duties, elsewhere than in the city of Albany to be audited by the board and paid from the contingent fund. No charge shall be made against the state by the clerk or the stenographer for copies of minutes, testimony or papers, furnished to the attorney-general or to the board, or filed in the office of the clerk.

Am'd L. 1907, ch. 580; L. 1911, ch. 856, in effect July 31, 1911.

§ 281. [Added, 1901.] Interpleader, consolidation and new parties.

Jurisdiction and powers are also conferred upon the court of claims in its discretion, to order other parties, known or unknown, to be brought in and made parties to any action or proceeding pending in said court or substituted whenever it appears or is made to appear to the court, necessary to a complete determination of the controversy, or the determination of a liability; to consolidate claims or actions, to order interpleader, in the same manner and to like extent and with like effect in matters over which said court of claims have or shall have jurisdiction, as is conferred upon other courts by sections four hundred and fifty-two, seven hundred and fifty-six, eight hundred and seventeen, eight hundred and twenty and twenty-five hundred and eighteen of this code. Said parties may be brought in by order instead of by citation or summons, which order may be served personally or by publication in like manner as is provided for the service of a citation in surrogate's court; and in the cases provided in this section the said court may render judgment for or against any of the parties in said action or proceeding as may be just and equitable.

L. 1901, ch. 286, in effect April 5, 1901.

5282 added L. 1915 Ch. I.

§ 282-313. [Repealed; L. 1895, ch. 946.]

§ 314. [Repealed 1877.]

283 added L. 1916 Ch. 343

284 " " " "

TITLE IV.

The City court of the city of New-York.

- Sec. 315. Jurisdiction.
 316. The last section limited.
 317. Jurisdiction in special causes.
 318. Power to naturalize aliens.
 319. Removal of action to supreme court from city court.
 319-a. Removal of cause in certain cases from city court to supreme court.
 319-b. Vacation of judgment in certain cases.
 320. Justices; their general duties.
 321. How suspended from office.
 322. Chief-justice; how designated; his general duties, etc.
 323. Justices may make rules.
 324. Court when open; justice to designate terms; routine of business.
 325. Terms, where held; publication of appointments.
 326. Justices may take oaths, acknowledgments, etc.
 327. Orders, etc., how made.
 328. Clerk, deputy-clerk and assistants.
 329. General duties of deputy-clerk.
 330. Special deputy-clerks.
 331. Clerk to account monthly for fees, and pay over the same.
 332. Stenographers.
 333. Interpreter.
 334. Id.; penalty for misconduct.
 335. Clerk must appoint attendants, etc.
 336. Clerks, interpreter and attendants not to receive fees.
 337. Suspension of an officer of the court.
 338. What mandates may be executed without the city.
 339. Direction and execution of mandates.
 339-a. Destruction of useless records.

§ 315. [Am'd, 1895, 1911.] Jurisdiction.

The jurisdiction of the city court of the city of New York, extends to the following cases:

1. An action against a natural person, or against a foreign or domestic corporation, wherein the complaint demands judgment for a sum of money only, or to recover one or more chattels, with or without damages for the taking or detention thereof.
2. An action to foreclose or enforce a lien upon real property in the city of New York, created as prescribed by statute, in favor of a person, who has performed labor upon, or furnished materials to be used in the construction, alteration or repair of a building, vault, wharf, fence, or other structure, or who has graded, filled in, or otherwise improved, a lot of land, or the sidewalk or street in front of or adjoining a lot of land.
3. An action to foreclose or enclose* a lien, for a sum not exceeding five thousand dollars, exclusive of interest, upon one or more chattels.
4. The taking and entry of a judgment, upon the confession of one or more defendants, where the sum, for which judgment is confessed, does not exceed five thousand dollars, exclusive of interest from the time of making the statement, upon which the judgment is entered.

Am'd by L. 1895, ch. 946; L. 1911, ch. 569, in effect Sept. 1, 1911.

* So in original.

§ 316. [Am'd, 1911.] The last section limited.

The jurisdiction conferred by the last section is subject to the following limitations and regulations:

1. In an action wherein the complaint demands judgment for a sum of money only, the sum, for which judgment is rendered in favor of the plaintiff, cannot exceed five thousand dollars, exclusive of interest, and costs as taxed; except where it is brought upon a bond or undertaking given in an action or special proceeding in the same court, or before a justice thereof; or to recover damages for a breach of promise of marriage; or where it is a marine cause, as that expression is defined in the next section. Where the action is brought upon a bond or other contract, the judgment must be for the sum actually due, without regard to a penalty therein contained; and where the money is payable in instalments, successive actions may be brought for the instalments, as they become due.

2. In an action to recover one or more chattels, a judgment cannot be rendered in favor of the plaintiff, for a chattel or chattels, the aggregate value of which exceeds five thousand dollars.

3. [Repealed, Laws 1889, ch. 441.]

Am'd by L. 1911, ch. 509, in effect Sept. 1, 1911.

§ 317. [Am'd, 1895.] Jurisdiction in special causes.

The city court of the city of New York possesses the same jurisdiction in the following actions as the supreme court of the State:

1. An action in favor of a person, belonging to a vessel in the merchant service, against the owner, master, or commander thereof, for the reasonable value of services, or for the breach of a contract to pay for services, rendered or to be rendered on board of the vessel, during a voyage, wholly or partly performed, or intended to be performed by it.

2. An action in favor of or against a person, belonging to or on board of a vessel in the merchant service to recover damages for an assault, battery, or false imprisonment, committed on board the vessel, upon the high seas, or in a place without the United States.

But this section does not confer upon the city court authority to proceed, as a court of admiralty or maritime jurisdiction.

L. 1895, ch. 946; L. 1872, ch. 629, § 3, subd. 13, and 14; and 2 R. S., § 106.

§ 318. [Am'd, 1911.] Power to naturalize aliens.

The court shall have power to naturalize aliens.

L. 1852, ch. 389, part of § 10. Am'd by L. 1911, ch. 509, in effect Sept. 1, 1911.

§ 319. [Am'd, 1895.] Removal of action to supreme court from city court.

The supreme court, at a term held in the first judicial district, may, by an order made at any time after joinder of an issue of fact, and before the trial thereof, remove to itself an action brought in the city court, for the purpose of changing the place of trial thereof. Where an order for removal is made, as prescribed in this section, the place of trial must be changed by the same order to another county, and the subsequent proceedings therein must be the same as if the action had been originally brought in the supreme court. The provisions of sections 344, 345 and 346 of this act apply to an application to remove such an action, and to the proceedings upon and subsequent to the removal, as if the city court were specified in those sections in place

of the county court, and a justice thereof in place of the county judge.

L. 1895, ch. 946.

§ 319-a. [Added, 1913.] Removal of cause in certain cases from city court to supreme court.

The supreme court, at a term held in the first judicial district, must, on the motion of any party, by an order made at any time before the entry of judgment, remove to itself an action brought in the city court of the city of New York in the following cases:

1. An action to foreclose or enforce a lien, for a sum exceeding two thousand dollars, exclusive of interest, upon one or more chattels.

2. An action wherein the complaint demands judgment for a sum of money only, exceeding two thousand dollars, exclusive of interest and costs as taxed; except where the action is brought upon a bond or undertaking given in an action or special proceeding in the same court, or before a justice thereof; or to recover damages for a breach of promise of marriage; or where it is a marine cause, as that expression is defined in section three hundred and seventeen of this code.

3. An action to recover one or more chattels the aggregate value of which exceeds two thousand dollars.

Upon the entry of the order of removal in the office of the clerk of the county of New York, the city court shall proceed no further therein, and the clerk of the city court must forthwith deliver to the clerk of the county of New York all papers filed therein, and certified copies of all minutes and entries relating thereto, which must be filed, entered or recorded, as the case requires, in the office of the clerk of the county of New York, and thereupon the supreme court shall proceed in said action as though said action had been commenced in said supreme court, and all proceedings had in the city court prior to the entry of said order of removal shall be of like force and effect as though had in the supreme court.

Added by L. 1913, ch. 210. In effect April 4, 1913.

§ 319-b. [Added, 1913.] Vacation of judgment in certain cases.

Whenever judgment has been or shall be entered in the city court of the city of New York in any one or more of the following cases, to-wit:

1. An action to foreclose or enforce a lien, for a sum exceeding two thousand dollars, exclusive of interest, upon one or more chattels;

2. An action wherein the complaint demands judgment for a sum of money only, and the judgment is in favor of the plaintiff, and exceeds two thousand dollars, exclusive of interest and costs as taxed; except where the action is brought upon a bond or undertaking given in an action or special proceeding in the same court or before a justice thereof; or to recover damages for a breach of promise of marriage; or where it is a marine cause, as that expression is defined in section three hundred and seventeen of this code.

3. An action to recover one or more chattels, and the judgment is in favor of the plaintiff for a chattel or chattels, the aggregate value of which exceeds two thousand dollars.

Any party to such action, at any time after the entry of such judgment, may apply to the said city court to have such judgment vacated, and thereupon the said city court may in its discretion vacate such judgment. Any case, wherein a judgment has been so vacated, may be removed to the supreme court in the first judicial district, as provided in section three hundred and nineteen-a.

Added by L. 1913, ch. 211. In effect April 4, 1913.

§ 320. [Am'd 1877, 1907.] Justices; their general duties.

The court consists of ten justices, one of whom is the chief justice of the court. Each justice must perform his share of the labors and duties appertaining to the office. One of the justices must attend at the chambers of the court, from ten o'clock in the morning until four o'clock in the afternoon of each day, except Sunday, a public holiday, or a day upon which the inhabitants of the city of New York generally refrain from business. Each justice, while in the rooms of the court, and not actually engaged in the performance of other official duties, must act upon any application for his official action, properly made to him. The justice, assigned to a trial term or a special term, must remain in attendance, until the day calendar is disposed of, or for such other time as is reasonable.

L. 1849, ch. 144, §§ 1 and 8; L. 1852, ch. 389, § 1; L. 1870, ch. 580, § 2 and L. 1872, ch. 629, § 4. See, also, 2 R. L., § 108; am'd 1907, ch. 707. In effect Aug. 12, 1907.

§ 321. How suspended from office.

Where it appears presumptively, to the satisfaction of the governor, that a justice of the court has been guilty of corruption, or other gross misconduct in office; or habitually neglects to perform his share of the labors and duties appertaining to the office; or is incapable of properly discharging the same; the governor may, in his discretion, make an order, suspending that justice from the exercise of the duties of his office, and directing that his compensation cease. Such an order must recite the grounds upon which it is made; and it remains in force, unless it is sooner revoked by the governor, until the final adjournment of the next session of the legislature; or, if the legislature is then in session, until the final adjournment of that session.

L. 1849, ch. 144, § 9.

§ 322. [Am'd, 1902.] Chief justice; how designated; his general duties, et cetera.

The justices of the court, or a majority of them, must, from time to time, as a vacancy occurs in the office of chief justice, designate one of their number to be chief justice. A certificate of the designation, under the hands of the justices making the same, must be filed in the office of the clerk of the court. The person so designated shall be chief justice during his term of office. The chief justice has the like authority, within the jurisdiction of the court, as a presiding justice of the supreme court.

L. 1872, ch. 629, § 4, am'd; L. 1902, ch. 515. In effect Sept. 1, 1902.

§ 323. [Am'd, 1900.] Justices may make rules.

The justices of the court, or a majority of them, may, from time to time, establish rules of practice for the court, not inconsistent with this act, or with the general rules of practice, established as prescribed in section ninety-four of the judiciary law. The latter govern the practice in the court, as far as they are applicable thereto.

L. 1875, ch. 479, § 56. Am'd by L. 1909, ch. 65, § 3. See note 33 of notes of Board of Statutory Consolidation at end of code.

§ 324. [Am'd, 1902.] Court when open; justices to designate terms; routine of business, et cetera.

The court is always open for the transaction of any business, for which notice is not required to be given to an adverse party. The justices of the court, or a majority of them, from time to time must appoint, and may alter, the times of holding special and trial terms of the court. They must prescribe the duration of the terms; designate the trial terms at which jurors are required to attend; and assign the justice to preside and attend at each of the terms so appointed. In case of the inability of a justice to preside or attend, another justice may preside or attend in his place. Each trial and special term must be held by one justice. Two or more special or trial terms may be appointed to be held at the same time.

L. 1872, ch. 629, § 4. Am'd, L. 1902, ch. 515. In effect Sept. 1, 1902.

§ 325. Terms where held; publication of appointments.

Each term so appointed must be held at the city-hall in the city of New-York, except that auxiliary or additional parts, for the transaction of any business specified in the appointment, may be held elsewhere within the city of New-York, as designated in the appointment. An appointment must be published in two newspapers, published in the city of New-York, at least once in each week, for three successive weeks, before a term is held in pursuance thereof.

L. 1875, ch. 479, § 38.

§ 326. Justices may take oaths, acknowledgments, etc.

Each of the justices may, within the city of New-York, administer an oath, or take a deposition, or the acknowledgment or proof of the execution of a written instrument, and certify the same, in like manner and with like authority and effect, as a justice of the supreme court.

L. 1874, ch. 545, § 8, am'd.

§ 327. [Am'd, 1895.] Orders, etc., how made.

In an action brought in the court; an order cannot be made, or a warrant of attachment granted, by an officer, other than a justice of the court; and each provision of this act, which empowers an officer, other than a judge of the court in which an action is brought, to make an order therein, must be construed as being exclusive of an action brought in the city court.

L. 1895, ch. 946.

§ 328. [Am'd, 1891, 1896, 1907, 1910, 1911, 1912.] Clerk, deputy clerk, assistants, stenographers, and typewriter operators.

The court has a clerk who is appointed, and may be removed, by the justices thereof, or a majority of them for cause upon charges and after a hearing after notice, and who shall receive a salary of six thousand dollars per annum. The justices of the court or a majority of them must appoint, and may remove, six deputy clerks and not more than twenty-one assistants, and a stenographer and typewriter operator for the purpose of copying their minutes and opinions and doing such other confidential work which may be required by said justices or the clerk of the court. The clerk is responsible for the faithful discharge of his duty by each deputy clerk, and each assistant and the stenographer and typewriter operator. Each deputy clerk, each assistant, and the stenographer and typewriter operator, is entitled to a salary, fixed and to be paid as prescribed by law.

L. 1891, ch. 154; L. 1896, ch. 662; L. 1907, chs. 707, 708; L. 1910, ch. 579; L. 1911, ch. 328; L. 1912, ch. 460, in effect Sept. 1, 1912.

§ 329. [Am'd, 1907.] General duties of deputy clerk.

The deputy clerk has all the powers, and may perform all the duties of the clerk, when the office of clerk is vacant, or at the clerk's office, when the clerk is absent therefrom, or at a term or sitting of the court which the deputy clerk attends.

Substituted for part of L. 1857, ch. 295; § 6; Am'd L. 1907, ch. 708. In effect Aug. 12, 1907.

§ 330. [Am'd, 1877.] Special deputy-clerks.

The clerk may designate as many of his assistants, as the justices of the court, or a majority of them deem necessary, as special deputy-clerks. Each special deputy-clerk possesses, in the absence of the clerk and a deputy-clerk, the same powers as the clerk, at any sitting or term of the court which he attends, with respect to the business transacted thereat.

§ 331. [Am'd, 1877.] Clerk to account monthly for fees, and pay over the same.

The clerk must receive, for the use of the city of New-York, the fees allowed by law. He shall not perform any service, for which a fee is allowed by law, until the fee therefor is paid to him. He must, on the first day of each month, or within three days thereafter, render to the comptroller of the city, an account, under oath, of all fees received, directly or indirectly, during the preceding month, by him, or by a deputy-clerk, or either of his assistants, for any official service; and he must, at the same time,

pay the same into the treasury of the city of New-York. When the return and payment are so made, the clerk is entitled to receive his compensation, for the period included in the return. He is not entitled to compensation for a period, for which he has not made his return and payment.

L. 1849, ch. 144, § 5, am'd.

§ 332. [Am'd, 1906, 1907.] Stenographers.

The justices of the court or a majority of them must appoint nine stenographers of the court, and may at pleasure remove either of them. The justices of the court, or a majority of them, must, from time to time, assign each of the stenographers to duty at the trial or special term. Each stenographer is entitled to a salary, fixed and to be paid as prescribed by law and must attend the term to which he is assigned.

From L. 1876, ch. 413, §§ 1 and 4; L. 1906, ch. 61; L. 1907, chs. 707, 708. In effect Aug. 12, 1907.

§ 333. [Am'd, 1877, 1907, 1909.] Official oath; interpreters.

The justices of the court or a majority of them, from time to time, must appoint, and may at pleasure remove, three official interpreters of the court, who are entitled to a salary, fixed and to be paid as prescribed by law. Before entering upon their official duties, the clerk, deputy clerks, assistant clerks, stenographers, interpreters and attendants must subscribe and file in the office of the clerk of the city of New York, the constitutional oath of office. Each interpreter must attend any trial or special term of the court, where his services are required; and the justice therein presiding shall regulate his attendance thereat.

Id. Am'd by L. 1907, chs. 707, 708; L. 1909, ch. 387. In effect Sept. 1, 1909.

§ 334. [Repealed by L. 1909, ch. 88. See Penal Law, § 1634.]

§ 335. [Am'd, 1907, 1912.] The justices must appoint attendants.

The justices of the court or a majority of them must appoint, and may at pleasure remove, as many attendants upon the court as they deem necessary, not exceeding twenty-five. The justices of the court, or a majority of them, may regulate their attendance. Each attendant is entitled to a salary fixed, and to be paid as prescribed by law.

From L. 1876, ch. 413, §§ 1 and 4. Am'd by L. 1907, ch. 708; L. 1912, ch. 465. In effect Sept. 1, 1912.

§ 336. Clerks, interpreter and attendants not to receive fees.

The clerk, the deputy-clerk, an assistant to the clerk, the official interpreter, or an attendant shall not receive any fee or compensation, except his salary, for any official service performed by him.

L. 1872, ch. 438, § 3, am'd.

§ 337. [Am'd, 1877.] Suspension of an officer of the court.

A justice of the court may, by an instrument under his hand, suspend a stenographer, or an officer specified in the last section,

for a period not exceeding ten days from the filing thereof. Such an instrument must express the cause of the suspension; it must be filed in the office of the clerk of the city and county of New York; and it may be revoked, at any time before the expiration of the period of suspension, by an instrument filed in like manner, under the hand of the justice who executed the first instrument, or the hands of a majority of the justices of the court. Where such an instrument has been revoked, the officer shall not be again suspended for the same cause.

Substituted for L. 1849, ch. 144, § 10.

§ 338. [Am'd, 1910.] What mandates may be executed without the city.

A mandate of the court can be executed only within the city of New York, except as follows:

1. An execution upon a judgment rendered therein, for a sum exceeding twenty-five dollars, may be issued out of the court, tested in the name of the chief justice thereof, to the sheriff of any county, wherein the judgment has been duly docketed.

2. A subpoena may be served within either of the counties of Richmond, Kings, Queens, or Westchester.

3. A warrant to apprehend a witness for a failure to obey a subpoena, may be executed by the sheriff of the city and county of New York, or a marshal of that city, within either of those counties.

4. An order duly made, in an action or special proceeding pending in the court, requiring the performance of an act by a party thereto, or by an officer, may be served upon a person bound to obey the order, and his obedience thereto may be required in any part of the State.

5. An order to show cause, why a person should not be punished for a contempt of the court, may be served by any person in any part of the State.

6. A warrant to apprehend, and bring before the court, a person charged with such contempt, may be executed by the sheriff of the city and county of New York, or a marshal of that city, in any part of the State.

L. 1875, ch. 479, § 40. Am'd L. 1910, ch. 583. In effect June 22, 1910.

§ 339. [Am'd, 1895.] Direction and execution of mandates.

In an action brought in the court, an order of arrest, a warrant of attachment, an execution, or a requisition to replevy a chattel, must be directed to and executed by the sheriff. Any other mandate, which must have been directed to and executed by the sheriff of the city and county of New York, if it issued out of the supreme court, may, where it issues out of the city court, be directed to, and executed either by that sheriff, or a marshal of that city, named therein. A marshal is entitled to the same fees as the sheriff, upon a mandate directed to him, or upon the service of a summons; and each provision of law, relating to the execution of a mandate by the sheriff, and the power and control of the court over the sheriff executing the same, applies to the marshal. The return of a marshal to such a

mandate, or his certificate of the execution thereof, or of the service of any paper served by him, has the same force and effect, as the like return and certificate of a sheriff.

L. 1865, ch. 400, §§ 2 and 3; and L. 1872, ch. 629, § 8, as affected by L. 1875, ch. 625, and 2 R. L., § 114; L. 1895, ch. 946.

§ 339-a. [Added, 1912.] Destruction of useless records.

The justices of the city court, or a majority of them, may, upon petition of the clerk of such court, by order made at any term thereof, direct the clerk of the court to destroy any records or papers deposited or filed in his office which the justices of the court or a majority of them conclude to be no longer necessary for any purpose whatsoever.

Added by L. 1912, ch. 515. In effect Sept. 1, 1912.

TITLE V.

The county courts.

Sec. 340. Jurisdiction.

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- 342. Action, etc., wherein county judge is incapable to act.
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- 344. Effect of order of removal; appeal, etc.
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- 357. Jurors, how drawn and notified.
- 358. Stenographers for county courts.
- 359. Stenographer for county courts in Kings and Queens counties.
- 360. Interpreters for county court, etc., in Kings county.
- 361. Stenographers.

§ 340. [Am'd, 1895, 1909, 1910.] Jurisdiction.

The jurisdiction of each county court extends to the following actions and special proceedings, in addition to the jurisdiction, power, and authority, conferred upon a county court, in a particular case, by special statutory provision:

1. To an action for the partition of real property; for dower; for the foreclosure, redemption, or satisfaction of a mortgage upon real property; or to procure a judgment requiring a specific performance of a contract, relating to real property; where the real property, to which the action relates, is situated within the county; or to foreclose a lien upon a chattel, in a case specified in section two hundred and six of the lien law, where the lien does not exceed one thousand dollars in amount, and the chattel is found within the county.

2. To an action in favor of the executor, administrator or assignee of a judgment creditor, or in a proper case, in favor of the judgment creditor, to recover a judgment for money remaining due upon a judgment rendered in the same court.

3. To an action for any other cause, where the defendant is, or if there are two or more defendants, where all of them are, at the time of the commencement of the action, residents of the county, and wherein the complaint demands judgment for a sum of money only, not exceeding two thousand dollars; or to recover one or more chattels, the aggregate value of which does not exceed one thousand dollars, with or without damages for the taking or detention thereof.

4. To the custody of the person and the care of the property, concurrently with the supreme court, of a resident of the county, who is incompetent to manage his affairs, by reason of lunacy, idiocy, or habitual drunkenness; or imbecility arising from old age or loss of memory and understanding or other cause; and to every special proceeding, which the supreme court has jurisdiction to entertain, for the appointment of a committee of the person or of the property of such an incompetent person or for the sale or other disposition of the real property situated within the county of a person, wherever resident, who is so incompetent for either of the reasons aforesaid, or who is an infant;

or for the sale or other disposition of the real property, situated within the county, of a domestic religious corporation.

L. 1895, ch. 940; Co. Proc., § 30, part of subd. 1, as am'd 1870, ch. 467, § 1. Am'd by L. 1909, ch. 65, § 3; L. 1910, ch. 123. In effect Sept. 1, 1910. See note 38a of notes of Board of Statutory Consolidation at end of code.

*am'd L. 1916
Ch. 350* § 341. [Am'd, 1899, 1911.] Domestic corporation, etc., when deemed resident, etc.

For the purpose of determining the jurisdiction of a county court, in either of the cases specified in the last section, a domestic corporation or joint-stock association, whose principal place of business is established, by or pursuant to a statute, or by its articles of association, or whose principal place of business or any part of its plant or plants, shops, factories or offices is actually located within the county, or in case of a railroad corporation where any portion of the road operated by it is within the county, it is deemed a resident of the county; and personal service of a summons, made within the county, as prescribed in this act, or personal service of a mandate, whereby a special proceeding is commenced, made within the county, as prescribed in this act for personal service of a summons, is sufficient service thereof upon a domestic corporation wherever it is located.

L. 1899, ch. 320; L. 1911, ch. 68, in effect Sept. 1, 1911.

§ 342. [Am'd, 1877.] Action, etc., wherein county judge is incapable to act.

If the county judge is, for any cause, incapable to act in an action or special proceeding, pending in the county court, or before him, he must make, and file in the office of the clerk, a certificate of the fact; and thereupon the special county judge, if any, and if not disqualified, must act as county judge in that action or special proceeding. Upon the filing of the certificate, where there is no special county judge, or the special county judge is disqualified, the action or special proceeding is removed to the supreme court, if it is then pending in the county court; if it is pending before the county judge, it may be continued before any justice of the supreme court within the same judicial district. The supreme court, upon the application of either party, made upon notice, and upon proof that the county judge is incapable to act in an action or special proceeding pending in the county court, may, and if the special county judge is also incapable to act, must, make an order removing it to the supreme court. Thereupon the subsequent proceedings in the supreme court must be the same as if it had originally been brought in that court, except that an objection to the jurisdiction may be taken, which might have been taken in the county court.

See last clause, subd. 13 of § 30, Co. Proc., as am'd 1876, ch. 431.

§ 343. Supreme court may remove action, and change place of trial.

The supreme court may, by an order, made at any time after joinder of an issue of fact, and before the trial thereof, remove to itself an action, brought in a county court, under subdivision second or subdivision third of the last section but two, for the purpose of changing the place of trial thereof. Where an order for removal is made, as prescribed in this section, the place of trial of the action must be changed by the same order to another county; and the subsequent proceedings therein must be the same, as if the action had been originally brought in the supreme court.

See last clause, subd. 1 of same section.

§ 344. Effect of order of removal; appeal, etc.

An order of removal, made as prescribed in either of the last two sections, takes effect upon the entry thereof in the office of the county clerk. Where the order directs that the action be tried in another county, the clerk with whom it is entered, must forthwith deliver to the clerk of that county, all papers filed therein, and certified copies of all minutes and entries relating thereto; which must be filed, entered, or recorded, as the case requires, in the office of the last mentioned clerk. The provisions of section 271 of this act apply to an appeal taken from such an order.

§ 345. Stay of proceedings.

An order to stay proceedings, for the purpose of affording an opportunity to make the application for removal, may be made by the county judge, or by a judge authorized to make such an order in the supreme court and with like effect and under like circumstances.

§ 346. Removal of action not to impair process, etc.

The removal of an action or special proceeding, as prescribed in this title, does not invalidate, or in any manner impair, a process, provisional remedy, or other proceeding, or a bond, undertaking, or recognizance in the action or special proceeding so removed; each of which continues to have the same validity and effect, as if the removal had not been made. Where bail was given, the surrender of the defendant in the supreme court has the same effect, as a surrender in the county court would have had, if the action or special proceeding had remained therein.

§ 347. County court may send its process to any county.

A county court has power, in an action or special proceeding of which it has jurisdiction, to send its process and other mandates into any county of the State, for service or execution, and to enforce obedience thereto, with like power and authority as the supreme court.

§ 348. When jurisdiction, etc., co-extensive with supreme court.

Where a county court has jurisdiction of an action or a special proceeding, it possesses the same jurisdiction, power and authority in and over the same, and in the course of the proceedings therein, which the supreme court possesses in a like case; and it may render any judgment, or grant either party any relief, which the supreme court might render or grant in a like case, and may enforce its mandates in like manner as the supreme court. And the county judge possesses the same power and authority, in the action or special proceeding, which a justice of the supreme court possesses, in a like action or special proceeding, brought in the supreme court.

§ 349. Power of county judge in special proceedings.

The county judge also possesses the same power and authority, in a special proceeding, which can be lawfully instituted before him, out of court, which a justice of the supreme court possesses in a like special proceeding, instituted before him in like manner.

§ 350. Fines and penalties; how remitted.

Upon the application of a person, who has been fined by a court, or of a person whose recognizance has become forfeited, or of his surety, the county court of the county in which the term of the court was held, where the fine was imposed, or the recognizance taken, may, except as otherwise prescribed in the

next section, upon good cause shown, and upon such terms as it deems just, make an order, remitting the fine, wholly or partly, or the forfeiture of the recognizance, or part of the penalty thereof; or it may discharge the recognizance. If a fine so remitted has been paid, the county treasurer, or other officer, in whose hands the money remains, must pay the same, or the part remitted, according to the order.

2 R. S. 486, § 37.

§ 351. [Am'd, 1895.] Restrictions upon power to remit.

The last section does not authorize a county court to remit any part of a fine exceeding two hundred and fifty dollars imposed by the supreme court upon conviction for a criminal offense; or a fine to any amount imposed by a court upon an officer or other person, for an actual contempt of court, or for disobedience to its process, or other mandate; or to remit or discharge a recognizance taken in its county for the appearance of a person in another county. In the latter case, the power of remitting or discharging the recognizance is vested in the county court of the county, in which the person is bound to appear.

Id., § 38, am'd; L. 1896, ch. 946.

§ 352. Notice of application, etc.; costs to be paid on remission.

An application for an order, as prescribed in the last section but one, cannot be heard, until such notice thereof as the court deems reasonable, has been given to the district-attorney of the county, and until he has had an opportunity to examine the matter, and prepare to resist the application. And upon granting such an order, the court must always impose, as a condition thereof, the payment of the costs and expenses, if any, incurred in an action or special proceeding for the collection of the fine, or the penalty of the recognizance.

Id., §§ 39 and 41.

§ 353. Fines imposed by justices of the peace; how remitted.

Where a person has been fined by a court of special sessions, or by a justice of the peace, upon a conviction for an offence, and has been committed to jail for non-payment of the fine, the county court of the county may make an order, remitting the fine, wholly or partly, and discharging him from his imprisonment. The power conferred by this section must be exercised in the manner prescribed, and subject to the provisions contained, in the last three sections.

Id., § 42.

§ 354. Who may make orders.

In an action or special proceeding in a county court, an order may be made without notice, or an order to stay proceedings may be made upon notice, by a justice of the supreme court, or by the county judge of the county where the attorney for the applicant resides, in a case where the county judge, in whose court the action or special proceeding is brought, may make the same, out of court; and with like effect.

See L. 1847, ch. 280, § 34.

§ 355. [Am'd, 1877, 1909.] County court sessions and terms.

The county court is always open for the transaction of any business, for which notice is not required to be given to an adverse party, except where it is specially prescribed by law, that the business must be done at a stated term.

See Co. Proc., § 31, and L. 1847, ch. 470, part of § 24. Am'd by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 190-191. See note 39 of notes of Board of Statutory Consolidation at end of code.

§ 356. [Old section repealed by L. 1909, chs. 16 and 35. See Consolidated Laws, tit. County Law, § 240, Judiciary Law, § 192.]

§ 356. [New section — Added, 1909.] Power of county judge when holding court in another county.

During the period that any county judge shall be in a county other than his own, for the purpose of holding courts therein, he may exercise all the powers and perform all the duties of the county judge of such other county, which said last-mentioned judge is by law authorized to exercise and perform out of court or in vacation; provided, however, that nothing herein contained shall empower him to perform the duties of surrogate in such other county.

Added by L. 1909, ch. 65. Derivation — L. 1877, ch. 11, § 1. See note 1 of notes of Board of Statutory Consolidation at end of code.

§ 357. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 533, 541.]

§ 358. [Partly repealed by L. 1909, chs. 16 and 35; but see Consolidated Laws, tits. County Law, § 12, Judiciary Law, § 197, which embody the whole of this section.]

§ 359. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 196, 197, 285, 318, 319.]

§ 360. [Repealed by L. 1909, chs. 35 and 65. See Consolidated Laws, tit. Judiciary Law, §§ 198, 382-385; and also Code Civ. Proc., § 2513a.]

§ 361. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 197, 318, 319.]

CHAPTER IV.

Limitation of the Time of Enforcing a Civil Remedy.

TITLE I.—Actions for the Recovery of Real Property.

TITLE II.—Actions other than for the Recovery of Real Property.

TITLE III.—General Provisions.

TITLE I.

Actions for the recovery of real property.

Sec. 362. When the people will not sue.

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§ 362. When the people will not sue.

The people of the State will not sue a person for or with respect to real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless either,

1. The cause of action accrued within forty years before the action is commenced; or,

2. The people, or those from whom they claim, have received the rents and profits of the real property, or of some part thereof, within the same period of time.

Co. Proc., § 75, am'd.

§ 363. Action by grantee from the State.

An action shall not be brought for or with respect to real property, by a person claiming by virtue of letters patent or a grant, from the people of the State, unless it might have been maintained by the people, as prescribed in this title, in the patent or grant had not been issued or made.

Id., § 76.

§ 364. Action after annulling letters patent.

Where letters patent or a grant of real property, issued or made by the people of the State, are declared void by the determination of a competent court, rendered upon an allegation of a fraudulent suggestion or concealment, or of a forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title; an action of ejectment, to recover the premises in question, may be commenced, either by the people, or by a subsequent patentee or grantee of the same premises, his heirs, or assigns, within twenty years after the determination is made: but not after that period.

Id., § 77.

§ 365. Seisin within twenty years, when necessary, etc.

An action to recover real property, or the possession thereof, cannot be maintained by a party, other than the people, unless the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the action.

Co. Proc., § 78.

§ 366. The same.

A defence or counterclaim, founded upon the title to real property, or to rents or services out of the same, is not effectual, unless the person making it, or under whose title it is made, or his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within twenty years before the committing of the act, with respect to which it is made.

Id., § 79, am'd.

§ 367. Action after entry.

An entry upon real property is not sufficient or valid as a claim, unless an action is commenced thereupon, within one year after the making thereof, and within twenty years after the time, when the right to make it descended or accrued.

Id., § 80.

§ 368. Possession, when presumed; occupation presumed to be under legal title.

In an action to recover real property, or the possession thereof, the person who establishes a legal title to the premises is presumed to have been possessed thereof, within the time required by law; and the occupation of the premises, by another person, is deemed to have been under and in subordination to the legal title, unless the premises have been held and possessed adversely to the legal title, for twenty years before the commencement of the action.

Id., § 81.

§ 369. Adverse possession under written instrument or judgment.

Where the occupant, or those under whom he claims, entered into the possession of the premises, under claim of title, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court; and there has been a continued occupation and possession of the premises, included in the instrument, decree, or judgment, or of some part thereof, for twenty years, under the same claim; the premises so included are deemed to have been held adversely; except that where they consist of a tract, divided into lots, the possession of one lot is not deemed a possession of any other lot.

Id., § 82.

§ 370. Id.; what constitutes it.

For the purpose of constituting an adverse possession, by a person claiming a title, founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial inclosure.

3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, either for the purposes of husbandry, or for the ordinary use of the occupant.

Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time, as the part improved and cultivated.

Co. Proc., § 88, am'd.

§ 371. Adverse possession under claim of title not written.

Where there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely.

Id., § 84.

§ 372. Id.; what constitutes it.

For the purpose of constituting an adverse possession, by a person claiming title, not founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others:

1. Where it has been protected by a substantial inclosure.
2. Where it has been usually cultivated or improved.

Id., § 85.

§ 373. Relation of landlord and tenant, as affecting adverse possession.

Where the relation of landlord and tenant has existed between any persons the possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years after the termination of the tenancy; or, where there has been no written lease, until the expiration of twenty years after the last payment of rent; notwithstanding that the tenant has acquired another title, or has claimed to hold adversely to his landlord. But this presumption shall not be made, after the periods prescribed in this section.

Id., § 86.

§ 374. Right not affected by descent cast.

The right of a person to the possession of real property is not impaired or affected, by a descent being cast, in consequence of the death of a person in possession of the property.

Id., § 87.

§ 375. Certain disabilities excluded from time to commence action.

If a person, who might maintain an action to recover real property, or the possession thereof, or make an entry, or interpose a defence or counterclaim, founded on the title to real property, or to rents or services out of the same, is when his title first descends, or his cause of action or right of entry first accrues, either:

1. Within the age of twenty-one years; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life:

The time of such a disability is not a part of the time, limited in this title, for commencing the action, or making the entry, or interposing the defence or counterclaim; except that the time so limited cannot be extended more than ten years, after the disability ceases, or after the death of the person so disabled.

Da. Proc., § 88.

TITLE II.

Actions other than for the recovery of real property.

- Sec. 376.** When satisfaction of judgment presumed.
377. Effect of return of execution.
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379. Limitation of action to redeem from a mortgage.
380. Other periods of limitation.
381. Within twenty years.
382. Within six years.
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386. When cause of action accrues on a current account.
387. Action for penalty, etc., by any person who will sue.
388. Actions not before provided for.
389. Actions by the people subject to the same limitations.
390. Actions against a non-resident, upon a demand barred by the law of his residence.
390a. Limitation of time to enforce a cause of action arising in another state.
391. When person liable, etc., dies without the state.
392. Cause of action accruing between the death of a testator or intestate, and the grant of letters.
393. No limitation of action on bank notes, etc.
394. Action against directors, etc., of banks.
395. Acknowledgment or new promise must be in writing.
396. Exceptions, as to persons under disabilities.
397. Defence or counterclaim.

§ 376. [Am'd, 1894.] When satisfaction of judgment presumed.

A final judgment or decree for a sum of money, or directing the payment of a sum of money, heretofore rendered in a surrogate's court of the State, or heretofore or hereafter rendered, in a court of record within the United States, or elsewhere, or hereafter docketed pursuant to the provisions of section thirty hundred and seventeen of this act, is presumed to be paid and satisfied, after the expiration of twenty years from the time, when the party recovering it was first entitled to a mandate to enforce it. This presumption is conclusive, except as against a person, who, within twenty years from that time, makes a payment or acknowledges an indebtedness of some part of the amount recovered by the judgment or decree, or his heir or personal representative, or a person whom he otherwise represents. Such an acknowledgment must be in writing, and signed by the person to be charged thereby.

L. 1894, ch. 307.

§ 377. Effect of return of execution.

If the proof of payment, under the last section, consists of the return of an execution partly satisfied, the adverse party may show, in full avoidance of the effect thereof, that the alleged partial satisfaction did not proceed from a payment made, or a sale of property claimed, by him or by a person whom he represents.

§ 378. How presumption raised.

A person may avail himself of the presumption created by the last section but one, under an allegation that the action was not commenced, or that the proceeding was not taken, within the time therein limited.

§ 379. Limitation of action to redeem from a mortgage.

An action to redeem real property from a mortgage, with or without an account of rents and profits, may be maintained by

the mortgagor, or those claiming under him, against the gagee in possession, or those claiming under him, unless they have continuously maintained an adverse possession mortgaged premises, for twenty years after the breach of condition of the mortgage, or the non-fulfilment of a covenant therein contained.

§ 380. Other periods of limitation.

The following actions must be commenced within the following periods, after the cause of action has accrued.

Co. Proc., part of § 74, and § 89.

§ 381. [Am'd, 1877.] Within twenty years.

Within twenty years:

An action upon a sealed instrument.

But where the action is brought for breach of a covenant, or against incumbrances, the cause of action is for the purposes of this section only, deemed to have accrued at the date of an eviction, and not before.

Id., part of § 90.

§ 382. [Am'd, 1877, ch. 416 and 422.] Within six :

Within six years:

1. An action upon a contract obligation or liability expressed; except a judgment or sealed instrument.

2. An action to recover upon a liability created by statute except a penalty or forfeiture.

3. An action to recover damages for an injury to property, or personal injury; except in a case where a different period is expressly prescribed in this chapter. (See § 383, subd. 5; § 384, subd. 1.)

4. An action to recover a chattel.

5. An action to procure a judgment, other than for a sum of money, on the ground of fraud, in a case which, on the first day of December, 1846, was cognizable by the court of common law. The cause of action, in such a case, is not deemed to have accrued, until the discovery, by the plaintiff, or the person whom he claims, of the facts constituting the fraud.

6. An action to establish a will. Where the will has been concealed, or destroyed, the cause of action is not deemed to have accrued, until the discovery, by the plaintiff, or the person whom he claims, of the facts upon which its validity depends.

7. [Am'd, 1894.] An action upon a judgment or decree rendered in a court not of record, except where a transcript has been filed, pursuant to section thirty hundred and seventy of this act, and, also, except a decree heretofore rendered in a justice's court of the State. The cause of action, in such a case, is deemed to have accrued when final judgment was rendered.

L. 1894, ch. 367.

§ 383. [Am'd, 1877.] Within three years.

Within three years:

1. An action against a sheriff, coroner, constable, or other officer, for the non-payment of money collected upon an execution.

2. An action against a constable, upon any other liability incurred by him, by doing an act in his official capacity, or in the omission of an official duty: except an escape.

3. An action upon a statute, for a penalty or forfeiture, where the action is given to the person aggrieved, or to that person and the people of the State, except where the statute imposing it prescribes a different limitation.

4. An action against an executor, administrator, or receiver, or against the trustee of an insolvent debtor, appointed, as prescribed by law, in a special proceeding instituted in a court or before a judge, brought to recover a chattel, or damages for taking, detaining, or injuring personal property, by the defendant, or the person whom he represents.

5. An action to recover damages for a personal injury, resulting from negligence.

Substitute for Co. Proc., § 92; L. 1886, ch. 572; L. 1889, ch. 440; L. 1902, ch. 600, § 2.

§ 384. [Am'd, 1896, 1900.] **Within two years.**

Within two years:

1. An action to recover damages for libel, slander, assault battery, seduction, criminal conversation, false imprisonment malicious prosecution or malpractice.

2. An action upon a statute, for a forfeiture or penalty to the people of the State.

Co. Proc., § 93, am'd. See post, § 1902. L. 1896, ch. 335; L. 1900, ch. 117. In effect Sept. 1, 1900.

§ 385. **Within one year.**

Within one year:

1. An action against a sheriff or coroner, upon a liability incurred by him, by doing an act in his official capacity, or by the omission of an official duty; except the non-payment of money collected upon an execution.

2. An action against any other officer, for the escape of a prisoner, arrested or imprisoned by virtue of a civil mandate.

Substitute for Co. Proc., § 94. See 1 R. S. 772, § 8; L. 1902, ch. 600, § 2.

§ 386. **When cause of action accrues on a current account.**

In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item, proved in the account on either side.

Co. Proc., § 95.

§ 387. **Action for penalty, etc., by any person who will sue.**

An action upon a statute for a penalty or forfeiture, given wholly or partly to any person who will prosecute for the same, must be commenced within one year after the commission of the offence; and if the action is not commenced within the year by a private person, it may be commenced within two years thereafter, in behalf of the people of the State, by the attorney-general, or the district-attorney of the county where the offence was committed.

Id., § 96.

§ 388. **Actions not before provided for.**

An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues.

Id., § 97. See § 1972.

§ 389. Actions by the people subject to the same limitations.

The limitations, prescribed in this title, apply alike to actions brought in the name of the people of the State, or for their benefit, and to actions by private persons.

Co. Proc., § 98.

*** § 390. Action against a non-resident, upon a demand barred by the law of his residence.**

Where a cause of action, which does not involve the title to or possession of real property within the State, accrues against a person, who is not then a resident of the State, an action cannot be brought thereon in a court of the State, against him or his personal representative, after the expiration of the time, limited, by the laws of his residence, for bringing a like action, except by a resident of the State, and in one of the following cases:

1. Where the cause of action originally accrued in favor of a resident of the State.

2. Where, before the expiration of the time so limited, the person, in whose favor it originally accrued, was or became a resident of the State; or the cause of action was assigned to, and thereafter continuously owned by a resident of the State.

§ 390-a. [Added, 1902.] Limitation of time to enforce a cause of action arising in another state.

Where a cause of action arises outside of this state, an action cannot be brought, in a court of this state, to enforce said cause of action, after the expiration of the time limited by the laws of the state or country where the cause of action arose, for bringing an action upon said cause of action, except where the cause of action originally accrued in favor of a resident of this state. Nothing in this act contained shall affect any pending action or proceeding.

L. 1902, ch. 198. In effect Sept. 1, 1902.

§ 391. [Am'd, 1877.] When person liable, etc., dies without the State.

If a person, against whom a cause of action exists, dies without the State, the time which elapses between his death, and the expiration of eighteen months after the issuing, within the State, of letters testamentary or letters of administration, is not a part of the time limited for the commencement of an action therefor, against his executor or administrator.

§ 392. [Am'd, 1877.] Cause of action accruing between the death of a testator or intestate, and the grant of letters.

For the purpose of computing the time, within which an action must be commenced in a court of the State, by an executor or administrator, to recover personal property, taken after the death of a testator or intestate, and before the issuing of letters testamentary or letters of administration; or to recover damages for taking, detaining, or injuring personal property within the same period; the letters are deemed to have been issued, within six years after the death of the testator or intestate. But where an action is barred by this section, any of the next of kin, legatees, or creditors, who, at the time of the transaction upon which

* See post, § 401.

it might have been founded, was within the age of twenty-one years, or insane, or imprisoned on a criminal charge, may, within five years after the cessation of such a disability, maintain an action to recover damages by reason thereof: in which he may recover such sum, or the value of such property, as he would have received upon the final distribution of the estate, if an action had been seasonably commenced by the executor or administrator.

§ 393. No limitation of action on bank notes, etc.

This chapter does not affect an action to enforce the payment of a bill, note, or other evidence of debt issued by a moneyed corporation, or issued or put in circulation as money.

Co. Proc., § 108.

§ 394. [Am'd, 1877, 1897.] Action against directors, etc., of banks.

This chapter does not affect an action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute; but such an action must be brought within three years after the cause of action has accrued.

Co. Proc., § 109, am'd; L. 1897, ch. 281. In effect September 1, 1897.

§ 395. Acknowledgment or new promise must be in writing.

An acknowledgment or promise contained in a writing, signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract, whereby to take a case out of the operation of this title. But this section does not alter the effect of a payment of principal or interest.

Id., § 110.

§ 396. Exceptions, as to persons under disabilities.

If a person, entitled to maintain an action specified in this title, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, is, at the time when the cause of action accrues, either:

1. Within the age of twenty-one years; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life;

The time of such a disability is not a part of the time limited in this title for commencing the action; except that the time so limited cannot be extended more than five years by any such disability, except infancy; or in any case, more than one year after the disability ceases.

Id., § 101.

§ 397. Defence or counterclaim.

A cause of action, upon which an action cannot be maintained, as prescribed in this title, cannot be effectually interposed as a defence or counterclaim.

TITLE III.**General provisions.**

- Sec. 398. When action deemed to be commenced.
 399. Attempt to commence action in a court of record.
 400. Id.; in a court not of record.
 401. Exception, when defendant is without the State.
 402. Id.; when a person entitled, etc., dies before limitation expires.
 403. Id.; when a person liable, etc., dies within the State.
 404. In suits by aliens, time of disability in case of war to be deducted.
 405. Provision where judgment has been reversed.
 406. Stay by injunction, etc., to be deducted.
 407. Certain actions by a principal, for misconduct of an agent, etc.
 408. Disability must exist when right accrues.
 409. If several disabilities, no limitation until all removed.
 410. Provision when the action cannot be maintained without a demand.
 411. Provision in case of submission to arbitration.
 412. Provision when action is discontinued, etc., after answer.
 413. How objection taken, under this chapter.
 414. Cases to which this chapter applies.
 415. Mode of computing periods of limitation.

§ 398. [Am'd, 1877.] When action deemed to be commenced.

An action is commenced against a defendant, within the meaning of any provision of this act, which limits the time for commencing an action, when the summons is served on him; or on a co-defendant who is a joint contractor, or otherwise united in interest with him.

Co. Proc., § 99, am'd.

§ 399. Attempt to commence action in a court of record.

An attempt to commence an action, in a court of record, is equivalent to the commencement thereof against each defendant, within the meaning of each provision of this act, which limits the time for commencing an action, when the summons is delivered, with the intent that it shall be actually served, to the sheriff, or where the sheriff is a party, to a coroner of the county, in which that defendant, or one of two or more co-defendants, who are joint contractors, or otherwise united in interest with him, resides or last resided; or, if the defendant is a corporation, to a like officer of the county, in which it is established by law, or wherein its general business is or was last transacted, or wherein it keeps, or last kept, an office for the transaction of business. But in order to entitle a plaintiff to the benefit of this section, the delivery of the summons to an officer must be followed, within sixty days after the expiration of the time limited for the actual commencement of the action, by personal service thereof upon the defendant sought to be charged, or by the first publication of the summons, as against that defendant, pursuant to an order for service upon him in that manner.

Id., part of § 99, am'd.

§ 400. Id.; in a court not of record.

The last section, excluding the provision requiring a publication or service of the summons within sixty days, applies to an attempt to commence an action, in a court not of record, where the summons is delivered to an officer authorized to serve the same, within the city or town, wherein the person resides or the corporation is located, as specified in that section; provided that actual service thereof is made with due diligence.

*** § 401. [Am'd, 1888, 1896.] Exception, when defendant is without the State.**

If, when the cause of action accrues against a person, he is without the State, the action may be commenced within the time limited therefor, after his return into the State. If, after a cause of action has accrued against a person, he departs from the State, and remains continuously absent therefrom for the space of one year or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the State under a false name, the time of his absence or of such residence within the State under such false name is not a part of the time, limited for the commencement of the action. But this section does not apply, while a designation, made as prescribed in section four hundred and thirty, or in subdivision second of section four hundred and thirty-two, of this act, remains in force.

Co. Proc., § 100, am'd; L. 1888, ch. 498; L. 1896, ch. 665. In effect Sept. 1, 1896. See ante, § 390.

§ 402. Id.; when a person entitled, etc., dies before limitation expires.

If a person, entitled to maintain an action, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representative, after the expiration of that time, and within one year after his death.

Id., § 102, am'd.

§ 403. [Am'd, 1891, 1896.] Id.; when a person liable, dies within the State.

The term of eighteen months after the death, within this state, of a person against whom a cause of action exists, or of a person who shall have died within sixty days after an attempt shall have been made to commence an action against him pursuant to the provisions of section three hundred and ninety-nine of this act, is not a part of the time limited for the commencement of an action against his executor or administrator. If letters testamentary or letters of administration upon his estate are not issued, within this state, at least six months before the expiration of the time to bring the action, as extended by the foregoing provision of this section, the term of one year after such letters are issued is not a part of the time limited for the commencement of such an action. The time during which an action is pending in a court of record between a person or persons and an executor or administrator, wherein the person or persons claim to recover from the executor or administrator any money or other property claimed by said executor or administrator to belong to the estate of the decedent, or is embraced in the inventory of the assets of said decedent's estate, is not a part of the time limited for the commencement of an action against an executor or administrator, for a claim against the estate of the decedent until the final determination of the action brought to recover said or other property claimed by said executor or administrator to belong to said decedent's estate:

1. Where the claim against the estate of the decedent is liquidated by the recovery of a judgment thereon against an executor or administrator in an action in a court of record or under section twenty-seven hundred and eighteen of this code, after trial on the merits.

* See ante, § 390.

2. Where a legatee brings an action, or institutes a proceeding, against an executor or administrator with the will annexed, to enforce the payment of a legacy.

L. 1891, ch. 70; L. 1896, ch. 897. In effect May 26, 1896.

§ 404. In suits by aliens, time of disability in case of war to be deducted.

Where a person is disabled to sue in the courts of the State, by reason of either party being an alien subject or citizen of a country, at war with the United States, the time of the continuance of the disability is not a part of the time limited for the commencement of the action.

Ca. Proc., § 103, am'd.

§ 405. Provision where judgment has been reversed.

If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits; the plaintiff, or, if he dies, and the cause of action survives, his representative, may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination.

Id., § 104.

§ 406. Stay by injunction, etc., to be deducted.

Where the commencement of an action has been stayed by injunction, or other order of a court or judge, or by statutory prohibition, the time of the continuance of the stay is not a part of the time, limited for the commencement of the action.

Id., § 105, am'd. See § 1923.

§ 407. Certain actions by a principal, for misconduct of an agent, etc.

Where an injury results from the act or omission of a deputy or agent, the time, within which an action to recover damages by reason thereof, must be commenced by the principal, against the deputy or agent, must be computed from the time, when a judgment against the principal, for the act or omission, is first recovered by the aggrieved person; and a subsequent reversal or setting aside of the judgment does not extend the time.

§ 408. Disability must exist when right accrues.

A person cannot avail himself of a disability, unless it existed when his right of action or of entry accrued.

Ca. Proc., § 106, am'd.

§ 409. If several disabilities, no limitation until all removed.

Where two or more disabilities co-exist, when the right of action or of entry accrues, the limitation does not attach, until all are removed.

Id., § 107, am'd.

§ 410. Provision when the action cannot be maintained without a demand.

Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time, within which the action must be commenced, must be computed from the time, when the

right to make the demand is complete; except in one of the following cases:

1. Where the right grows out of the receipt or detention of money or property, by an agent, trustee, attorney, or other person acting in a fiduciary capacity, the time must be computed from the time, when the person, having the right to make the demand, has actual knowledge of the facts, upon which that right depends.

2. Where there was a deposit of money, not to be repaid at a fixed time, but only upon a special demand, or a delivery of personal property, not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand.

§ 411. Provision in case of submission to arbitration.

Where the persons, who might be adverse parties in an action, have entered into a written agreement to submit to arbitration, or to refer the cause of action, or a controversy in which it might be available, or have entered into a written submission thereof to arbitrators; and before an award, or other determination thereupon, the agreement or submission is revoked, so as to render it ineffectual, by the death of either party thereto, or by the act of the person against whom the action might have been brought; or the execution thereof, or the remedy upon an award or other determination thereunder, is stayed by injunction, or other order procured by him from a competent court or judge: the time which has elapsed, between the entering into the written submission or agreement, and the revocation thereof or the expiration of the stay, is not a part of the time, limited for the commencement of the action.

§ 412. Provision when action is discontinued, etc., after answer.

Where a defendant in an action has interposed an answer, in support of which he would be entitled to rely, at the trial, upon a defence or counterclaim then existing in his favor, the remedy upon which at the time of the commencement of the action, was not barred by the provisions of this chapter; and the complaint is dismissed, or the action is discontinued, or abates in consequence of the plaintiff's death; the time which intervened, between the commencement and the termination of the action, is not a part of the time, limited for the commencement of an action by the defendant, to recover for the cause of action so interposed as a defence, or to interpose the same defence in another action brought by the same plaintiff, or a person deriving title from or under him.

§ 413. How objection taken, under this chapter.

The objection, that the action was not commenced within the time limited, can be taken only by answer. The corresponding objection to a defence or counterclaim can be taken only by reply; except where a reply is not required, in order to enable the plaintiff to raise an issue of fact, upon an allegation contained in the answer.

Co. Proc., part of § 74.

§ 414. Cases to which this chapter applies.

The provisions of this chapter apply, and constitute the only rules of limitation applicable, to a civil action or special proceeding, except in one of the following cases:

1. A case, where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties.

2. A cause of action or a defence which accrued before the first day of July, 1848. The statutes then in force govern, with respect to such a cause of action or defence.

3. A case, not included in the last subdivision, in which a person is entitled, when this act takes effect, to commence an action, or to institute a special proceeding, or to take any proceeding therein, or to pursue a remedy upon a judgment, where he commences, institutes, or otherwise resorts to the same, before the expiration of two years after this act takes effect; in either of which cases, the provisions of law applicable thereto, immediately before this act takes effect, continue to be so applicable, notwithstanding the repeal thereof.

4. A case, where the time to commence an action has expired, when this act takes effect.

The word, "action", contained in this chapter, is to be construed, when it is necessary so to do, as including a special proceeding, or any proceeding therein, or in an action.

§ 415. Mode of computing periods of limitation.

The periods of limitation, prescribed by this chapter, except as otherwise specially prescribed therein, must be computed from the time of the accruing of the right to relief by action, special proceeding, defence, or otherwise, as the case requires, to the time when the claim to that relief is actually interposed by the party, as a plaintiff or a defendant, in the particular action or special proceeding.

CHAPTER V.

Commencement of and Parties to an Action.

TITLE I.—Commencement of an Action.

TITLE II.—Parties to an Action.

TITLE I.

Commencement of an action.

Article 1. The summons and accompanying papers; personal service thereof; appearance of the defendant.

2. Substitutes for personal service in special cases.

ARTICLE FIRST.

The summons and accompanying papers; personal service thereof; appearance of the defendant.

Sec. 416. Action to be commenced by summons; time when court acquires jurisdiction.

417. Requisites of summons.

418. Form of summons.

419. Service of copy complaint or notice with summons; consequences of failure.

420. Cases where such service must be made.

421. Appearance of defendant.

422. When defendant must answer before time to appear expires.

423. Notice of no personal claim; effect of service thereof.

424. Effect of voluntary appearance.

425. Summons; when and by whom served. Sheriff's duty.

426. How personal service of summons made upon a natural person.

427, 428. Id.; in certain cases of infancy, or lunacy, etc., not judicially declared.

429. Id.; when delivery of copy to lunatic dispensed with.

430. Designation, by a resident, of a person upon whom to serve a summons during his absence; effect and revocation thereof.

431. How personal service of summons made upon a domestic corporation.

432. Id.; upon a foreign corporation.

433. Service of process, etc., to commence a special proceeding.

434. Proof of service of summons, etc.; how made.

§ 416. Action to be commenced by summons; time when court acquires jurisdiction.

A civil action is commenced by the service of a summons. But from the time of the granting of a provisional remedy, the court acquires jurisdiction, and has control of all the subsequent proceedings. Nevertheless, jurisdiction thus acquired is conditional, and liable to be divested, in a case where the jurisdiction of the court is made dependent, by a special provision of law, upon some act, to be done after the granting of the provisional remedy.

Co. Proc., part of § 127, and id., § 139.

§ 417. [Am'd, 1879.] Requisites of summons.

The summons must contain the title of the action, specifying the court in which the action is brought, the names of the parties to the action, and, if it is brought in the supreme court, the name of the county in which the plaintiff desires the trial; and it must be subscribed by the plaintiff's attorney; who must add to his signature his office address, specifying a place within the

State where there is a post-office. If in a city, he must add the street, and the street number, if any, or other suitable designation of the particular locality.

Co. Proc., § 128, remodelled. See ante, § 55.

§ 418. [Am'd, 1877.] Form of summons.

The summons, exclusive of the title of the action and the subscription, must be substantially in the following form, the blanks being properly filled:

"To the above named defendant: You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint. Dated _____"

The summons is deemed the mandate of the court.

See Co. Proc., § 129.

§ 419. [Am'd, 1879.] Service of copy complaint or notice with summons; consequence of failure.

A copy of the complaint may be served with the summons. If a copy of the complaint is not served with the summons, the plaintiff cannot take judgment by default without application to the court, unless either the defendant appears, or by a notice is served with the summons, stating the sum of money for which judgment will be taken, and the case is one embraced in the next section.

Id. See post, § 1212, and §§ 422, 479.

§ 420. [Am'd, 1877.] Cases where such service must be made.

Judgment may be taken without application to the court, where the complaint sets forth one or more causes of action, each consisting of the breach of an express contract to pay, absolutely or upon a contingency, a sum or sums of money, fixed by the terms of the contract, or capable of being ascertained therefrom, by computation only; or an express or implied contract to pay money received or disbursed, or the value of property delivered, or of services rendered by, to, or for the use of, the defendant or a third person; and thereupon demands judgment for a sum of money only. This section includes a case, where the breach of the contract, set forth in the complaint, is only partial; or where the complaint shows that the amount of the plaintiff's demand has been reduced by payment, counterclaim, or other credit.

Id. See post, § 1212.

§ 421. Appearance of defendant.

The defendant's appearance must be made by serving upon the plaintiff's attorney, within twenty days after service of the summons, exclusive of the day of service, a notice of appearance, or a copy of a demurrer or of an answer. A notice or pleading, so served, must be subscribed by the defendant's attorney, who must add to his signature his office address, with the particulars prescribed in section 417 of this act, concerning the office address of the plaintiff's attorney.

See Rule 9.

§ 422. [Am'd, 1877.] When defendant must answer before time to appear expires.

A defendant, upon whom the plaintiff has served, with the summons, a copy of the complaint, must serve a copy of his demand or answer upon the plaintiff's attorney, before the expiration of the time, within which the summons requires him to answer. If a copy of the complaint is not so served, a notice of appearance entitles him only to notice of the subsequent proceedings, unless within the same time he demands the service of a copy of the complaint as prescribed in section four hundred and seventy-nine of this act.

See Co. Proc., §§ 130 and 143. See §§ 419, 479.

§ 423. [Am'd, 1877.] Notice of no personal claim; effect of service thereof.

Where a personal claim is not made against a defendant, a notice, subscribed by the plaintiff's attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific real or personal property, and that a personal claim is not made against him, may be served with the summons. If the defendant so served, unreasonably defends the action, costs may be awarded against him.

Id., § 181.

§ 424. Effect of voluntary appearance.

A voluntary general appearance of the defendant is equivalent to personal service of the summons upon him.

Id., part of § 189.

§ 425. Summons; when and by whom served. Sheriff's duty.

The summons may be served by any person, other than a party to the action, except where it is otherwise specially prescribed by law. The plaintiff's attorney may, by an indorsement on the summons, fix a time within which the service thereof must be made: in that case, the service cannot be made afterwards. Where a summons is delivered for service to the sheriff of the county, wherein the defendant is found, the sheriff must serve it, and return it, with proof of service, to the plaintiff's attorney, with reasonable diligence.

Id., § 133, am'd. See § 1895.

§ 426. [Am'd, 1879, 1913.] How personal service of summons made upon a natural person.

Personal service of the summons upon a defendant, being a natural person, must be made by delivering a copy thereof, within the State, as follows:

1. If the defendant is an infant, under the age of fourteen years, to his father, mother or guardian; or, if there is none within the state, to the person having the care and control of him, or with whom he resides, or in whose service he is employed. If the defendant is an infant over the age of fourteen years, to the infant in person, and also to his father, mother or guardian; or, if there is none within the state, to the person having the care and control of him, or with whom he resides, or in whose service he is employed. Where the defendant is an infant under the age of fourteen years, the court shall, in the defendant's interest, make an order, requiring a copy of the summons to be also delivered, in behalf of the defendant, to a

person designated in the order, and that service of the summons shall not be deemed complete until it is so delivered. Where the defendant is an infant over the age of fourteen years a similar order may be made by the court in its discretion, with or without application therefor.

Subd. am'd by L. 1913, ch. 279. In effect Sept. 1, 1913.

2. If the defendant is a person judicially declared to be incompetent to manage his affairs, in consequence of lunacy, idiocy, or habitual drunkenness, and for whom a committee has been appointed, to the committee, and also to the defendant in person.

3. If the action is against a sheriff, for a cause specified in section one hundred and fifty-eight of this act, by delivering it to the defendant in person, or to his under-sheriff in person, or at the office of the sheriff during the hours when it is required by law to be kept open, to a deputy-sheriff or a clerk in the employment of the sheriff, or other person in charge of the office.

4. In any other case, to the defendant in person.

Co. Proc., § 134, subd. 2, 3, and 4. See §§ 427-9, 1753, post.

§ 427. [Am'd, 1913.] **Id.; in certain cases of infancy, or lunacy, etc., not judicially declared.**

If the court has, in its opinion, reasonable ground to believe, that the defendant, by reason of habitual drunkenness, or for any other cause, is mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, the court may, in its discretion, with or without an application therefor, and, in the defendant's interest, make an order, requiring a copy of the summons to be also delivered, in behalf of the defendant, to a person designated in the order, and that service of the summons shall not be deemed complete, until it is so delivered.

Am'd L. 1913, ch. 279. In effect Sept. 1, 1913.

§ 428. **The same.**

In a case specified in subdivision first or second of section four hundred and twenty-six of this act, where the court has, in its opinion, reasonable ground to believe that the interest of the person, other than the defendant, to whom a copy of the summons has been delivered, is adverse to that of the defendant, or that, for any reason, he is not a fit person to protect the rights of the defendant, it may likewise make an order, as prescribed in the last section. In a case specified in subdivision second, the court may, as a part of the same order, or by a separate order, made in like manner and upon like ground, at any stage of the action, appoint a special guardian ad litem to conduct the defence for the incompetent defendant, to the exclusion of the committee, and with the same powers, and subject to the same liabilities, as a committee of the property.

§ 429. **Id.; when delivery of copy to lunatic dispensed with.**

Where the defendant has been judicially declared to be incompetent to manage his affairs, in consequence of lunacy, and it appears satisfactorily to the court, by affidavit, that the delivery of a copy of the summons to him, in person, will tend to aggravate his disorder, or to lessen the probability of his recovery,

the court may make an order, dispensing with such delivery. In that case a delivery of a copy of the summons, to a committee duly appointed for him, is sufficient personal service upon the defendant.

§ 430. [Am'd, 1899.] Designation, by a resident, of a person upon whom to serve a summons during his absence: effect and revocation thereof.

A resident of the state, of full age, may execute, under his hand, and acknowledge, in the manner required by law to entitle a deed to be recorded, a written designation of another resident of the state, as a person upon whom to serve a summons, or any process or other paper for the commencement of a civil special proceeding, in any court or before any officer, during the absence from the state of New York of the person making the designation; and may file the same, with the written consent of the person so designated, executed and acknowledged in the same manner, in the office of the clerk of the county, where the person making the designation resides. The designation must specify the occupation, or other proper addition, and the residence of the person making it, and also of the person designated; and it remains in force during the period specified therein, if any; or, if no period is specified for that purpose, for three years after the filing thereof. But it is revoked earlier, by the death or legal incompetency of either of the parties thereto; or by the filing of a revocation thereof, or of the consent, executed and acknowledged in like manner. The clerk must file and record such a designation, consent, or revocation; and must note, upon the record of the original designation, the filing and recording of a revocation. While the designation remains in force, as prescribed in this section, a summons, or any process or other paper for the commencement of a civil special proceeding, against the person making it, in any court or before any officer, may be served upon the person so designated, in like manner and with like effect, as if it were served personally upon the person making the designation, notwithstanding the return of the latter to the state of New York.

L. 1899, ch. 524. In effect Sept. 1, 1899.

§ 431. How personal service of summons made upon a domestic corporation.

Personal service of the summons upon a defendant, being a domestic corporation, must be made by delivering a copy thereof, within the State, as follows:

1. If the action is against the mayor, aldermen, and commonalty of the city of New-York, to the mayor, comptroller, or counsel to the corporation.

2. If the action is against any other city, to the mayor, treasurer, counsel, attorney, or clerk; or, if the city lacks either of those officers, to the officer performing corresponding functions, under another name.

3. In any other case, to the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director or managing agent.

§ 432. [Am'd, 1877, 1903, 1909.] Id.; upon a foreign corporation.

Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the state, as follows:

1. [Am'd, 1903.] To the president, vice-president, assistant treasurer, secretary or assistant secretary; or if the corporation lacks either of those officers, to the officer performing the corresponding functions, under another name.

2. [Am'd, 1900.] To a person designated for the purpose in section sixteen of the general corporation law.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of section sixteen, can be found with due diligence, and the corporation has property within the state, or the cause of action arose from the cashier, a director, or a managing agent of the corporation, within the state.

4. [Added, 1909.] If the person designated as provided in section sixteen of the general corporation law dies or departs from the place where the corporation has its principal business within the state and the corporation does not within thirty days after such death or removal designate in like manner another person upon whom process against it may be served within the state, process against the corporation in such case may be served upon any liability incurred within this state or if the corporation has property within the state may after such death, removal or departure and before another designation is made be served on the secretary of state.

Co. Proc., § 134, part of subd. 1, and L. 1855, ch. 279, §§ 1-3 and ch. 311. Am'd by L. 1909, ch. 65. Also partly repealed by L. 1919, ch. 19. See Consolidated Laws, tit. General Corporation Law, § 10, and Co. Proc., § 931a. See note 40 of notes of Board of Statutory Consolidation of Code.

§ 433. Service of process, etc., to commence a proceeding.

The provisions of this article, relating to the mode of serving a summons, apply likewise to the service of any other paper, whereby a special proceeding is commenced in court, or before an officer, except a proceeding to punish for contempt, and except where special provision for the service thereof is otherwise made by law.

See L. 1855, ch. 279, § 4 (3 Edm. 685). See §§ 425, 2000.

§ 434. Proof of service of summons, etc.; how made.

Proof of service, as prescribed in this article, must be by affidavit, except as follows:

1. If the service was made by the sheriff, it may be proved by his certificate thereof.

2. If the defendant served is an adult, who has not been judicially declared to be incompetent to manage his affairs, service may be proved by a written admission, signed by him, and either acknowledged by him, and certified in like manner as a deed to be recorded in the county, or accompanied by the affidavit of a person, other than the plaintiff, showing that the signature is genuine.

A certificate, admission, or affidavit of service of a summons must state the time and place of service. A written admission of the service of a summons, or of a paper accompanying it, imports, unless otherwise expressly stated therein, that the service was made in the manner and at the place otherwise plainly to be inferred from its contents, that the paper was delivered to the person signing the admission.

Substitute for portions of Co. Proc., § 138. See Rule 18.

ARTICLE SECOND.

Substitutes for personal service in special cases.

- Sec. 435. Order for service of summons upon defendant residing in this State, upon what proof to be made.
436. How service must be made.
437. Papers to be filed; proof of service.
438. Cases in which service of summons by publication, etc., may be ordered.
439. Papers upon which order for publication may be made.
440. By whom order may be made; contents of order.
441. When publication must be commenced; when service deemed complete.
442. Papers to be filed; notice to defendant.
443. Id.; when service is made without the State.
444. Proof of service.
445. Defendant, when allowed to defend.

§ 435. [Am'd, 1880, 1913.] Order for service of summons upon defendant residing in this State, upon what proof to be made.

Where a summons is issued in any court of record, an order for the service thereof upon a defendant, whether a domestic corporation, other than a municipal corporation, a joint-stock or other unincorporated association or a natural person, residing within the state may be made by the court, or a judge thereof, or the county judge of the county where the action is triable upon satisfactory proof, by the affidavit of a person, not a party to the action, or by the return of the sheriff of the county where such defendant resides, or has its principal office or place of business, that proper and diligent effort has been made to serve the summons upon the defendant and that none of the persons mentioned in subdivision three of section four hundred and thirty-one, nor the president or treasurer of such association, can be found, or if the defendant is a natural person, that the place of his sojourn cannot be ascertained, or if he is within the state, that he avoids service, so that personal service cannot be made.

Part of L. 1853, ch. 511 (4 Edm. 589). Am'd L. 1880, ch. 535; L. 1913, ch. 230. In effect Sept. 1, 1913. See § 638, post.

§ 436. [Am'd, 1896, 1913.] How service must be made.

The order must direct that the service of the summons be made, by leaving a copy thereof, and of the order, if the defendant is a domestic corporation or joint-stock or other unincorporated association at its principal office or place of business, or if a natural person at the residence of the defendant, with a person of proper age, if upon reasonable application, admittance can be obtained, and such person found who will receive it; or, if admittance cannot be so obtained, nor such a person found, by affixing the same to the outer or other door of the defendant's said place of business or office, or of his residence, and by depositing another copy thereof, properly enclosed in a post-paid wrapper, addressed to the defendant at its said principal office or place of business, or to him at his place of residence, in the post-office at the place where he resides, or where said office, place of business or residence is located, or upon proof being made by affidavit that no such residence can be found, service of the summons may be made in such manner as the court may direct.

Part of L. 1853, ch. 511. Am'd L. 1896, ch. 562; L. 1913, ch. 230. In effect Sept. 1, 1913.

§ 437. Papers to be filed; proof of service.

The order, and the papers upon which it was granted, must be filed, and the service must be made, within ten days after the order is granted; otherwise the order becomes inoperative. On filing an affidavit, showing service according to the order the summons is deemed served, and the same proceedings may be taken thereupon, as if it had been served by publication, pursuant to an order for that purpose, made as prescribed in the next section.

§ 438. [Am'd, 1879, 1884, 1890, 1900, 1913.] Cases in which service of summons by publication, etc., may be ordered.

An order directing the service of a summons upon a defendant, without the State, or by publication, may be made in either of the following cases:

1. Where the defendant to be served is a foreign corporation; or, is an unincorporated association consisting of seven or more persons, having a president and treasurer, neither of whom is a resident of this state; or, being a domestic corporation, where after diligent effort, service cannot be made within the state upon the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer or a director or managing agent; or, being a natural person, is not a resident of the state; or, where, after diligent inquiry, the defendant remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state.

2. Where the defendant, being a resident of the state, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons; or keeps himself concealed therein, with like intent.

3. Where the defendant, being an adult, and a resident of the state, has been continuously without the state of New York more than six months next before the granting of the order, and has not made a designation of a person, upon whom to serve a summons in his behalf, as prescribed in section four hundred and thirty of this act; or a designation so made no longer remains in force; or service upon the person so designated cannot be made within the state, after diligent effort.

4. Where the complaint demands judgment annulling a marriage, or for a divorce, or a separation.

5. Where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in or lien upon, specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined, or limited; or otherwise affecting the title to such property.

6. Where the defendant is a resident of the state or a domestic corporation; and an attempt was made to commence the action against the defendant, as required in chapter fourth of this act, before the expiration of the limitation applicable thereto as fixed in that chapter; and the limitation would have expired, within sixty days next preceding the application, if time had not been extended by the attempt to commence the action.

7. Where the action is against the stockholders of a corporation, or joint-stock company, and is authorized by law of the state, and the defendant is a stockholder thereof. When a copy

of the summons is required by subdivision first or subdivision second of section four hundred and twenty-six of this act, or by section four hundred and twenty-nine of this act, to be delivered to a person other than the defendant, an order, directing the service of a copy of the summons upon such person without the state, or by publication, may be made as prescribed in this section, as if such person was the defendant in the action, and upon a verified complaint and the same proof with respect to such person, as is required in the next succeeding section with respect to a defendant. And sections four hundred and forty to four hundred and forty-four both inclusive, apply to the proceedings in like manner as if such person was a defendant.

Substitute for Co. Proc., § 135. Am'd L. 1884, ch. 399; L. 1899, ch. 301; L. 1909, ch. 492; L. 1913, ch. 179. In effect Sept. 1, 1913.

§ 439. [Am'd, 1879.] Papers upon which order for publication may be made.

The order must be founded upon a verified complaint, showing a sufficient cause of action against the defendant to be served, and proof by affidavit of the additional facts required by the last section; and also, where the application is made upon the ground that the defendant is a foreign corporation, or not a resident of the State, or in a case specified in subdivision fourth, fifth, or seventh of the last section, that the plaintiff has been or will be unable, with due diligence, to make personal service of the summons.

See Co. Proc., § 135.

Am'd L. 1914
Ch. 346 **§ 440. [Am'd, 1889.] By whom order may be made; contents of order.**

The order may be made by a judge of the court, or the county judge of the county where the action is triable. It must direct that service of the summons, upon the defendant named or described in the order, be made by publication thereof in two newspapers, designated in the order as most likely to give notice to the defendant, for a specified time, which the judge deems reasonable, not less than once a week for six successive weeks; or, at the option of the plaintiff, by service of the summons, and of a copy of the complaint and order, without the State, upon the defendant personally, and if he is an infant under the age of fourteen years, also upon the person with whom he is sojourning; or, if the defendant is a corporation, upon an officer thereof, specified in section four hundred and thirty-one or four hundred and thirty-two of this act. It must also contain, either a direction that, on or before the day of the first publication, the plaintiff deposit in a specified post-office, one or more sets of copies of the summons, complaint, and order, each contained in a securely closed post-paid wrapper, directed to the defendant, at a place specified in the order; or a statement that the judge, being satisfied, by the affidavits upon which the order was granted, that the plaintiff cannot, with reasonable diligence, ascertain a place or places, where the defendant would probably receive matter transmitted through the post-office, dispenses with the deposit of any papers therein.

L. 1889, ch. 195.

§ 441. [Am'd, 1877.] When publication must be commenced; when service deemed complete. *Am'd L. 1914 ch 346*

The first publication in each newspaper designated in the order, or the service upon the defendant without the State, must be made within three months after the order is granted. For the purpose of reckoning the time within which the defendant must appear or answer, service by publication is complete upon the day of the last publication, pursuant to the order; and service made without the State is complete upon the expiration thereafter of a time equal to that prescribed for publication.

§ 442. [Am'd, 1877.] Papers to be filed; notice to defendant.

Where service is made by publication, the summons, complaint, and order, and the papers upon which the order was made, must be filed with the clerk, on or before the day of the first publication; and a notice, subscribed by the plaintiff's attorney, and directed only to the defendant or defendants to be thus served, substantially in the following form, the blanks being properly filled up, must be subjoined to, and published with the summons:

See post, §§ 1541, 1774.

"To : The foregoing summons is served upon you, by publication, pursuant to an order of " (naming the judge and his official title), "dated the day of 18 , and filed with the complaint, in the office of the clerk of at " *Am'd L. 1914 ch 346*

§ 443. [Am'd, 1877.] Id.: when service is made without the State. *Am'd L. 1914 ch 346*

Where service is made without the State, the papers specified in the last section must be previously filed; and a notice must be served with the summons, in all respects like the notice required by the last section, except that the words, "without the State of New York", must be substituted for the words, "by publication". *443-15 1916 ch 439*

§ 444. Proof of service.

Proof of the publication of the summons and notice must be made by the affidavit of the printer or publisher, or his foreman or principal clerk. Proof of deposit in the post-office, or of delivery, of a paper required to be deposited or delivered by the provisions of this article, must be made by the affidavit of the person, who deposited or delivered it.

Co. Proc., § 138, subd. 3.

§ 445. [Am'd, 1877.] Defendant when allowed to defend. *Am'd L. 1914 ch 346*

Where the summons is served, pursuant to an order made as prescribed in this article, and the defendant so served does not appear; he or his representative, on application and sufficient cause shown, at any time before final judgment, must be allowed to defend the action; and, except in an action for divorce, or wherein the contrary is expressly prescribed by law, the defendant, or his representative, must, in like manner, upon good cause shown, and upon just terms, be allowed to defend, after final judgment, at any time within one year after personal ser-

vice of written notice thereof; or, if such a notice has not been served, within seven years after the filing of the judgment-roll. If the defence is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled, as the court directs; but the title to property, sold, to a purchaser in good faith, pursuant to a direction contained in the judgment, or by virtue of an execution issued upon the same, shall not be affected thereby.

Id., part of § 135. See § 1557, subd. 1.

TITLE II.

Parties to an action.

Article 1. Parties generally.

1. Parties severally liable.
2. Parties prosecuting and defending as poor persons.
4. Infant plaintiffs and defendants.

ARTICLE FIRST.

Parties generally.

Sec. 446. Who may be joined as plaintiffs.

447. Id.; as defendants.
448. Parties united in interest, when to be joined; when one or more may sue or defend for the whole.
449. Party in interest to sue. Trustee, etc., may sue alone.
450. When married woman is a party.
451. When defendant or his name is unknown.
452. When court to decide controversy or to order other parties to be brought in.
453. Supplemental summons.

§ 446. Who may be joined as plaintiffs.

All persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly prescribed in this act.

Ca. Proc., § 117.

§ 447. [Am'd, 1901, 1911.] Idem; as defendants.

Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party defendant for the complete determination or settlement of a question involved therein, except as otherwise expressly prescribed in this act. In any action brought affecting real estate upon which the people of the state of New York have or claim to have a lien under the transfer tax act, the said people of the state of New York may be made a party defendant in the same manner as a private person, but where the people of the state of New York are made a party defendant, as herein provided, the complaint shall set forth, in addition to the matters required to be set forth by the code of civil procedure, the name or names of the decedent or decedents against whose estate there is an unpaid transfer tax, the place of residence of decedent at the time of death, the heirs at law and next of kin of decedent and if decedent left none that fact shall be stated, whether decedent died testate or intestate, and whether the estate of decedent has been administered, and if so where; and if not administered, such facts shall be stated; and also that the people of the state of New York are made a party defendant for no other reason than the lien of said transfer tax. Upon failure to state such facts, the complaint shall be dismissed as to the people of the state of New York. In such a case the summons must be served on the attorney-general, who may appear in behalf of the people.

Id., part of § 118; L. 1901, ch. 609; L. 1911, ch. 24, in effect Sept. 1, 1911.

§ 448. Parties united in interest, when to be joined; when one or more may sue or defend for the whole.*

Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants, except as otherwise

* See § 19.9, post.

expressly prescribed in this act. But if the consent of any one, who ought to be joined as a plaintiff, cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint. And where the question is one of a common or general interest of many persons; or where the persons, who might be made parties, are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Id., § 119, am'd.

§ 449. [Am'd, 1877.] Party in interest to sue. Trustee, etc., may sue alone.

Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A person, with whom or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.

Id., part of § 111, and all of § 113.

§ 450. [Am'd, 1877, 1879, 1890, 1909.] When married woman is a party.

In an action or special proceeding a married woman appears, prosecutes or defends alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate or character of his wife. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate or character of another on account of the wrongful acts of his wife committed without his instigation.

L. 1890, ch. 248. Am'd by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 19. See Consolidated Laws, tit. Domestic Relations Law, § 51. See note 41 of notes of Board of Statutory Consolidation at end of code.

§ 451. [Am'd, 1879.] When defendant or his name is unknown.

Where the plaintiff is ignorant of the name or part of the name of a defendant, he may designate that defendant, in the summons; and in any other process or proceeding in the action, by a fictitious name, or by as much of his name as is known, adding a description, identifying the person intended. Where the plaintiff demands judgment against an unknown person, he may designate that person as unknown, adding a description, tending to identify him. In either case the person intended is thereupon regarded as a defendant in the action, and as sufficiently described therein, for all purposes including service of the summons, as prescribed in article second of the last title. When the name, or the remainder of the name, or the person, becomes known, an order must be made by the court, upon such notice and such terms as it prescribes, that the proceedings already taken be deemed amended, by the insertion of the true name, in place of the fictitious name or part of name, or the designa-

tion as an unknown person; and that all subsequent proceedings be taken under the true name.

Substitute for Co. Proc., § 175, and portion of § 135.

§ 452. [Am'd, 1901.] When court to decide controversy, or to order other parties to be brought in.

The court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in. And where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment.

Co. Proc., part of § 122, am'd; L. 1901, ch. 512. In effect Sept. 1, 1901.

§ 453. [Am'd, 1877.] Supplemental summons.

Where the court directs a new defendant to be brought in, and the order is not made upon his own application, a supplemental summons must be issued, directed to him, and in the same form as an original summons; except that, in the body thereof, it must require the defendant to answer the original or the amended complaint, and the supplemental complaint, or either of them as the case requires. And each provision of this chapter, relating to personal service, or a substitute for personal service of an original summons, applies to such a supplemental summons.

ARTICLE SECOND.

Parties severally liable.

Sec. 454. When persons liable for the same demand may be sued together.

455. Defendant so sued may apply for any relief.

456. Proceedings in action against defendants severally liable.

457. Application of this article to defendants jointly liable.

§ 454. [Am'd, 1877.] When persons liable for the same demand may be sued together.

Two or more persons, severally liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon the instrument, or by a party thereto to recover against other parties liable over to him; may, all or any of them, be included as defendants in the same action, at the option of the plaintiff.

Co. Proc., § 120. See § 1204, post.

§ 455. Defendant so sued may apply for any relief.

The joinder of a person, as defendant in an action, with another person, as prescribed in the last section, does not affect his right to any order or other relief, to which he would have been entitled, if he had been separately sued in the action.

L. 1841, ch. 282, § 1 (4 Edm. 457).

§ 456. Proceedings in action against defendants severally liable.

Where a summons, issued against two or more defendants, alleged to be severally liable, is served upon some, but not upon all of them, the plaintiff may proceed against those upon whom it is served, as if they were the only defendants named therein. Where it is served upon all of them, the plaintiff may take judgment against one or more of them, where he would be entitled to judgment, if the action was against him or them alone. Where judgment is so taken, the clerk must, upon the plaintiff's application, enter an order, directing that the action be severed, and that the plaintiff may proceed against the other defendants. In any subsequent proceeding, the plaintiff may use, together with a certified copy of such an order, a copy of a paper constituting a part of the judgment-roll, with like effect as if it was the original.

Substitute for Co. Proc., § 136, subd. 2 and 3.

§ 457. Application of this article to defendants jointly liable.

The last three sections do not affect a defence or other objection of a defendant, growing out of the failure to join in the action two or more persons jointly liable; and, as regards the other parties to the action, persons jointly liable are regarded as one party, for every purpose contemplated by those sections.

See L. 1832, ch. 276, § 2 (4 Edm. 453). and L. 1835, ch. 211, § 1 (4 Edm. 455).

ARTICLE THIRD.

Parties prosecuting and defending as poor persons.

Sec. 458. Who may petition for leave to prosecute as a poor person.

459. Contents of petition.

460. When and how leave granted.

461. Not liable for costs and fees.

462. When leave may be annulled.

463. When defendant may petition to defend as a poor person.

464. Contents of petition.

465. Proceedings thereon.

466. Appeal, when party prosecutes or defends as a poor person.

467. Costs in favor of petitioner.

§ 458. [Am'd, 1891.] Who may petition for leave to prosecute as a poor person.

A poor person, whether an adult or infant, not being of ability to sue, who alleges that he has a cause of action against another person, may apply by petition to the court in which the action is pending, or in which it is intended to be brought, for leave to prosecute as a poor person, and to have an attorney and counsel assigned to conduct his action.

2 R. S. 444, § 1 (2 Edm. 463); L. 1891, ch. 170.

§ 459. [Am'd, 1891.] Contents of petition.

The petition must state:

1. The nature of the action brought or intended to be brought.

2. That the applicant is not worth one hundred dollars besides the wearing apparel and furniture necessary for himself and his family, and the subject-matter of the action.

It must be verified by the applicant's affidavit, unless the applicant is an infant under the age of fourteen years, and in that case by the affidavit of his guardian appointed in said action, and supported by a certificate of a counselor at law to the effect that he has examined the case and is of the opinion that the applicant has a good cause of action.

Id., § 2; L. 1891, ch. 170. See § 460.

§ 460. When and how leave granted.

The court to which the petition is presented, if satisfied of the truth of the facts alleged, and that the applicant has a good cause of action, may, by order, admit him to prosecute as a poor person, and assign to him an attorney and counsel to prosecute his action, who must act therein without compensation.

Id., § 3.

§ 461. Not liable for costs and fees.

A person so admitted, may prosecute his action, without paying fees to any officer; and he shall not be prevented from prosecuting the same, by reason of his being liable for the costs of a former action, brought by him against the same defendant. If judgment is rendered against him, or his complaint is dismissed, costs shall not be awarded against him.

2 R. S. 445, § 4.

§ 462. When leave may be annulled.

If the person so admitted is guilty of improper conduct in the prosecution of his action, or of wilful or unnecessary delay, the court may, in its discretion, annul the order admitting him to prosecute as a poor person; and he shall thereafter be deprived of all the privileges conferred thereby.

Id., § 5.

§ 463. When defendant may petition to defend as a poor person.

A defendant in an action involving his right, title, or interest, in or to real or personal property, may petition the court, in which the action is pending, for leave to defend the action as a poor person, and to have an attorney and counsel assigned to conduct his defence.

§ 464. Contents of petition.

The petition must contain the same matters, respecting the ability of the petitioner, required to be contained in a petition for leave to prosecute as a poor person; and it must be supported by a similar certificate, relating to the defence.

§ 465. Proceedings thereon.

The provisions of this article, relating to the order, to be made upon an application for leave to prosecute as a poor person, and the proceedings subsequent thereto, apply to the order and subsequent proceedings, upon an application for leave to defend as a poor person.

§ 466. Appeal when party prosecutes or defends as a poor person.

An order, made as prescribed in this article, does not authorize the petitioner to take or maintain an appeal, as a poor person; but where an appeal is taken by the adverse party, the order is applicable, in favor of the petitioner, as respondent in the appeal.

§ 467. Costs in favor of petitioner.

Where costs are awarded in favor of a person, who had been admitted to prosecute or defend as a poor person, as prescribed in this article, they must be paid over to his attorney, when collected from the adverse party, and distributed among the attorney and counsel assigned to the poor person, as the court directs.

ARTICLE FOURTH.

Infant plaintiffs and defendants.

Sec. 468. Right of infant to bring action.

469. Guardian for infant plaintiff must be appointed.

470. Application therefor.

471. Application for appointment of guardian for infant defendant.

472. Guardian, how appointed. Clerk, when to act.

473. Guardian for absent infant defendant.

474. Guardian not to receive property until security given.

475. Security.

476. Last two sections not to apply to general guardian.

477. Liability of defendant's guardian for costs.

§ 468. Right of infant to bring action.

Where an infant has a right of action, he is entitled to maintain an action thereon; and the same shall not be deferred or delayed, on account of his infancy.

§ 469. [Am'd, 1891.] Guardian for infant plaintiff must be appointed.

Before a summons is issued, in the name of an infant plaintiff, a competent and responsible person must be appointed, to appear as his guardian for the purpose of the action, who shall be responsible for the costs thereof, except where such infant prosecutes as a poor person as provided for under section 459 of this act, in which case security for costs shall not be required.

In effect September 1, 1891; not applicable to actions or proceedings commenced prior to such date; L. 1891, ch. 170. See § 3249.

§ 470. Application therefor.

The guardian must be appointed upon the application of the infant, if he is of the age of fourteen years, or upwards; or, if he is under that age, upon the application of his general or testamentary guardian, if he has one, or of a relative or friend. If the application is made by a relative or friend, notice thereof must be given to his general or testamentary guardian, if he has one; or, if he has none, to the person with whom the infant resides.

Co. Proc., § 116, subd. 1.

§ 471. [Am'd, 1879.] Application for appointment of guardian for infant defendant.

An infant defendant must also appear by guardian, who must be a competent and responsible person, appointed upon the application of the infant, if he is of the age of fourteen years, or upwards, and applies within twenty days after personal service of the summons, or after service thereof is complete, as prescribed in section 441 of this act; or if he is under that age, or neglects so to apply, upon the application of any other party to the action, or of a relative or friend of the infant. Where the application is made by a person other than the infant, notice thereof must be given to his general or testamentary guardian, if he has one within the State; or, if he has none, to the infant himself, if he is of the age of fourteen years, or upwards, and within the State; or, if he is under that age, and within the State, to the person with whom he resides.

§ 472. [Am'd, 1879.] Guardian, how appointed. Clerk, when to act.

The court in which the action is brought, or a judge thereof, or if the action is brought in the supreme court, the county judge

of the county where the action is triable, may appoint a guardian ad litem for an infant, either plaintiff or defendant, as prescribed in this article. The clerk must act in that capacity for an infant defendant where the court or the judge appoints him. No person, other than the clerk, shall be appointed a guardian ad litem, unless his written consent, duly acknowledged, is produced to the court or judge making the appointment.

Predicated on Co. Proc., § 115; 2 R. S. 446, § 4. See § 1535.

§ 473. [Am'd, 1889.] Guardian for absent infant defendant.

Where an infant defendant resides out of the State or resides within the State, and is temporarily absent therefrom, the court may, in its discretion, make an order designating a person to be his guardian ad litem, unless he, or some one in his behalf, procures such a guardian to be appointed, as prescribed in the last two sections, within a specified time after service of a copy of the order. The court must give special directions in the order, respecting the service thereof, which may be upon the infant. The summons may be served by delivering a copy to the guardian so appointed, with like effect as where a summons is served without the State upon an adult defendant, pursuant to an order for that purpose, granted as prescribed in section four hundred and thirty-eight of this act; except that the time to appear or answer is twenty days after the service of the summons, exclusive of the day of service.

Based on Co. Proc., part of § 116; L. 1889, ch. 494.

§ 474. Guardian not to receive property until security given.

Except in a case where it is otherwise specially prescribed by law, a guardian, appointed for an infant, as prescribed in this article, shall not be permitted to receive money or property of the infant, other than costs and expenses allowed to the guardian by the court, until he has given sufficient security, approved by a judge of the court, or a county judge, to account for and apply the same, under the direction of the court.

Co. Proc., § 420, am'd.

§ 475. Security.

The security must be a bond to the infant, in such penalty as the judge directs, not less than twice the sum, or the value of the property, to be received, executed by the guardian and at least two sureties, approved by the judge, and filed in the office of the clerk. The infant, or any other party to the action, may afterwards apply for an order, directing a new bond to be given, with an increased penalty; or the court may so direct, of its own motion.

2 R. S. 446, § 5 (2 Edm. 465).

§ 476. Last two sections not to apply to general guardian.

The last two sections do not apply to the general guardian of the infant, who has been appointed his guardian ad litem, as prescribed in this article; but the court may, at any time, require the general guardian to give additional security for the faithful discharge of his trust, before receiving money or property of the infant, under a judgment or order in the action.

§ 477. Liability of defendant's guardian for costs.

A person appointed guardian, as prescribed in this article, for an infant defendant in an action, is not liable for the costs of the action, unless specially charged therewith by the order of the court, for personal misconduct.

3 R. S. 447, § 12 (3 Edm. 400).

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at 211 L. 1916-cl. 440

CHAPTER VI.

Pleadings in Courts of Record, including Counter-claims.

TITLE I.—The Consecutive Pleadings in an Action.

TITLE II.—Provisions Generally Applicable to Pleadings.

TITLE I.

The consecutive pleadings in an action.

- Article 1. Complaint.
2. Demurrer.
3. Answer.
4. Reply.

ARTICLE FIRST.

Complaint.

- Sec. 478. First pleading to be complaint.
479. Copy complaint, when to be served.
480. Consequence of failure.
481. Complaint; what to contain.
482. When interlocutory and final judgment may be demanded.
483. Causes of action to be separately stated.
484. What causes of action may be joined in the same complaint.
485-486. [Stricken out.]

§ 478. First pleading to be complaint.

The first pleading, on the part of the plaintiff, is the complaint.
Co. Proc., § 141.

§ 479. [Am'd, 1877.] Copy complaint, when to be served.

If a copy of the complaint is not delivered to a defendant, at the time of the delivery of a copy of the summons to him, either within or without the State, his attorney may, at any time within twenty days after the service of the summons is complete, serve upon the plaintiff's attorney a written demand of a copy of the complaint, which must be served within twenty days thereafter. The demand may be incorporated into the notice of appearance. But where the same attorney appears for two or more defendants, only one copy of the complaint need be served upon him; and if, after service of a copy of the complaint upon him, as attorney for a defendant, he appears for another defendant, the last defendant must answer the complaint within twenty days after he appears in the action.

Substitute for part of § 180, Co. Proc. See post, § 824. See §§ 419, 422.

§ 480. Consequence of failure.

If the plaintiff's attorney fails to serve a copy of the complaint, as prescribed in the last section, the defendant may apply to the court for a dismissal of the complaint.

§ 481. [Am'd, 1904, 1905.] Complaint; what to contain.

The complaint must contain:

1. The title of the action, specifying the name of the court in which it is brought; if it is brought in the supreme court, the

name of the county, which the plaintiff designates as the place of trial; and the names of all the parties to the action, plaintiff and defendant.

2. [Am'd, 1904, 1905.] A plain and concise statement of the facts constituting each cause of action without unnecessary repetition.

3. A demand of the judgment to which the plaintiff supposes himself entitled.

Co. Proc., § 142, am'd; L. 1904, ch. 500; L. 1905, ch. 431. In effect May 16, 1905.

§ 482. [Am'd, 1877.] When interlocutory and final judgment may be demanded.

In an action triable by the court, without a jury, the plaintiff may, in a proper case, demand an interlocutory judgment, and also a final judgment, distinguishing them clearly.

§ 483. Causes of action to be separately stated.

Where the complaint sets forth two or more causes of action, the statement of the facts constituting each cause of action must be separate and numbered.

From Co. Proc., § 167, am'd.

§ 484. [Am'd, 1877, 1900, 1906, 1907, 1909.] What causes of action may be joined in the same complaint.

The plaintiff may unite in the same complaint, two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows:

1. Upon contract, express or implied.
2. For personal injuries, except libel, slander, criminal conversation or seduction.
3. For libel or slander.
4. For injuries to real property.
5. Real property, in ejectment, with or without damages for the withholding thereof. (See § 1496.)
6. For injuries to personal property.
7. Chattels, with or without damages for the taking or detention thereof. (See § 1689.)
8. Upon claims against a trustee, by virtue of a contract, or by operation of law.
9. Upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section. (See § 1815.)
10. For penalties incurred under the forest, fish and game law.
11. For penalties incurred under the agricultural law.
12. For penalties incurred under the public health law.

But it must appear, upon the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint, that they do not require different places of trial.

Substitute for part of § 167. Co. Proc. L. 1900, ch. 500; L. 1906, ch. 29; L. 1907, ch. 26; L. 1909, ch. 65. See note 42 of notes of Board of Statutory Consolidation at end of code.

§ 485. [Stricken out in 1877.]

§ 486. [Stricken out in 1877.]

ARTICLE SECOND.

Demurrer.

Sec. 487. Defendant must demur or answer.

488. When he may demur.

489. [Stricken out.]

490. Demurrer to complaint must specify grounds of objection.

491. [Stricken out.]

492. Demurrer to all or part of the complaint; demurrer to part, and answer to part.

493. Defendant may demur to reply.

494. When plaintiff may demur to answer.

495. Demurrer to counterclaim, when defendant demands an affirmative judgment.

496. Demurrer to counterclaim must specify grounds of objection.

497. Amendments in certain cases after decision of demurrer.

498. When objection may be taken by answer.

499. Objection; when deemed waived.

§ 487. Defendant must demur or answer.

The only pleading, on the part of the defendant, is either a demurrer or an answer.

Co. Proc., part of § 143.

§ 488. [Am'd, 1877.] When he may demur.

The defendant may demur to the complaint, where one or more of the following objections thereto appear upon the face thereof:

1. That the court has not jurisdiction of the person of the defendant.

2. That the court has not jurisdiction of the subject of the action.

3. That the plaintiff has not legal capacity to sue.

4. That there is another action pending between the same parties, for the same cause.

5. That there is a misjoinder of parties plaintiff.

6. That there is a defect of parties, plaintiff or defendant.

7. That causes of action have been improperly united.

8. That the complaint does not state facts sufficient to constitute a cause of action.

Id., § 144, am'd by adding subd. 5.

§ 489. [Stricken out in 1877.]

§ 490. [Am'd, 1877.] Demurrer to complaint must specify grounds of objection.

The demurrer must distinctly specify the objections to the complaint; otherwise it may be disregarded. An objection, taken under subdivision first, second, fourth, or eighth of section four hundred and eighty-eight of this act, may be stated in the language of the subdivision; an objection, taken under either of the other subdivisions, must point out specifically the particular defect relied upon.

First sentence Co. Proc., part of § 145.

Am'd L. 1914-186
§ 491. [Stricken out in 1877.]

§ 492. Demurrer to all or part of the complaint; demurrer to part, and answer to part.

The defendant may demur to the whole complaint, or to one or more separate causes of action, stated therein. In the latter case, he may answer the causes of action not demurred to.

Co. Proc., § 145, 2d sentence, consolidated with id., § 151.

§ 493. Defendant may demur to reply.

The defendant may also demur to the reply, or to a separate traverse to, or avoidance of, a defence or counterclaim, contained in the reply, on the ground that it is insufficient in law, upon the face thereof.

Substitute for Co. Proc., § 155.

§ 494. When plaintiff may demur to answer.

The plaintiff may demur to a counterclaim or a defence consisting of new matter, contained in the answer, on the ground that it is insufficient in law, upon the face thereof.

Id., part of § 153.

§ 495. [Am'd, 1877.] Demurrer to counterclaim, when defendant demands an affirmative judgment.

The plaintiff may also demur to a counterclaim, upon which the defendant demands an affirmative judgment, where one or more of the following objections thereto, appear on the face of the counterclaim:

1. That the court has not jurisdiction of the subject thereof.
2. That the defendant has not legal capacity to recover upon the same.
3. That there is another action pending between the same parties, for the same cause.
4. That the counterclaim is not of the character specified in section 501 of this act.
5. That the counterclaim does not state facts sufficient to constitute a cause of action.

§ 496. [Am'd, 1877.] Demurrer to counterclaim must specify grounds of objection.

A demurrer, taken under the last section, must distinctly specify the objections to the counterclaim; otherwise it may be disregarded. The mode of specifying the objections is the same, as where a demurrer is taken to a complaint.

§ 497. [Am'd, 1877.] Amendments in certain cases after decision of demurrer.

Upon the decision of a demurrer, either at a general or special term, or in the court of appeals, the court may, in its discretion, allow the party in fault to plead anew or amend, upon such terms as are just. If a demurrer to a complaint is allowed, because two or more causes of action have been improperly united, the court may, in its discretion, and upon such terms as are just, direct that the action be divided into as many actions, as are necessary for the proper determination of the causes of action therein stated.

Co. Proc., part of § 172.

§ 498. [Am'd, 1877.] When objection may be taken by answer.

Where any of the matters enumerated in section four hundred and eighty-eight of this act as grounds of demurrer, do not appear on the face of the complaint, the objection may be taken by answer.

Id., § 167.

§ 499. Objection; when deemed waived.

If such an objection is not taken, either by demurrer or answer, the defendant is deemed to have waived it; except the objection to the jurisdiction of the court, or the objection that the complaint does not state facts sufficient to constitute a cause of action.

Co. Proc., § 148.

ARTICLE THIRD.

Answer.

Sec. 500. Answer; what to contain.

501. Counterclaim defined.

502. Rules respecting the allowance of counterclaims.

503. Judgment, when demand and counterclaim are equal or unequal.

504. Id.; for affirmative relief.

505. Counterclaim, when defendant is sued in a representative capacity.

506. Id.; when plaintiff is an executor or administrator.

507. Defendant may interpose several defences or counterclaims; rules relating thereto.

508. Partial defences.

509. When defendant to demand affirmative judgment.

510. [Stricken out.]

511. When pleadings admit part of plaintiff's claim to be just, action may be severed, etc.

512. Judgment, where counterclaim only is interposed for less than plaintiff's claim.

513. Dilatory defences to be verified.

§ 500. [Am'd, 1877, 1904, 1905.] Answer; what to contain.

The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. [Am'd, 1904, 1905.] A statement of any new matter constituting a defense or counter-claim, in ordinary and concise language without repetition.

Co. Proc., § 149. See § 522. L. 1904, ch. 500; L. 1905, ch. 431. In effect May 16, 1906.

§ 501. [Am'd, 1877.] Counterclaim defined.

The counterclaim, specified in the last section, must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:

1. A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract, existing at the commencement of the action.

Substitute for first part of Co. Proc., § 150.

§ 502. [Am'd, 1877.] Rules respecting the allowance of counterclaims.

But the counterclaim, specified in subdivision second of the last section, is subject to the following rules:

1. If the action is founded upon a contract, which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand, existing against the party thereto, or an assignee of the contract, at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of the assignment, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him.

2. If the action is upon a negotiable promissory note or bill of exchange, which has been assigned to the plaintiff after it became due, a demand, existing against a person who assigned or

transferred it, after it became due, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the assignor, while the note or bill belonged to him.

3. If the plaintiff is a trustee for another, or if the action is in the name of a plaintiff, who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim; but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counterclaim, if it might have been so allowed in an action brought by the person beneficially interested.

Founded upon 2 R. S. 354, § 18, subds. 8, 9 and 10, and part of subd. 7.

§ 503. [Am'd, 1877.] Judgment, when demand and counterclaim are equal or unequal.

Where a counterclaim is established, which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff. Where part of the excess is not due from the plaintiff, the judgment does not prejudice the defendant's right to recover, from another person, so much thereof as the judgment does not cancel.

Id., §§ 21, 22 (2 Edm. 387).

§ 504. Id.; for affirmative relief.

In a case not specified in the last section, where a counterclaim is established, which entitles the defendant to an affirmative judgment, demanded in the answer, judgment must be rendered for the defendant accordingly.

Co. Proc., last clause of § 263.

§ 505. Counterclaim, when defendant is sued in a representative capacity.

In an action against an executor or an administrator, or other person sued in a representative capacity, the defendant may set forth, as a counterclaim, a demand belonging to the decedent, or other person whom he represents, where the person so represented would have been entitled to set forth the same, in an action against him.

2 R. S. 355, § 25.

§ 506. Id.; when plaintiff is an executor or administrator.

In an action brought by an executor or administrator, in his representative capacity, a demand against the decedent, belonging, at the time of his death, to the defendant, may be set forth by the defendant as a counterclaim, as if the action had been brought by the decedent in his life-time; and, if a balance is found to be due to the defendant, judgment must be rendered therefor against the plaintiff, in his representative capacity. Execution can be issued upon such a judgment, only in a case where it could be issued upon a judgment, in an action against the executor or administrator.

Id., §§ 23 and 24. See § 1825.

§ 507. [Am'd, 1879.] Defendant may interpose several defences or counterclaims; rules relating thereto.

A defendant may set forth, in his answer, as many defences or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defence or counterclaim must be separately stated, and numbered. Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer.

Co. Proc., part of § 150, am'd.

§ 508. [Am'd, 1877.] Partial defences.

A partial defence may be set forth, as prescribed in the last section; but it must be expressly stated to be a partial defence to the entire complaint, or to one or more separate causes of action, therein set forth. Upon a demurrer thereto, the question is, whether it is sufficient for that purpose. Matter tending only to mitigate or reduce damages, in an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, is a partial defence, within the meaning of this section.

See post, § 536.

§ 509. [Am'd, 1877.] When defendant to demand affirmative judgment.

Where the defendant deems himself entitled to an affirmative judgment against the plaintiff, by reason of a counterclaim interposed by him, he must demand the judgment in his answer.

§ 510. [Stricken out in 1877.]

§ 511. [Am'd, 1879.] When pleadings admit part of plaintiff's claim to be just, action may be severed, etc.

Where the answer of the defendant⁺, expressly or by not denying, admits a part of the plaintiff's claim to be just, the court, upon the plaintiff's motion, may, in its discretion, order that the action be severed; that a judgment be entered for the plaintiff for the part so admitted; and if the plaintiff so elects, that the action be continued, with like effect, as to the subsequent proceedings, as if it had been originally brought for the remainder of the claim. The order must prescribe the time and manner of the plaintiff's election. If the plaintiff elects to continue the action, his right to costs upon the judgment is the same, as if it was taken in an action brought for only that part of the claim. If the plaintiff does not elect to continue the action, costs must be awarded, as upon final judgment in any other case.

Substitute for concluding paragraph of § 244, Co. Proc.

§ 512. Judgment, where counterclaim only is interposed for less than plaintiff's claim.

In an action upon contract, where the complaint demands judgment for a sum of money only, if the defendant, by his answer, does not deny the plaintiff's claim, but sets up a counterclaim amounting to less than the plaintiff's claim, the plaintiff, upon filing with the clerk an admission of the counterclaim, may take judgment for the excess, as upon a default for want of an

answer. The admission must be made a part of the judgment-roll.

Co. Proc., part of § 246, am'd.

§ 513. Dilatory defences to be verified.

A defence which does not involve the merits of the action, shall not be pleaded, unless it is verified as prescribed in title second of this chapter.

From 2 R. S. 352, § 7 (2 Edm. 384).

ARTICLE FOURTH.

Reply.

Sec. 514. Reply; what to contain.

515. Judgment upon failure to reply.

516. Cases where the court may require a reply.

517. Plaintiff may set forth several avoidances in reply.

§ 514. [Am'd, 1877, 1904, 1905.] Reply; what to contain.

Where the answer contains a counterclaim, the plaintiff, if he does not demur, may reply to the counterclaim. The reply must contain a general or specific denial of each material allegation of the counterclaim controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief; and it may set forth in ordinary and concise language, without repetition, new matter not inconsistent with the complaint, constituting a defense to the counterclaim.

Co. Proc., part of § 153. See § 522. L. 1904, ch. 500; L. 1905, ch. 481. In effect May 16, 1905.

§ 515. Judgment upon failure to reply.

If the plaintiff fails to reply or demur to the counterclaim, the defendant may apply, upon notice, for judgment thereupon; and, if the case requires it, a reference may be ordered, or a writ of inquiry may be issued, as prescribed in chapter eleventh of this act, where the plaintiff applies for judgment.

Id., § 154, am'd. See post, § 1219.

§ 516. Cases where the court may require a reply.

Where an answer contains new matter, constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter. In that case, the reply, and the proceedings upon failure to reply, are subject to the same rules as in the case of a counterclaim.

Id., concluding paragraph of § 153.

§ 517. [Am'd, 1877.] Plaintiff may set forth several avoidances in reply.

A reply may contain two or more distinct avoidances of the same defence or counterclaim; but they must be separately stated and numbered.

TITLE II.

Provisions generally applicable to pleadings.

Sec. 518. Application and effect of this chapter.

519. Pleadings to be liberally construed.

520. Pleadings to be subscribed; within what time to be served.

521. When defendant to serve copy answer on co-defendant.

522. Allegation not denied; when to be deemed true.

523. When pleading must be verified; and when verification may be omitted.

524. Form and construction of certain allegations and denials in verified pleading.

525. Verification; how and by whom made.

526. Form of affidavit of verification.

527. When verification may be confined to a counterclaim.

528. Remedy for defective verification, or want of verification.

529. When defendant not excused from verifying answer to charge of fraud.

530. Private statute; how pleaded.

531. Account; how pleaded. Bill of particulars.

532. Judgment; how pleaded.

533. Conditions precedent; how pleaded.

534. Instrument for payment of money; how pleaded.

535. Pleadings in libel and slander.

536. Pleading mitigating circumstances, in action for a wrong.

537. Frivolous pleadings; how disposed of.

538. Sham defences to be stricken out.

539. Material variances; how provided for.

540. Immaterial variances; how provided for.

541. What to be deemed a failure of proof.

542. Amendments of course.

543. Amended pleading to be served; answer thereto.

544. Supplemental pleadings.

545. Motion to strike out irrelevant, etc., matter.

546. Indefinite or uncertain allegations.

547. Motions for judgment upon pleadings.

§ 518. Application and effect of this chapter.

This chapter prescribes the form of pleadings in an action, and the rules by which the sufficiency thereof is determined, except where special provision is otherwise made by law.

Substitute for Co. Proc., § 140.

§ 519. Pleadings to be liberally construed.

The allegations of a pleading must be liberally construed, with a view to substantial justice between the parties.

Co. Proc., § 150.

§ 520. Pleadings to be subscribed; within what time to be served.

A pleading must be subscribed by the attorney for the party. A copy of each pleading, subsequent to the complaint, must be served on the attorney for the adverse party, within twenty days after service of a copy of the preceding pleading.

Part of Co. Proc., § 156. See ante, § 55.

§ 521. [Am'd, 1884.] When defendant to serve copy answer on co-defendant.

Where the judgment may determine the ultimate rights of two or more defendants, as between themselves, a defendant who requires such a determination must demand it in his answer, and must at least twenty days before the trial serve a copy of his answer upon the attorney for each of the defendants to be affected by the determination, and personally, or as the court or judge may direct, upon defendants, so to be affected who have

not duly appeared therein by attorney. The controversy between the defendants shall not delay a judgment, to which the plaintiff is entitled, unless the court otherwise directs.

See § 1204, post.

§ 522. Allegation not denied; when to be deemed true.

Each material allegation of the complaint, not controverted by the answer, and each material allegation of new matter in the answer, not controverted by the reply, where a reply is required, must, for the purposes of the action, be taken as true. But an allegation of new matter in the answer, to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party, by traverse or avoidance, as the case requires.

Co. Proc., § 168; L. 1884, ch. 400. See §§ 500, 514.

§ 523. When pleading must be verified; and when verification may be omitted.

Where a pleading is verified, each subsequent pleading, except a demurrer, or the general answer of an infant by his guardian ad litem, must also be verified. But the verification may be omitted, in a case where it is not otherwise specially prescribed by law, where the party pleading would be privileged from testifying, as a witness, concerning an allegation or denial contained in the pleading. A pleading cannot be used, in a criminal prosecution against the party, as proof of a fact admitted or alleged therein.

Id., part of § 156, am'd. See §§ 1757, subd. 1; 1938.

§ 524. Form and construction of certain allegations and denials in verified pleading.

The allegations or denials in a verified pleading must, in form, be stated to be made by the party pleading. Unless they are therein stated to be made upon the information and belief of the party, they must be regarded, for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading. An allegation that the party has not sufficient knowledge or information, to form a belief, with respect to a matter, must, for the same purposes, be regarded as an allegation that the person verifying the pleading has not such knowledge or information.

§ 525. Verification; how and by whom made.

The verification must be made by the affidavit of the party, or, if there are two or more parties united in interest, and pleading together, by at least one of them, who is acquainted with the facts, except as follows:

1. Where the party is a domestic corporation, the verification must be made by an officer thereof.

2. Where the people of the State are, or a public officer, in their behalf, is the party, the verification may be made by any person acquainted with the facts.

3. [Am'd, 1879.] Where the party is a foreign corporation; or where the party is not within the county where the attorney resides, or if the latter is not a resident of the State, the county where he has his office, and capable of making the affidavit; or if there are two or more parties united in interest, and pleading together, where neither of them, acquainted with the facts is within that county, and capable of making the affidavit; or

where the action or defence is founded upon a written instrument for the payment of money only, which is in the possession of the agent or the attorney; or where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney; in either case the verification may be made by the agent of or the attorney for the party.

From Co. Proc., § 157, am'd.

§ 526. Form of affidavit of verification.

The affidavit of verification must be to the effect, that the pleading is true to the knowledge of the deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. Where it is made by a person, other than the party, he must set forth, in the affidavit, the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why it is not made by the party.

Id., § 157.

§ 527. When verification may be confined to a counterclaim.

Where the complaint is not verified, and the answer sets up a counterclaim, and also a defence by way of denial or avoidance, the affidavit of verification may be made to refer exclusively to the counterclaim. In that case, the last three sections are applicable to the affidavit and the counterclaim, as if the latter was a separate pleading.

§ 528. Remedy for defective verification, or want of verification.

The remedy for a defective verification of a pleading is to treat the same as an unverified pleading. Where the copy of a pleading is served without a copy of a sufficient verification, in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice, with due diligence, to the attorney of the adverse party, that he elects so to do.

§ 529. When defendant not excused from verifying answer to charge of fraud.

A defendant is not excused from verifying his answer to a complaint, charging him with having confessed or suffered a judgment, or executed a conveyance, assignment, or other instrument, or transferred or delivered money, or personal property, with intent to hinder, delay, or defraud his creditors; or with being a party or privy to such a transaction by another person, with like intent towards the creditors of that person; or with any fraud whatever, affecting a right or the property of another.

Substance of 2 R. S. 174, § 41 (2 Edm. 181), and L. 1833, ch. 14, § 1 (4 Edm. 531).

§ 530. [Am'd, 1877.] Private statute; how pleaded.

In pleading a private statute, or a right derived therefrom, it is sufficient to designate the statute by its chapter, year of passage, and title, or in some other manner with convenient certainty, without setting forth any of the contents thereof.

Co. Proc., § 163, am'd.

§ 531. [Am'd, 1904.] Account, how pleaded. Bill of particulars.

It is not necessary for a party to set forth, in a pleading, the items of an account therein alleged; but in that case, he must deliver to the adverse party, within ten days after a written demand thereof, a copy of the account, which, if the pleading is verified, must be verified by his affidavit, to the effect, that he believes it to be true; or, if the facts are within the personal knowledge of the agent or attorney for the party, or the party is not within the county where the attorney resides, or capable of making the affidavit, by the affidavit of the agent or attorney. If he fails so to do, he is precluded from giving evidence of the account. The court, or a judge authorized to make an order in the action, may direct the party to deliver a further account, where the one delivered is defective. Upon application in any case, the court, or a judge authorized to make an order in the action, may, upon notice, direct a bill of the particulars of the claim of either party to be delivered to the adverse party, and in case of default the court shall preclude him from giving evidence of the part or parts of his affirmative allegation of which particulars have not been delivered.

Co. Proc., § 158, am'd; L. 1904, ch. 500. In effect April 29, 1904.

§ 532. Judgment; how pleaded.

In pleading a judgment, or other determination, of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must, on the trial, establish the facts conferring jurisdiction.

Id., § 161.

§ 533. Conditions precedent; how pleaded.

In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state, generally, that he, or the person whom he represents, duly performed all the conditions on his part. If that allegation is controverted, he must, on the trial, establish performance.

Id., part of § 162.

§ 534. Instrument for payment of money; how pleaded.

Where a cause of action, defence, or counterclaim, is founded upon an instrument for the payment of money only, the party may set forth a copy of the instrument, and state that there is due to him thereon, from the adverse party, a specified sum, which he claims. Such an allegation is equivalent to setting forth the instrument, according to its legal effect.

Id., part of § 162, am'd. See § 1917.

§ 535. Pleadings in libel and slander.

It is not necessary, in an action for libel or slander, to state, in the complaint, any extrinsic fact, for the purpose of showing the application to the plaintiff, of the defamatory matter; but the plaintiff may state, generally, that it was published or spoken concerning him; and, if that allegation is controverted, the plaintiff must establish it on the trial. In such an action, the defendant may prove mitigating circumstances, notwithstanding that he has pleaded or attempted to prove a justification.

Id., § 164.

§ 536. [Am'd, 1877.] Pleading mitigating circumstances in action for a wrong.

In an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, the defendant may prove, at the trial, facts, not amounting to a total defence, tending to mitigate or otherwise reduce the plaintiff's damages, if they are set forth in the answer, either with or without one or more defences to the entire cause of action. A defendant, in default for want of an answer, may, upon a reference or inquiry to ascertain the amount of the plaintiff's damages, prove facts of that description.

§ 537. [Am'd, 1879.] Frivolous pleadings; how disposed of.

If a demurrer, answer or reply is frivolous, the party prejudiced thereby, upon a previous notice to the adverse party, of not less than five days, may apply to the court or to a judge of the court for judgment thereupon, and judgment may be given accordingly. If the application is denied, an appeal cannot be taken from the determination, and the denial of the application does not prejudice any of the subsequent proceedings of either party. Costs, as upon a motion, may be awarded upon an application pursuant to this section.

Co. Proc., § 247. See § 547.

§ 538. Sham defences to be stricken out.

A sham answer or a sham defence may be stricken out by the court, upon motion, and upon such terms as the court deems just.

Id., § 152, am'd.

§ 539. Material variances; how provided for.

A variance, between an allegation in a pleading and the proof, is not material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. If a party insists that he has been misled, that fact, and the particulars in which he has been misled, must be proved to the satisfaction of the court. Thereupon the court may, in its discretion, order the pleading to be amended, upon such terms as it deems just.

Id., § 169.

§ 540. Immaterial variances; how provided for.

Where the variance is not material, as prescribed in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

Id., § 170.

§ 541. What to be deemed a failure of proof.

Where, however, the allegation to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance, within the last two sections, but a failure of proof.

Id., § 171.

§ 542. [Am'd, 1897.] Amendments of course.

Within twenty days after a pleading, or the answer, demurrer or reply thereto, is served, or at any time before the period for

answering it expires, the pleading may be once amended by the party, of course, without costs and without prejudice to the proceedings already had. But if it is made to appear to the court that the pleading was amended for the purpose of delay, and that the adverse party will thereby lose the benefit of a term, for which the cause is or may be noticed, the amended pleading may be stricken out, or the pleading may be restored to its original form, and such terms imposed as the court deems just.

Co. Proc., part of § 172, remodelled; L. 1897, ch. 470. In effect Sept. 1, 1897.

§ 543. Amended pleading to be served; answer thereto.

Where a pleading is amended, as prescribed in the last section, a copy thereof must be served upon the attorney for the adverse party. A failure to demur to, or answer the amended pleading, within twenty days thereafter, has the same effect as a like failure to demur to, or answer the original pleading.

Id., part of § 172, and of § 146.

§ 544. [Am'd, 1877.] Supplemental pleadings.

Upon the application of either party, the court may, and, in a proper case, must, upon such terms as are just, permit him to make a supplemental complaint, answer or reply, alleging material facts which occurred after his former pleading, or of which he was ignorant when it was made; including the judgment or decree of a competent court, rendered after the commencement of the action, determining the matters in controversy, or a part thereof. The party may apply for leave to make a supplemental pleading, either in addition to, or in place of, the former pleading. In the former event, if the application is granted, a provisional remedy, or other proceeding already taken in the action, is not affected by the supplemental pleading; but the right of the adverse party to have it vacated or set aside, depends upon the cases presented by the original and supplemental pleadings.

Id., § 177, am'd.

§ 545. [Am'd, 1877.] Motion to strike out irrelevant, etc., matter.

Irrelevant, redundant, or scandalous matter, contained in a pleading, may be stricken out, upon the motion of a person aggrieved thereby. Where scandalous matter is thus stricken out, the attorney whose name is subscribed to the pleading may be directed to pay the costs of the motion, and his failure to pay them may be punished as a contempt of the court.

Id., § 180, am'd. See Rule 22.

§ 546. [Am'd, 1877.] Indefinite or uncertain allegations.

Where one or more denials or allegations, contained in a pleading, are so indefinite or uncertain that the precise meaning or application thereof is not apparent, the court may require the pleading to be made definite and certain by amendment.

Id., part of § 180, am'd. See Rule 22.

§ 547. [Added, 1908.] Motions for judgment upon pleadings.

If either party is entitled to judgment upon the pleadings, the court may upon motion at any time after issue joined give judgment accordingly.

Added, L. 1908, ch. 166. In effect Sept. 1, 1908.

CHAPTER VII.

General Provisional Remedies in an Action.

TITLE I.— Arrest, Pending the Action, and Proceedings Thereupon.

TITLE II.— Injunction.

TITLE III.— Attachment of Property.

TITLE IV.— Other Provisional Remedies; General and Miscellaneous Provisions.

TITLE I.

Arrest, pending the action, and proceedings thereupon.

Article 1. Cases where an order of arrest may be granted, and persons liable to arrest.

2. Granting, executing, and vacating or modifying the order of arrest.
3. Discharging the defendant upon bail or deposit; justification of the bail and disposition of the deposit.
4. Charging and discharging bail.

ARTICLE FIRST.*

Cases where an order of arrest may be granted, and persons liable to arrest.

Sec. 548. No person to be arrested in civil proceedings, without a statutory provision. No exeat abolished.

549. When the right to arrest depends upon the nature of the action.

550. When the right to arrest depends partly upon extrinsic facts.

551. Order, when and where granted; when of right, and when discretionary.

552. Foreign judgment not to affect right to arrest.

553. Women not to be arrested, except, etc.

554. Idiot, lunatic, or infant under fourteen, if arrested, to be discharged.

555. Person sued in a representative capacity, not to be arrested.

§ 548. [Repealed by L. 1909, ch. 14. See Consolidated Laws, tit. Civil Rights Law, § 23.]

§ 549. [Am'd. 1877 and 1886.] **When the right to arrest depends upon the nature of the action.**

A defendant may be arrested in an action, as prescribed in this title, where the action is brought for either of the following causes:

1. To recover a fine or penalty.
2. To recover damages for a personal injury; an injury to property, including the wrongful taking, detention or conversion of personal property; breach of a promise to marry; misconduct or neglect in office, or in a professional employment; fraud; or deceit, or to recover a chattel where it is alleged in the complaint that the chattel or a part thereof has been concealed, removed or disposed of so that it cannot be found or taken by the sheriff and with intent that it should not be so found or taken, or to deprive the plaintiff of the benefit thereof; or to recover for

* See Laws 1886, ch. 672.

money received, or to recover property or damages for the conversion or misapplication of property where it is alleged in the complaint that the money was received or the property was embezzled or fraudulently misapplied by a public officer or by an attorney, solicitor or counselor, or by an officer or agent of a corporation or banking association in the course of his employment, or by a factor, agent, broker, or other person in a fiduciary capacity. Where such allegation is made, the plaintiff cannot recover unless he proves the same on the trial of the action; and a judgment for the defendant is not a bar to the new action to recover the money or chattel.

3. To recover money, funds, credits, or property, held or owned by the State, or held, or owned, officially or otherwise, for or in behalf of a public or governmental interest, by a municipal or other public corporation, board, officer, custodian, agency, or agent, of the State or of a city, county, town, village, or other division, subdivision, department, or portion of the State, which the defendant has, without right, obtained, received, converted, or disposed of, or to recover damages for so obtaining, receiving, paying, converting, or disposing of the same.

4. [Added, 1879; am'd, 1886.] In an action upon contract, express or implied, other than a promise to marry, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability, or that he has since the making of the contract, or in contemplation of making of the same, removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the same with like intent; but where such allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action; and a judgment for the defendant is not a bar to a new action to recover upon the contract only.

Co. Proc., § 170, am'd; L. 1886, ch. 672.

§ 550. [Am'd, 1877 and 1886.] When the right to arrest depends partly upon extrinsic facts.

A defendant may also be arrested in an action wherein the judgment demanded requires the performance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt, where the defendant is not a resident of the State, or, being a resident, is about to depart therefrom, by reason of which non-residence or departure there is danger that a judgment or an order requiring the performance of the act will be rendered ineffectual.

Substitute for part of § 170, Co. Proc.; L. 1886, ch. 672.

§ 551. [Am'd, 1877 and 1886.] Order when and where granted; when of right, and when discretionary.

In a case specified in the last section, the order of arrest can be granted only by the court, is always in its discretion, and may be granted or served, either before or after final judgment, unless an appeal from the judgment is pending, upon which security has been given, sufficient to stay the execution thereof. In either of the cases specified in section five hundred and forty-nine, the order cannot be served after final judgment; but it may be granted, where a proper case therefor is presented, at any time before final judgment.

L. 1886, ch. 672.

§ 552. Foreign judgment not to affect right to arrest.

The recovery of judgment in a court, not of the State, for the same cause of action; or, where the action is founded upon fraud

or deceit, for the price or value of the property obtained thereby; does not affect the right of the plaintiff to arrest the defendant, as prescribed in this title.

§ 553. [Am'd, 1877.] Woman not to be arrested, except, etc.

A woman cannot be arrested, as prescribed in this title, except in a case where the order can be granted only by the court; or where it appears, that the action is to recover damages for a wilful injury to person, character, or property.

Last sentence of Co. Proc., § 179.

§ 554. [Am'd, 1877.] Idiot, lunatic, or infant under fourteen, if arrested, to be discharged.

A lunatic, an idiot, or an infant under the age of fourteen years, if arrested, may be discharged from arrest, as a privileged person, in the discretion of the court. The application for his discharge may be made, in his behalf, by a relative, or by any other person whom the court or judge permits to represent him, for the purpose.

§ 555. Person sued in a representative capacity, not to be arrested.

A person prosecuted in a representative capacity, as heir, executor, administrator, legatee, devisee, next of kin, assignee, or trustee, cannot be arrested, as prescribed in this title, except for his personal act.

Modelled upon 2 B. S. 348, § 9 (2 Edm. 350).

ARTICLE SECOND.

Granting, executing, and vacating or modifying the order of arrest.

- Sec. 556. Order required for arrest; how granted.
 557. Proof necessary to procure order.
 558. When order may be granted; effect of complaint subsequently made.
 559. Security, upon order of arrest made by a judge.
 560. Id.; upon order of arrest granted by the court.
 561. Contents of the order; to whom directed; when to be executed.
 562. Copies of papers to be delivered to defendant; originals to be filed.
 563. Arrest; how made.
 564. General provision as to privilege from arrest; discharge of privileged person.
 565. Privilege of officers of courts.
 566. Defendant arrested to have twenty days to answer.
 567. When application to be made to vacate order of arrest, etc.
 568. How and to whom application must be made; opposing it by new proofs.
 569-571. [Repealed.]
 572. Supersedeas, unless defendant is charged in execution, etc.

§ 556. [Am'd, 1877.] Order required for arrest; how granted.

An order for the arrest of the defendant, except as otherwise prescribed in section five hundred and fifty-one of this act, must be obtained from a judge of the court in which the action is brought, or from any county judge.

Co. Proc., § 180. See §§ 606, 638 and 1949, post.

§ 557. [Am'd, 1879.] Proof necessary to procure order.

The order may be granted, in a case specified in section five hundred and forty-nine of this act, where it appears by the affidavit of the plaintiff or any other person, that a sufficient cause of action exists against the defendant, as prescribed in that section. It may be granted, in a case specified in section five hundred and fifty of this act, upon the like proof that a sufficient cause of action exists against the defendant, as prescribed in that section, and of the other matters, extrinsic to the cause of action, specified in that section. The affidavit may also contain any statement, tending to determine the amount of bail to be required.

Id., § 181, with modifications.

§ 558. [Am'd, 1879, 1886.] When order may be granted; effect of complaint subsequently made.

Subject to the provisions of the last preceding section, the order may be granted at any time, after the commencement of the action. It may also be granted to accompany the summons, but at any time after the filing or service of the complaint, the order of arrest must be vacated on motion, if the complaint fails to set forth a sufficient cause of action, as required by section five hundred and forty-nine of this act, but where the order is applied for after the filing or service of the complaint, the court before granting the same may without notice direct the service of an amended complaint so as to conform to the allegations required in subdivisions two and four of section five hundred and forty-nine of this act.

Id., § 183; L. 1896, ch. 672.

§ 550. [Am'd, 1879.] Security, upon order or arrest made by judge.

Except where the action is brought for a cause specified in subdivision third of section five hundred and forty-nine of this act, or in a case where it is specially prescribed by law that security may be dispensed with, or the security to be given is specially regulated by law, the judge, before he grants the order, must require a written undertaking on the part of the plaintiff, with two sufficient sureties, to the effect that, if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to the order of arrest, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which must be at least equal to one-tenth of the amount of bail required by the order, and not less than two hundred and fifty dollars.

Co. Proc., part of § 182.

§ 560. Id.; upon order of arrest granted by the court.

Where the order can be granted only by the court, an undertaking on the part of the plaintiff may be dispensed with. If it is required, its form, and the security to be given thereupon, must be such as the court prescribes.

Covers case of a de exeat.

§ 561. [Am'd, 1877.] Contents of the order; to whom directed; when to be executed.

The order must be subscribed by the plaintiff's attorney, and, except where it is granted by the court, by the judge. It may be directed, either to the sheriff of a particular county, or, generally, to the sheriff of any county. It must require the sheriff forthwith to arrest the defendant, if he is found within his county; to hold him to bail in a specified sum; and to return the order, with his proceedings thereunder, as prescribed by law. The plaintiff's attorney may, at his option, by an indorsement upon the order, or, where it was granted by the court, upon the copy thereof, delivered to the sheriff, fix a time within which the defendant must be arrested. In that case, he cannot be arrested afterwards, under the same order.

Co. Proc., part of § 183, am'd. See § 590. See also Rule 13.

§ 562. [Am'd, 1879.] Copies of papers to be delivered to defendant; originals to be filed.

The order of arrest, or, where it was granted by the court, a certified copy thereof, subscribed by the plaintiff's attorney; and, in either case, the papers upon which the order was granted, with the undertaking, if any; must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy thereof. The papers, upon which the order was granted, with the undertaking, if any, must be filed, with the order of arrest, or a certified copy thereof, at the time prescribed for filing the same, in section five hundred and ninety of this act.

Id., § 184, am'd by the addition of the last sentence. See § 590. See also Rule 4.

§ 563. Arrest; how made.

The sheriff must execute the order by arresting the defendant, if he is found within his county, and keeping him in custody, until discharged by law.

Id., first clause of § 185.

§ 564. [Am'd, 1865.] General provision as to privilege from arrest; discharge of privileged person.

This title does not abridge or affect a privilege from arrest given by law, or a right of action for a breach thereof. A privileged person is entitled to be discharged from arrest, where other provision is not made therefor by law, by the court, or a judge thereof; or by the county judge of a county where the arrest was made. The order must be made, upon proof, by affidavit, of the facts entitling the applicant to the discharge; and the arrest and discharge are not a bar to a new arrest, after the privilege has ceased. The court or judge may make the order without notice, or may require notice to be given to the sheriff, or to the plaintiff, or to both.

L. 1893, ch. 946.

§ 565. [Repealed by L. 1909, ch. 14. See Consolidated Laws, tit. Civil Rights Law, § 24.]

§ 566. Defendant arrested to have twenty days to answer.

Except where an order of arrest can be granted only by the court, a defendant, arrested before answer, has twenty days, after the arrest, in which to answer the complaint; and judgment must be stayed accordingly.

Substituted for part of Co. Proc., § 183.

§ 567. [Am'd, 1877.] When application to be made to vacate order of arrest, etc.

Except where an order of arrest can be granted only by the court, a defendant, arrested as prescribed in this title, may, at any time before final judgment, or, if he was arrested within twenty days before final judgment, at any time within twenty days after the arrest, apply to vacate the order of arrest; or to reduce the amount of bail; or to increase the security given by the plaintiff; or for one or more of those forms of relief, together, or in the alternative. In a case where the order of arrest can be granted only by the court, a like application may be made, at any time within twenty days after the arrest; and an application to increase the security given by the plaintiff, may be made at any time before final judgment.

Id.

§ 568. [Am'd, 1877.] How and to whom application must be made; opposing it by new proofs.

An application, specified in the last section, may be founded only upon the papers upon which the order was granted; in which case, it must be made to the court, or, if the order was granted by a judge out of court, to the same judge, in court or out of court, and with or without notice, as he deems proper; and the application must be heard upon those papers only. (Or it may be founded upon proof, by affidavit, on the part of the defendant; in which case, it must be made to the court, or, if the order was granted by a judge out of court, to any judge of the court, upon notice, and it may be opposed by new proof, by affidavit, on the part of the plaintiff, tending to sustain any ground of arrest recited in the order, and no other, unless the defendant relies upon a discharge in bankruptcy, or upon a discharge or exoneration, granted in insolvent proceedings; in which

case, the plaintiff may show any matter in avoidance thereof, which he might show upon the trial.

Substitute for Co. Proc., § 205.

§ 569. [Repealed, 1877.]

§ 570. [Repealed, 1877.]

§ 571. [Repealed, 1877.]

§ 572. [Am'd, 1877, 1882 and 1886.] Supersedeas, unless defendant is charged in execution, etc.

Except in a case where an order of arrest can be granted only by the court if the plaintiff unreasonably delay the trial of the action or neglects to enter judgment therein within ten days after it is in his power to do so, or neglects to issue execution against the person of the defendant within ten days after the return of the execution against the property, and in any event neglects to issue the same within three months after the entry of the judgment, or whenever it shall appear to the satisfaction of the court that the plaintiff in an action, or a judgment creditor in a judgment, delays the enforcement of his remedies therein by collusion, or for the purpose of allowing the debtor to remain in prison under the mandate in any other action, before the issuing of the mandate in favor of such creditor, so as to produce a continued and extended imprisonment by virtue of the separate mandates in the different actions, the defendant must upon his application, made upon notice to the plaintiff, be discharged from custody if he has already been taken under the mandate against him in such action; or if he has not yet been imprisoned therein, be relieved from imprisonment by virtue of such mandate, by the court in which the action was commenced, unless reasonable cause is shown why the application should not be granted. A defendant discharged as prescribed in this section shall not be arrested upon an execution issued upon the judgment in the action.

Co. Proc., part of § 288, am'd; L. 1886, ch. 672.

ARTICLE THIRD.

Discharging the defendant upon bail or deposit; justification of the bail and disposition of the deposit.

- Sec. 573.** Defendant to be discharged on bail or deposit.
 574. When defendant may elect to give bail, etc., or bond for liberties.
 575. Undertaking of the bail; what to contain.
 576. Examination of persons offered as bail.
 577. Filing, etc., of papers; plaintiff's acceptance or rejection of bail.
 578. Notice of jurisdiction; new undertaking, if other bail is given.
 579. Qualifications of bail.
 580. Justification of bail.
 581. Allowance of bail.
 582. Deposit of money with sheriff.
 583. Payment of deposit into court by sheriff.
 584. Substituting bail for deposit.
 585. How deposit disposed of.
 586. When deposit to be paid to a third person.
 587. Sheriff, when liable to bail; his discharge from liability.
 588. Proceedings on judgment against sheriff.
 589. Bail liable to sheriff.
 590. Filing papers if bail not given.

§ 573. Defendant to be discharged on bail or deposit.

The defendant, at any time before he is in contempt, where the order can be granted only by the court, or, in any other case, at any time before execution against his person, must be discharged from arrest, either upon giving bail, or upon depositing the sum specified in the order of arrest. The defendant may give bail, or make the deposit, immediately upon his arrest, at any hour of the day or night; and he must have reasonable opportunity to see* for and to procure bail, before being committed to jail.

Co. Proc., § 186, am'd. See post, § 1706.

§ 574. When defendant may elect to give bail, etc., or bond for liberties.

Where the defendant is actually confined in the jail, by virtue of an order of arrest, and final or interlocutory judgment has been rendered against him in the action, but an execution against his person has not been issued, he may elect, either to give a bond for the liberties of the jail, or to give bail or make a deposit, as prescribed in this article.

§ 575. Undertaking of the bail; what to contain.

The defendant may give bail, by delivering to the sheriff a written undertaking, in the sum specified in the order of arrest, executed by two or more sufficient bail, stating their places of residence and occupations, to the following effect:

1. If the order of arrest could be granted only by the court, that the defendant will obey the direction of** court, or of an appellate court, contained in an order or a judgment, requiring him to perform the act specified in the order; or, in default of his so doing, that he will, at all times, render himself amenable to proceedings to punish him for the omission.

2. If the action is to recover a chattel, that the defendant will deliver it to the plaintiff, if delivery thereof is adjudged in the action, and will pay any sum recovered against him in the action.

* Error in engrossing for "seek."

** Word "the" omitted by error in engrossing.

3. In any other case, that the defendant will, at all times, render himself amenable to any mandate, which may be issued to enforce a final judgment against him in the action.

Substitute for Co. Proc., § 187.

§ 576. [Am'd, 1879.] Examination of persons offered as bail.

It is not necessary that the undertaking should be approved, or accompanied with an affidavit of justification of the bail. But the officer, taking the acknowledgment of the undertaking, must, if the sheriff so requires, examine under oath, to a reasonable extent, the persons offering to become bail, concerning their property and their circumstances. The examination must be reduced to writing, subscribed by the bail, and attached to the undertaking.

From 2 R. S. 380, § 20 (2 Edm. 386).

§ 577. [Am'd, 1879.] Filing, etc., of papers; plaintiff's acceptance or rejection of bail.

Within three days after bail is given, the sheriff must deliver to the plaintiff's attorney copies, certified by him, of the order of arrest, return and undertaking. The plaintiff's attorney, within ten days thereafter, must serve upon the sheriff a notice that he does not accept the bail; otherwise he is deemed to have accepted them, and the sheriff is exonerated from liability.

Co. Proc., § 192, am'd.

§ 578. Notice of justification; new undertaking, if other bail is given.

Within ten days after the receipt of the notice, the sheriff or the defendant may serve upon the plaintiff's attorney, notice of the justification of the same or other bail, specifying the place of residence and occupation of each of the latter, before a judge of the court, or a county judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter, and the place to be within the county where one of the bail resides, or where the defendant was arrested. If other bail are given, a new undertaking must be executed, as prescribed in section 575 of this act.

Id., § 193, am'd.

§ 579. Qualifications of bail.

The qualifications of bail are as follows:

1. Each of them must be a resident of, and a householder or freeholder within the State.

2. Each of them must be worth the sum specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify, severally, in sums less than that specified in the order, if the whole justification is equivalent to that of two sufficient bail.

Id., § 194, am'd.

§ 580. Justification of bail.

For the purpose of justification, each of the bail must attend before the judge, at the time and place mentioned in the notice, and be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge, in his discretion, thinks proper. The judge may, in his discretion, adjourn the examination from day to day, until it is completed; but such an adjournment must always be to the next judicial day, unless by consent of parties. If required by the plaintiff's attorney, the examination must be reduced to writing, and subscribed by the bail.

Co. Proc., § 195, am'd.

§ 581. Allowance of bail.

If the judge finds the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is thereupon exonerated from liability.

Id., § 196, am'd. See post, § 1705.

§ 582. [Am'd, 1904.] Deposit of money with sheriff.

A defendant, or other person arrested or attached on civil process, who is entitled to release on bail, or to jail liberties on giving the undertaking required by section one hundred and fifty of this act, may instead of giving bail, or such undertaking, deposit with the sheriff the sum specified in, or endorsed upon such process, or which might be required in such undertaking. The sheriff must thereupon give the prisoner a certificate of the deposit and discharge him from custody. A deposit so made in lieu of an undertaking for jail liberties must be applied, under direction of the court, in satisfaction of any judgment for escape of the prisoner from such liberties and in payment of any expense incurred in the defense of an action for such escape, and thereafter the surplus, if any, and in case there has been no such escape, the whole, of such deposit must be refunded to the prisoner or his representative, and in case of a deposit in lieu of bail on attachment against the person, it shall abide the disposition of the court, or a judge thereof, or a county judge.

Id., § 197, am'd; L. 1904, ch. 384. In effect April 26, 1904.

§ 583. Payment of deposit into court by sheriff.

The sheriff must, within four days after the deposit, pay it into court. He must take, from the officer receiving it, two certificates of the payment, one of which he must deliver to the plaintiff, and the other to the defendant. For a default in making the payment, the official bond of the sheriff may be prosecuted, as in any other case of delinquency.

Id., § 198.

§ 584. Substituting bail for deposit.

If money is deposited, as prescribed in the last two sections, bail may be given, and may justify upon notice, at any time before the expiration of the right to be discharged on bail. Thereupon the judge, before whom the justification is had, must direct, in the order of allowance, that the money deposited be refunded to the defendant or his representative, and it must be refunded accordingly.

Id., § 199, am'd.

§ 585. How deposit disposed of.

If money deposited is not refunded, as prescribed in the last section, it is, in a case where the order of arrest could be granted only by the court, subject to the direction of the court, as justice requires, before and after the judgment. In any other case, if it remains on deposit, when final judgment is rendered for the plaintiff, it must be applied, under the direction of the court, in satisfaction of the judgment, and the surplus, if any, must be refunded to the defendant, or his representative. If the final judgment is for the defendant, or the action abates or is discontinued, the sum deposited, and remaining unapplied, must be refunded to the defendant or his representative.

Substitute for Co. Proc., § 200.

§ 586. When deposit to be paid to a third person.

At any time before the deposit is paid into court, the defendant may deliver to the sheriff a written direction, to pay it to a third person, therein specified, in the event that the defendant becomes entitled to a return thereof; but without expressing any other contingency. The direction must be acknowledged or proved, and certified, in like manner as a deed to be recorded; and the sheriff must deliver it to the officer who receives the deposit, who must note the substance thereof, with the entries of the deposit, in his books, and upon the two certificates of payment into court. The money thus deposited is deemed the property of the third person, subject to the plaintiff's interest therein, and subject to the rights of a creditor of the defendant, where the direction was given for the purpose of hindering, delaying, or defrauding creditors. The money, or the residue thereof, must be paid to the third person, where, by the provisions of the last two sections, it is required to be refunded to the defendant, or his representative.

§ 587. [Am'd, 1877.] Sheriff, when liable as bail; his discharge from liability.

If, after the defendant is arrested, he escapes or is rescued, or the bail, if any, given by him, do not justify, when they are not accepted, or if the sheriff fails to pay the deposit into court as required by section 583 of this act, the sheriff is liable as bail. But the sheriff may, except in an action to recover a chattel, discharge himself from liability, by the giving and justification of bail, as follows:

1. If the case is one where the order could be granted only by the court, at any time before the court directs the performance of the act specified in the order.

2. In any other case, at any time before an execution is issued against the person of the defendant, upon a judgment in the action.

Co. Proc., § 201, am'd.

§ 588. Proceedings on judgment against sheriff.

If judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned wholly or partly unsatisfied, the official bond of the sheriff may be prosecuted, as in any other case of delinquency.

Id., § 202.

§ 589. Bail liable to sheriff.

The bail taken upon the arrest, unless they justify, or other bail are given and justify, are liable to the sheriff for all damages, which he sustains by reason of the omission.

Id., § 203.

§ 590. [Am'd, 1879.] Filing papers if bail not given.

Within ten days after the defendant is arrested, if he does not give bail, or if he gives bail, within ten days after the justification of the bail, the sheriff must file with the clerk the order of arrest, or, where it was granted by the court, the certified copy thereof delivered to him; with his return thereupon indorsed, the papers upon which the order of arrest was granted, and the undertaking given on the part of the plaintiff. Where an order of arrest, directing the arrest of two or more defendants, has been executed as to one or more, but not as to all of them, the sheriff may file a copy of the order of arrest, instead of the original.

See §§ 561, 562. See also Rule 4.

ARTICLE FOURTH.

Charging and discharging bail.

- Sec. 591. When defendant may be surrendered.
 592. How surrender to be made; exoneration of bail thereupon.
 593. Bail may arrest defendant.
 594. Voluntary surrender; exoneration of bail thereupon.
 595. Rights, etc., of sheriff who is liable as bail.
 596. Bail; how proceeded against.
 597. Certain executions necessary before action against bail.
 598. Duty of sheriff on such executions.
 599. Defences in action against bail.
 600. Relief of bail where principal is imprisoned on criminal charge.
 601. Bail exonerated by death, etc.

§ 591. When defendant may be surrendered.

Except in an action to recover a chattel, the bail may surrender the defendant in their own exoneration, or the defendant may surrender himself in exoneration of the bail, before the expiration of the time to answer, in an action against them. The surrender must be made to the sheriff of the county, where the defendant was arrested.

Co. Proc., § 188, first and last clauses, am'd.

§ 592. How surrender to be made; exoneration of bail thereupon.

Where the bail surrender the defendant, the surrender must be made in the following manner:

1. They must take the defendant to the sheriff, and require him, in writing, to take the defendant into his custody.

2. A certified copy of the undertaking of the bail must be delivered to the sheriff, who must detain the defendant in his custody thereupon, as upon the original mandate, and must, by a certificate in writing, acknowledge the surrender. Upon the application of the bail, made upon notice to the plaintiff's attorney, and upon production of the sheriff's certificate and a copy of the undertaking, a judge of the court, or the county judge of the county where the action is triable, may make an order, directing that the bail be exonerated. On filing the order and the papers used on the application therefor, the bail are exonerated accordingly.

Id., part of § 188, am'd.

§ 593. [Am'd, 1877.] Bail may arrest defendant.

For the purpose of surrendering the defendant, the bail, at any place or at any time before they are finally charged, may themselves arrest him, or, by a written authority, indorsed on a certified copy of the undertaking, may empower another person to do so, and one or more of the bail may thus arrest and surrender the defendant, although the others do not join with him or them, for that purpose.

Id., § 189, am'd.

§ 594. Voluntary surrender; exoneration of bail thereupon.

Where the defendant surrenders himself in exoneration of his bail, he must present himself to the sheriff, and require the sheriff, in writing, to take him into custody, in exoneration of his bail. The sheriff must detain him accordingly, as prescribed in subdivision second of section 592 of this act; and, if requested by the

bail, at any time after the surrender, the sheriff must, by a certificate in writing, acknowledge the surrender. An order for exoneration of the bail may be procured, as prescribed in section 592 of this act.

§ 595. Rights, etc., of sheriff who is liable for bail.

Where the sheriff is liable as bail, he has all the rights and privileges, and is subject to all the duties and liabilities of bail; and bail given by him, in order to discharge himself from liability, must be regarded as the bail of the defendant in the action. But this section does not apply to an action to recover a chattel; or to a case where a defence arises to an action against the bail, in consequence of an act or omission of the sheriff.

§ 596. Bail; how proceeded against.

In case of failure to comply with the undertaking, the bail may be proceeded against by action, and not otherwise.

Co. Proc., § 190.

§ 597. Certain executions necessary before action against bail.

An action may be brought, as prescribed in the last section, in a case where the order of arrest could be granted only by the court, at any time after the bail have failed to comply with their undertaking. Where the undertaking was given in an action to recover a chattel, an action may be brought thereupon, at any time after the return, wholly or partly unsatisfied, of an execution for the delivery of the possession of the chattel, with respect to which the order of arrest was granted. In any other case, an action cannot be brought, as prescribed in the last section, until the following requisites have been complied with:

1. An execution, against the property of the defendant, must have been issued to the sheriff of the county in which he was arrested, and returned by that sheriff, wholly or partly unsatisfied.

2. An execution, against the person of the defendant, must have been issued to the same sheriff, and by him returned, not less than fifteen days after its receipt, to the effect that the defendant could not be found within his county.

2 R. S. 882, § 31 (2 Edm. 397), am'd.

§ 598. Duty of sheriff on such executions.

The sheriff must diligently endeavor to enforce an execution issued and delivered to him, as prescribed in the last section, notwithstanding any direction he may receive from the plaintiff, or his attorney.

Id., § 32.

§ 599. Defences in action against bail.

In an action against bail, it is a defence, that an execution, against the property, or against the person, of the defendant in the original action, was not issued, as prescribed in section five hundred and ninety-seven of this act; or that it was not issued in sufficient time to enable the sheriff to enforce it; or that a direction was given, or other fraudulent or collusive means were used, by the plaintiff or his attorney, to prevent the service thereof.

Id., § 33, am'd.

§ 600. Relief of bail where principal is imprisoned on criminal charge.

If the defendant in the original action, after his discharge upon bail, is imprisoned, either within or without the State, upon a criminal charge, or a conviction of a criminal offence, the court, in which an action against the bail is pending, may, before the expiration of the time to answer, and upon notice to the adverse party, make such an order for the relief of the bail, as justice requires.

L. 1845, ch. 231, § 4 (4 Edm. 554), substitute for Co. Proc., § 191

§ 601. Bail exonerated by death, etc.

Except in an action to recover a chattel, the bail must be exonerated where either of the following events occurs, before the expiration of the time to answer in an action against them:

1. The death of the original defendant.
2. His legal discharge from the obligation to render himself amenable to the process, direction, or proceedings, with respect to which the undertaking of the bail was made.
3. His surrender to the sheriff of the county where he was arrested, as prescribed in this article.

Where either event occurs, after the commencement of the action against the bail, the court may, in its discretion, impose the payment of the plaintiff's costs and expenses, incurred after the return of the execution against the person, as a condition of allowing the exoneration. And the court may, by an order, made upon notice to the adverse party, grant such further time as it deems just, after answer, for the surrender of the original defendant. In that case, his surrender, within the time so granted, has the same effect, as if it had been made before answer.

Substitute for 2 B. S. 385, §§ 16 and 34, and Co. Proc., § 191.

TITLE II.

Injunction.

Article 1. Cases where an injunction may be granted; granting and service of an injunction order.

2. Security.

3. Vacating or modifying an injunction order.

ARTICLE FIRST.

Cases where an injunction may be granted; granting and service of an injunction order.

Sec. 602. Writ of injunction abolished, and order substituted.

603. Injunction, when the right thereto depends upon the nature of the action.

604. Id.; when the right thereto depends upon extrinsic facts.

605. Restrictions upon injunction to restrain State officers.

606. By whom injunction granted in other cases.

607. Proof necessary to procure injunction.

608. At what time the order may be granted.

609. When notice required or not required. Injunction pending an application.

610. Order must recite grounds; service of order.

§ 602. Writ of injunction abolished, and order substituted.

The writ of injunction has been abolished. A temporary injunction may be granted by order, as prescribed in this article.

Part of Co. Proc., § 218, am'd.

§ 603. Injunction, when the right thereto depends upon the nature of the action.

Where it appears, from the complaint, that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action, would produce injury to the plaintiff, an injunction order may be granted to restrain it. The case, provided for in this section, is described in this act, as a case, where the right to an injunction depends upon the nature of the action.

Co. Proc., § 219, first clause, am'd.

§ 604. [Am'd, 1877.] Id.; when the right thereto depends upon extrinsic facts.

In either of the following cases, an injunction order may also be granted in an action:

1. Where it appears, by affidavit, that the defendant, during the pendency of the action, is doing, or procuring, or suffering to be done, or threatens, or is about to do, or to procure, or suffer to be done, an act, in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, an injunction order may be granted to restrain him therefrom.

2. Where it appears, by affidavit, that the defendant, during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted, to restrain the removal or disposition.

Substituted for the remainder of Co. Proc., § 219.

§ 605. [Am'd, 1895.] Restrictions upon injunction to restrain State officers.

Where a duty is imposed by statute upon a State officer, or board of State officers, an injunction order to restrain him or them, or a person employed by him or them, from the performance of that duty, or to prevent the execution of the statute, shall not be granted, except by the supreme court, at a term thereof, sitting in the department in which the officer or board is located, or the duty is required to be performed; and upon notice of the application therefor to the officer, board, or other person to be restrained.

L. 1895, ch. 946.

§ 606. [Am'd, 1913.] By whom injunction granted in other cases.

Except where it is otherwise specially prescribed by law, an injunction order may be granted by the court in which the action is brought, or by a judge thereof, or by any county judge; and where it is granted by a judge, it may be enforced as the order of the court. An injunction order which may be modified or vacated by the appellate division may also be granted or continued by the appellate division, or a justice thereof, pending appeal to that court or to the court of appeals from an order or judgment denying or vacating an injunction.

Co. Proc., part of § 218. See §§ 1787, 1802, 1809. Am'd, L. 1913, ch. 112. In effect Sept. 1, 1913.

§ 607. [Am'd, 1877.] Proof necessary to procure injunction.

The order may be granted, where it appears to the court or judge, by the affidavit of the plaintiff, or any other person, that sufficient grounds exist therefor.

Id., part of § 220, am'd.

§ 608. [Am'd, 1877.] At what time the order may be granted.

The order may be granted to accompany the summons, or at any time after the commencement of the action and before final judgment.

Id., remainder of § 220.

§ 609. When notice required or not required. Injunction pending an application.

The order may be granted, upon or without notice, in the discretion of the court or judge, unless the defendant has answered; in which case, it can be granted only upon notice, or an order to show cause. Where an application for an injunction is made upon notice, or an order to show cause, either before or after answer, the court or judge may enjoin the defendant, until the hearing and decision of the application.

Id., §§ 221 and 223, consolidated.

§ 610. Order must recite grounds; service of order.

The injunction order must briefly recite the grounds for the injunction. Where it is granted by the court, it must be served by delivering a certified copy thereof; where it is granted by a judge, it must be served by showing the original order, and delivering a copy thereof. Service of the order, upon a corporation, may be made as prescribed in this act, for making personal service of a summons upon a corporation. Copies of the papers, upon which the order was granted, must be delivered with the copy of the order.

As to service on corporations, see ante, §§ 431 and 432. See also Rules 4, 13.

ARTICLE SECOND.

Security.

- Sec. 611.** Security, on staying proceedings in an action, before trial.
 612. *Id.*; after trial, and before judgment.
 613. *Id.*; after judgment.
 614. Money deposited may be paid over.
 615. Undertaking to be cancelled thereupon.
 616. Security on staying proceedings after verdict, in ejectment or dower.
 617. *Id.*; damages to include waste.
 618. Deposit may be dispensed with.
 619. Undertaking and deposit; when dispensed with.
 620. Security in other cases.
 621. Special cases excepted.
 622. [*Repealed.*]
 623. Damages; how ascertained.
 624. Damages sustained by a third person.
 625. Action on the undertaking.

§ 611. Security, on staying proceedings in an action, before trial.

An injunction order shall not be granted, to stay the trial of an action, in which the complaint demands judgment for a sum of money only, after issue has been joined therein, unless the party applying therefor gives an undertaking to the party enjoined, with sufficient sureties, to the effect, that he will pay to the party enjoined, or his representative, all damages and costs, which may be recovered by him in the action stayed by the injunction, not exceeding a sum, specified in the undertaking; and, also, all damages and costs that may be awarded to him, in the action in which the injunction order is granted.

2 R. S. 188, § 139 (2 Edm. 196).

§ 612. *Id.*; after trial, and before judgment.

An injunction order shall not be granted, to stay proceedings in an action specified in the last section, after verdict, report, or decision, and before final judgment thereupon, unless a sum of money, sufficient to cover the sum awarded by the verdict, report, or decision, and the costs of the action, is first paid, by the party applying for the injunction into the court, in which his action is commenced, or an undertaking for the payment thereof, with interest, is given, as prescribed in this article.

Id., § 140, am'd.

§ 613. [Am'd, 1877.] *Id.*; after judgment.

An injunction order shall not be granted, to stay proceedings upon a judgment for a sum of money, unless the following requisites are complied with, by the party applying therefor:

1. The full amount of the judgment, including interest and costs, must be paid by him, into the court in which his action is commenced; or an undertaking in lieu thereof must be given, as prescribed in this article.

2. He must also give an undertaking, with sufficient sureties, to pay to the party enjoined, all damages and costs, which may be awarded to him by the court, in the action in which the injunction order is granted; not exceeding a sum, specified in the undertaking.

Id., § 141.

§ 614. Money deposited may be paid over.

Money paid into court, as prescribed in the last two sections may be paid over, by the direction of the court, to the party whose proceedings are stayed, upon his giving an undertaking to the people of the State, with sufficient sureties, in a sum fixed by the court, to pay the money and interest, or any part thereof, as directed in the order or judgment of the court.

2 R. S. 183 (2 Edm. 196), § 142, am'd.

§ 615. Undertaking to be cancelled thereupon.

Where money so paid into court has been paid over to the party whose proceedings are stayed, if the final decision of the action, in which the injunction order is granted, is against the party obtaining it, the court must give such directions, as justice requires, with respect to cancelling the undertaking given by the successful party; making perpetual the injunction staying collection of the judgment; and requiring the judgment to be discharged of record.

Id., § 143.

§ 616. Security on staying proceedings after verdict, in ejectment or dower.

An injunction order shall not be granted, to stay proceedings in an action of ejectment, or for dower, after verdict, report, or decision, unless the party applying therefor gives an undertaking, with sufficient sureties, to pay to the party enjoined, or his representative, all damages and costs, not exceeding a sum specified in the undertaking, which may be awarded to him, in the action wherein the injunction was granted.

Id., § 144, am'd.

§ 617. Id.; damages to include waste.

Where an undertaking is given, as prescribed in the last section, the damages to be paid, upon the vacating of the injunction order, or the decision of the action against the party obtaining it, include, not only the reasonable rents and profits of the real property, recovered by the verdict, report, or decision, but all waste committed upon the property, after the granting of the injunction.

Id., § 145. See § 623, post.

§ 618. Deposit may be dispensed with.

In a case where money is required by the foregoing sections of this article, to be paid into court, the court or judge may dispense with the payment, and may require the party to give, in lieu thereof, an undertaking, with two or more sureties, to pay the sum specified, with interest, as directed by the court. If an undertaking is required, in addition to the deposit, both undertakings may be contained in the same instrument, at the election of the party applying for the injunction.

Id., § 146, am'd.

§ 619. Undertaking and deposit; when dispensed with.

The foregoing sections of this article do not apply to a case, where an injunction order is applied for, to stay proceedings in another action, on the ground that a judgment, verdict, report, or decision therein was obtained by actual fraud. In that case, the court or judge granting the injunction order may dispense with

the deposit of money, or the execution of an undertaking, except as prescribed in the next section.

2 R. S. 188 (2 Edm. 196), § 147, am'd.

§ 620. [Am'd, 1877.] Security in other cases.

Where special provision is not otherwise made by law for the security to be given upon an injunction order, the party applying therefor must give an undertaking, executed by him, or by one or more sureties, as the court or judge directs, to the effect that the plaintiff will pay to the party enjoined, such damages, not exceeding a sum, specified in the undertaking, as he may sustain by reason of the injunction, if the court finally decides that the plaintiff was not entitled thereto.

Co. Proc., the first sentence of § 22.

§ 621. Special cases excepted.

The foregoing provisions of this article do not affect any special statutory provision, whereby security upon granting an injunction order may be dispensed with, in a particular case, or the security to be given in a particular case is otherwise regulated.

§ 622. [Repealed, 1877.]

§ 623. [Am'd, 1877.] Damages, how ascertained.

The damages, sustained by reason of an injunction, may be ascertained and determined by the court, or by a referee, appointed by the court, or by a writ of inquiry, or otherwise, as the court shall direct; and the decision of the court thereupon, or an order confirming the report of the referee, is conclusive, as to the amount of those damages, upon all the persons who have executed the undertaking, unless it is reversed upon appeal. The court may, in its discretion, direct that the sureties have notice of the hearing, or of an appeal, and may prescribe the time and manner of giving them notice.

Co. Proc., last sentences of §§ 22 and 24, and part of § 145, 2 R. S. 190.

§ 624. Damages sustained by a third person.

Where the defendant enjoined was an officer of a corporation, or joint-stock association, or a bailee, agent, trustee, or other representative of another, and the damages, sustained by him, are less than the sum specified in the undertaking, the court or the referee may also separately ascertain and determine the damages sustained, by reason of the injunction, by the corporation, association, or person, whom the defendant represents, to an amount not exceeding the surplus of the sum specified in the undertaking; and those damages may be recovered in a separate action, brought as prescribed in the next section.

§ 625. Action on the undertaking.

Where the damages have been ascertained by the decision of the court, or the confirmation of a referee's report, as prescribed in the last two sections, any person, entitled to the benefit of an undertaking, executed pursuant to the provisions of this title, may bring an action thereon, without further leave of the court.

ARTICLE THIRD.

Vacating or modifying an injunction order.

Sec. 626. Application to vacate or modify, without notice.

627. Id.; upon notice.

628. When prior motion not to prejudice subsequent application.

629. New undertaking may be required.

630. Verified answer to have the effect only of an affidavit.

631-634. [Repealed.]

§ 626. [Am'd, 1895.] Application to vacate or modify, without notice.

Where the injunction order was granted without notice, the party enjoined may apply, upon the papers upon which it was granted, for an order vacating or modifying the injunction order. Such an application may be made, without notice, to the judge or justice who granted the order, or who held the term of the court where it was granted; or to a term of the appellate division of the supreme court. It cannot be made without notice, to any other judge, justice or term, unless the applicant produces proof, by affidavit, that, by reason of the absence or other disability of the judge or justice who granted the order, the application cannot be made to him; and that the applicant will be exposed to great injury, by the delay required for an application upon notice. The affidavit must be filed with the clerk; and a copy thereof, and of the order vacating or modifying the injunction order, must be served upon the plaintiff's attorney, before that order takes effect.

L. 1895, ch. 946.

§ 627. [Am'd, 1879.] Id.; upon notice.

Where the injunction order was granted without notice, or where it was granted upon notice, with leave to apply to vacate or modify it, the party enjoined may apply, upon notice, to the judge who granted it, or to the court, at a term where a contested motion in the action may be heard, for an order, vacating or modifying the injunction order. Such an application may be founded upon the papers upon which the injunction was granted; or upon proof, by affidavit, on the part of the defendant; or both. Where it is founded upon proof on the part of the defendant, it may be opposed by new proof, by affidavit, on the part of the plaintiff, tending to sustain the injunction.

Ca. Proc., §§ 225 and 226, am'd. See § 630, post.

§ 628. When prior motion not to prejudice subsequent application.

The granting or denial of an application, made as prescribed in the last section, founded only upon the papers upon which the injunction order was granted, does not prejudice a subsequent application, seasonably made, founded upon proof, by affidavit, on the part of the defendant. And the granting or denial of either application does not prejudice a subsequent application, seasonably made, founded upon the failure of a complaint, which had not been made at the time of the former application, to set forth a cause of action, sufficient to entitle the plaintiff to the injunction order, upon one or more grounds, recited therein.

§ 629. [Am'd, 1883 and 1884.] New undertaking may be required.

Upon the hearing of an application, upon notice, to vacate or modify an injunction order, the court or judge may require a new undertaking, in the same or in a different sum, to be given by the plaintiff, with the like sureties, and to the like effect, as upon granting an original order. The persons executing the new undertaking become liable thereon, as if they had executed it upon the granting of the original order. The persons who executed the original undertaking remain liable thereon, until the new undertaking is given and approved, and no longer. Upon such hearing the court or judge may where the alleged wrong or injury is not irreparable and is capable of being adequately compensated for in money, vacate the injunction order upon the defendant's executing an undertaking in such form and amount and with such sureties as the court or judge shall direct, conditioned to indemnify the plaintiff against any loss sustained by reason of vacating such injunction order.

L. 1884, ch. 401.

§ 630. Verified answer to have the effect only of an affidavit.

Upon the hearing of a contested application for an injunction order, or to vacate or modify such an order, a verified answer has the effect only of an affidavit.

§ 631. [Repealed, 1877.]

§ 632. [Repealed, 1877.]

§ 633. [Repealed, 1877.]

§ 634. [Repealed, 1877.]

TITLE III.

Attachment of property.

- Article 1. Cases where a warrant of attachment may be granted; and proceedings upon granting the same.
2. Executing the warrant, pending the action.
 3. Vacating or modifying the warrant; discharging the attachment.
 4. Regulations where there are two or more warrants against the same defendant.
 5. Proceedings after judgment; right of parties and duties of the sheriff, after the warrant is vacated or annulled, or the attachment discharged.

ARTICLE FIRST.

Cases where a warrant of attachment may be granted; and proceedings upon granting the same.

Sec. 635. In what actions.

636. What must be shown to procure the warrant.
637. Warrant in action against public officer, etc., for peculation.
638. When and by whom the warrant may be granted.
639. Affidavits to be filed.
640. Security on obtaining warrant.
641. Contents of warrant; to whom directed.
642. Validity of undertaking.

§ 635. [Am'd, 1895.] In what actions.

A warrant of attachment against the property of one or more defendants in an action, may be granted upon the application of the plaintiff, as specified in the next section, where the action is to recover a sum of money only, as damages for one or more of the following causes:

1. Breach of contract, express or implied, other than a contract to marry.
2. Wrongful conversion of personal property.
3. An injury to person or property, in consequence of negligence, fraud or other wrongful act.

L. 1895, ch. 573.

§ 636. [Am'd, 1895, 1899.] What must be shown to procure the warrant.

To entitle the plaintiff to such a warrant, he must show, by affidavit, to the satisfaction of the judge granting the same, as follows:

1. That one of the causes of action specified in the last section exists against the defendant. If the action is to recover damages for breach of contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

2. That the defendant is either a foreign corporation or not a resident of the state; or, if he is a natural person and a resident of the state, that he has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or, if the defendant is a natural person or a domestic corporation, that he or it has removed, or is about to remove, property from the state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of or secrete property with the like intent; or where, for the purpose of procuring credit, or the extension of credit, the defendant has made

a false statement in writing, under his own hand or signature, or under the hand or signature of a duly authorized agent, made with his knowledge and acquiescence as to his financial responsibility or standing; or, where the defendant, being an adult and a resident of the state, has been continuously without the state of New York for more than six months next before the granting of the order of publication of the summons against him, and has not made a designation of a person upon whom to serve a summons in his behalf, as prescribed in section four hundred and thirty of this act; or a designation so made no longer remains in force; or service upon the person so designated cannot be made within the state, after diligent effort.

L. 1895, ch. 578; L. 1899, ch. 57. In effect May 14, 1899.

§ 637. [Am'd, 1894.] Warrant in action against public officer, etc., for speculation.

A warrant of attachment, against the property of one or more defendants in an action, may also be granted, upon the application of the plaintiff, where the complaint demands judgment for a sum of money only; and it appears, by affidavit, that the action is brought to recover money, funds, credits, or other property, held or owned by the State, or held or owned, officially or otherwise, for or in behalf of a public governmental interest, by a municipal or other public corporation, board, officer, custodian, agency, or agent, of the State, or of a city, county, town, village, or other division, subdivision, department, or portion of the State, which the defendant has, without right, obtained, received, converted, or disposed of; or in the obtaining, reception, payment, conversion, or disposition of which, without right, he has aided or abetted; or to recover damages for so obtaining, receiving, paying, converting, or disposing of the same; or the aiding or abetting thereof; or in an action in favor of a private person or corporation, brought to recover damages for an injury to personal property where the liability arose, in whole or in part, in consequence of the false statements of the defendant as to his responsibility or credit, in writing, under the hand or signature of the defendant or his authorized agent, made with his knowledge and acquiescence. In order to entitle the plaintiff to a warrant of attachment, in the case specified in this section, he must show, by affidavit, to the satisfaction of the judge granting it, that a sufficient cause of action exists against the defendant for a sum stated in the affidavit.

L. 1894, ch. 736.

§ 638. [Am'd, 1877.] When and by whom the warrant may be granted.

The warrant may be granted by a judge of the court, or by any county judge, to accompany the summons, or at any time after the commencement of the action, and before final judgment therein. Personal service of the summons must be made upon the defendant, against whose property the warrant is granted, within thirty days after the granting thereof; or else, before the expiration of the same time, service of the summons by publication must be commenced, or service thereof must be made without the State, pursuant to an order obtained therefor, as prescribed in this act; and if publication

has been, or is thereafter commenced, the service must be made complete, by the continuance thereof.

Substitute for Co. Proc., § 228, and the latter part of § 227. See §§ 485-7, ante.

§ 639. [Am'd, 1877.] Affidavits to be filed.

The plaintiff procuring the warrant must, within ten days after the granting thereof, cause the affidavits, upon which it was granted, to be filed in the office of the clerk.

Co. Proc., last sentence of § 229.

§ 640. Security on obtaining warrant.

The judge, before granting the warrant, must require a written undertaking, on the part of the plaintiff, with sufficient sureties, to the effect, that if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs, which may be awarded to the defendant, and all damages, which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least two hundred and fifty dollars. But this section does not apply to a case, where the action is brought for a cause specified in section 637 of this act, or where it is specially prescribed by law that security may be dispensed with, or where the security to be given is specially regulated by law.

Id., § 230, am'd. See § 811, post.

§ 641. Contents of warrant; to whom directed.

The warrant must be subscribed by the judge and the plaintiff's attorney, and must briefly recite the ground of the attachment. It may be directed, either to the sheriff of a particular county, or, generally, to the sheriff of any county. It must require the sheriff to attach and safely keep, so much of the property, within his county, which the defendant has, or which he may have, at any time before final judgment in the action, as will satisfy the plaintiff's demand, with costs and expenses. The amount of the plaintiff's demand must be specified in the warrant, as stated in the affidavit. Warrants may be issued at the same time, to sheriffs of different counties.

Id., § 231, am'd and enlarged. See ante, § 55. See also Rule 13.

§ 642. Validity of undertaking.

It is not a defence to an action upon an undertaking, given upon granting a warrant of attachment, that the warrant was granted improperly, for want of jurisdiction, or for any other cause.

ARTICLE SECOND.

Executing the warrant, pending the action.

Sec. 643. [Repealed.]

644. Sheriff must attach property of defendant.

645. What interest in real property may be attached.

646. Attachment of unpaid subscription to foreign corporation.

647. Interest in shares or bonds.

648. Id.; bond, note, etc.

649. How property to be attached.

650. Certificate of defendant's interest to be furnished.

651. Person refusing certificate may be examined.

652. Rights of owner or master of vessels by which goods have been shipped.

653. Foregoing section not to apply in certain cases.

654. Sheriff must make inventory.

655. Sheriff may maintain actions.

656. Perishable goods and animals to be sold.

657. Claim of property; how tried.

658. Proceedings, if claimant succeeds.

658a. Discharge of personal property from attachments.

659. Finding, not to prejudice right of claimant.

660. Proceedings on claim to domestic vessel.

661. Appraisers to be sworn; valuation to be returned.

662. Undertaking to be given.

663. Vessel; when to be discharged.

664. When undertaking to be sued.

665. Defence in such an action; plaintiff's recovery.

666. Foreign vessel; how valued.

667. Notice thereof.

668. Plaintiff to give undertaking with sureties.

669. Vessel; when to be discharged.

670. Terms on which debtor may claim vessel.

671, 672, 673. When vessel to be sold.

674. Sheriff to keep property.

675. Sheriff may be directed to pay money into court.

676. When he may be directed to release or deliver property.

677. Plaintiff may bring action in name of himself and the sheriff.

678. How leave to bring such action procured.

679. Plaintiff may be joined with sheriff, after action commenced.

680. Judge to direct as to management of such an action, etc.

681. Return of inventory; how enforced.

§ 643. [Repealed, 1877.]

§ 644. Sheriff must attach property of defendant.

The sheriff must immediately execute the warrant, by levying upon so much of the personal and real property of the defendant, within his county, not exempt from levy and sale by virtue of an execution, as will satisfy the plaintiff's demand, with the costs and expenses. He must take into his custody all books of account, vouchers, and other papers, relating to the personal property attached, and all evidences of the defendant's title to the real property attached, which he must safely keep, to be disposed of, as prescribed in this title. The sheriff, to whom a warrant of attachment is delivered, may levy, from time to time, and as often as is necessary, until the amount, for which it was issued, has been secured, or final judgment has been rendered in the action, notwithstanding the expiration of his term of office.

Co. Proc., part of § 232, and 2 R. S. 4, § 7 (2 Edm. 4), am'd.

§ 645. What interest in real property may be attached.

The real property, which may be levied upon by virtue of a warrant of attachment, includes any interest in real property, either vested or not vested which is capable of being aliened by the defendant. (See §§ 1253, 1874.)

§ 646. Attachment of unpaid subscription to foreign corporation.

Under a warrant of attachment against a foreign corporation, other than a corporation created by or under the laws of the United States, the sheriff may levy upon the sum remaining unpaid upon a subscription to the capital stock of the corporation, made by a person within the county; or upon one or more shares of stock therein, held by such a person, or transferred by him, for the purpose of avoiding payment thereof.

Substitute for part of L. 1845, ch. 234, § 1 (3 Edm. 680).

§ 647. [Am'd, 1911.] Interest in shares or bonds.

The rights or shares which the defendant has in the stock of an association or corporation, or in a bond negotiable or otherwise, together with the interest and profits thereon, may be levied upon; and the sheriff's certificate of the sale thereof entitles the purchaser to the same rights and privileges, with respect thereto, which the defendant had when they were so attached.

Co. Proc., § 234, and final clause of § 237. Am'd by L. 1911, ch. 419, in effect Sept. 1, 1911.

§ 648. [Am'd, 1877, 1907.] Id.; bond, note, etc.

The attachment may also be levied upon a cause of action arising upon contract; including a bond, promissory note, or other instrument for the payment of money only, negotiable or otherwise, whether past due, or yet to become due, executed by a foreign or domestic government, state, county, public officer, association, municipal or other corporation, or by a private person, either within or without the State; which belongs to the defendant, and is found within the county. The levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the debt represented thereby. The attachment may also be levied upon a right or interest, present or future to any of the property or estate of a deceased person which may belong to the defendant and which could be legally assigned by him as legatee or distributee, whether the same exists by reason of the provisions of a last will and testament admitted to probate at the time the attachment is granted, or by operation of the law in case of the intestacy of the deceased. Levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the rights and interests of the defendant at the time of such levy, subject to the rights of the executor, administrator or trustee of such estate to administer the same according to law.

Am'd by L. 1907, ch. 318. In effect Sept. 1, 1907.

§ 649. [Am'd, 1889, 1907.] How property to be attached.

A levy under a warrant of attachment must be made as follows:

1. Upon real property, by filing with the clerk of the county, where it is situated, a notice of the attachment, stating the names of the parties to the action, the amount of the plaintiff's claim, as stated in the warrant, and a description of the particular property levied upon. The notice must be subscribed by the plaintiff's

attorney, adding the office address; and must be recorded and indexed by the clerk, in the same book, in like manner, and with like effect, as a notice of the pendency of an action.

2. Upon the personal property, capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money, by taking the same into the sheriff's actual custody. He must thereupon, without delay, deliver to the person from whose possession the property is taken, if any, a copy of the warrant, and of the affidavits upon which it was granted.

3. [Am'd, 1907.] Upon other personal property, by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same; or, if it consists of a demand, other than as specified in the last subdivision with the person against whom it exists; or, if it consists of a right or share in the stock of an association or corporation, or interests or profits thereon, with the president, or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or if it consists of a right or interest in an estate of a deceased person arising under the provisions of a will or under the provisions of law in case of intestacy, with the executor or trustee under the will, or the administrator of the estate.

4. [Added, 1889.] Upon property discovered in any action brought as prescribed in subdivision two of section six hundred and fifty-five of this act, by entering in the proper clerk's office, the judgment rendered in said action, and thereafter levying on said property in the manner prescribed in subdivisions one, two and three of this section.

Substitute for Co. Proc., § 225; L. 1889, ch. 504; L. 1907, ch. 318. In effect Sept. 1, 1907. See §§ 1370, 707, 708.

§ 650. Certificate of defendant's interest to be furnished.

Upon the application of a sheriff, holding a warrant of attachment, the president or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the sheriff a certificate, under his hand, specifying the rights or number of shares of the defendant, in the stock of the association or corporation, with all dividends declared or incumbrances thereon; or the amount, nature, and description of the property, held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires.

Substitute for part of § 236, Co. Proc.

§ 651. Person refusing certificate may be examined.

If a person, to whom application is made, as prescribed in the last section, refuses to give such a certificate; or if it is made to appear, by affidavit, to the satisfaction of the court, or a judge thereof, or the county judge of the county to which the warrant is issued, that there is reason to suspect that a certificate given by him is untrue, or that it fails fully to set forth the facts,

required to be shown thereby; the court or judge may make an order, directing him to attend, at a specified time, and at a place within the county to which the warrant is issued, and submit to an examination under oath, concerning the same. The order may in the discretion of the court or judge, direct an appearance before a referee named therein.

Substitute for remainder of § 236, Co. Proc.

§ 652. [Am'd, 1895.] Rights of owner or master of vessels by which goods have been shipped.

Except as otherwise prescribed in the next section, the owner or master of a vessel, on board of which goods of a defendant against whom a warrant of attachment is issued, have been shipped for transportation, without reshipment and transshipment in the State, to a port or place without the State, may transport and deliver them according to their destination, notwithstanding the warrant; unless the plaintiff, his agent or attorney, executes to the owner or the master of the vessel, a written undertaking, with sufficient sureties, in a sum specified therein, to pay him all expenses, damages, and charges, which may be incurred by him, or to which he may be subjected, for unloading the goods from the vessel, and for all necessary detention of the vessel, for that purpose. The undertaking must be approved, with respect to its form, the sum specified therein and the sufficiency of the sureties, by a judge or justice of the court, or the county judge of the county wherein the vessel is situated, or in the city and county of New-York, by a justice of the supreme court.

L. 1896, ch. 946.

§ 653. Foregoing section not to apply in certain cases.

The last section does not apply, where the owner or master before the shipment of the goods, had actual information of the granting of the warrant, or where he has, in any wise, connived at or been privy to, the shipment thereof, for the purpose of screening them from legal process, or of hindering, delaying, or defrauding creditors.

§ 654. Sheriff must make inventory.

The sheriff must, immediately after levying under a warrant of attachment, make, with the assistance of two disinterested freeholders, a description of the real property, and a just and true inventory of the personal property, upon which it was levied, and of the books, vouchers, and other papers taken into his custody, stating therein the estimated value of each parcel of real property attached, or of the interest of the defendant therein, and of each article of personal property, enumerating such of the latter as are perishable. The inventory must be signed by the sheriff and the appraisers; and must, within five days after the levy, be filed in the office of the clerk of the county, where the property is attached.

The first clause of 2 R. S. 4, § 8 (2 Edm. 4), am'd.

§ 655. [Am'd, 1889.] Sheriff may maintain actions.

The sheriff must, subject to the direction of the court or judge, collect and receive all debts, effects, and things in action, attached by him. He may maintain any action or special proceeding, in his name, or in the name of the defendant, which is necessary, for that purpose, or to reduce to his actual possession an article of personal property, capable of manual delivery, but of which he has been unable to obtain possession. And he may discontinue such an action or special proceeding, at such time and on such terms, as the court or judge directs.

2. Where the summons was served without the State, or by publication, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act; and where the defendant has not appeared in the action (otherwise than specially) but has made default and before entering final judgment, the sheriff may, in aid of such attachment, maintain an action against the attachment debtor, and any other person or persons, or against any other person or persons, to compel the discovery of any thing in action, or other property belonging to the attachment debtor; and of any money, thing in action, or other property due to him, or held in trust for him, or to prevent the transfer thereof, or the payment or delivery thereof, to him or any other person, and the sheriff may, in aid of such attachment, also maintain any other action against the attachment debtor and any other person or persons, or against any other person or persons, which may now be maintained by a judgment creditor in a court of equity, either before the return of an execution in aid thereof, or after the return of an execution unsatisfied. The judgment in any of the above-mentioned actions must provide and direct that the said property shall be applied by the sheriff, to the satisfaction of any judgment which the plaintiff may obtain in the attachment action.

Co. Proc., part of § 232, am'd; L. 1889, ch. 504.

§ 656. [Am'd, 1877.] Perishable goods and animals to be sold.

If property attached, other than a vessel, is perishable, the court or judge may, by an order made with or without notice, as the urgency of the case in its or his opinion requires, direct the sheriff to sell it at public auction, and thereupon the sheriff must sell it accordingly. If it consists of live animals, the same proceedings may be had, but such notice shall be given to the parties to the action, of the application for the order as the court or judge prescribes. The order directing the sale must prescribe the time and place of the sale, and notice thereof must be given in such manner, and for such time as is prescribed in the order. The sheriff must retain in his hands the proceeds of the sale, after deducting his expenses as allowed by the court or judge.

Co. Proc., § 233; and 2 R. S. 4, part of § 9 (2 Edm. 5), am'd.

§ 657. [Am'd, 1904.] Claim of property; how tried.

If goods or effects, other than a vessel, attached as the property of the defendant, are claimed by or in behalf of another person, as his property, an affidavit may be made and delivered to the sheriff, in behalf of such person, at any time while such goods or effects or the proceeds thereof are in the sheriff's possession, stating that he makes such a claim; specifying in whole or in part the property to which it relates, and in all cases stating the value of the property claimed and the damages. If any, over and above such value, which the claimant will suffer in case such levy is not released. In that case, the sheriff may, in his discretion, empanel a jury to try the validity of the claim.

2 R. S. 4, § 10 (2 Edm. 5). See §§ 108 and 109, ante. L. 1904, ch. 541. In effect Sept. 1, 1904.

§ 658. [Am'd, 1895, 1904.] Proceedings if claimant succeeds.

If, by their inquisition, the jury finds the property of the goods or effects to have been in the claimant, at the time of the levy, they must also determine its value, and the damages above such value as specified in the last section. Thereupon the officer must forthwith deliver such goods or effects to him or his agent; unless the plaintiff gives an undertaking with at least two sufficient sureties, to the effect that the sureties will indemnify him to the amount therein specified, not less than twice the value of the goods and effects and damages as determined by the jury, and two hundred and fifty dollars in addition thereto, against all damages, costs and expense, in an action to be brought against him by any person, by the claimant, his assignee, or other representative, by reason of the levy upon, detention, or sale of any of the goods or effects, by virtue of the attachment. If the undertaking is given, the officer must detain the goods or effects, as the property of the defendant. Where an undertaking is given to indemnify the sheriff, he must, within two days after the giving of said undertaking, cause the same to be filed in the office of the court out of which the attachment was issued, and serve upon the claimant or his agent, and the attaching creditor or attorney, whose name is subscribed to the warrant of attachment, a copy of said undertaking, with a notice of the justification of the sureties thereon. The justification must take place before a judge of the court out of which the attachment was issued, at a time to be specified in the notice, which must not be less than two nor more than five days after the serving of the said notice. For the purpose of justification, each of the sureties upon the undertaking must attend before the judge at the time and place mentioned in the notice, and be examined on oath on the part of the claimant, or his agent or attorney, touching his sufficiency, in such manner as the judge, in his discretion, thinks proper. The examination may be adjourned from day to day until it is completed, but such adjournment must always be to the next judicial day. If required by the claimant, his assignee or other representative, the examination must be reduced to writing and subscribed by the sureties. If the judge finds the sureties sufficient he must annex the examination to the under-

taking, endorse his allowance thereon, and cause the said undertaking, together with the examination of the sureties, to be filed with the clerk of the court. Thereupon the sheriff is released and discharged from all liability, by reason of the taking and detention of the property seized. When any such undertaking shall have been approved and filed, as hereinbefore provided, the clerk of the court in which the same shall be filed shall immediately index the same in the general index book in his office under the title of the suit in which the attachment is issued.

2 R. S. 4, § 11; L. 1895, ch. 662; L. 1904, ch. 541. In effect Sept. 1, 1904.

§ 658-a. [Added, 1904.] Discharge of personal property from attachments.

If goods or effects, other than a vessel, attached as the property of the defendant, or any portion thereof, are claimed by or in behalf of another person, such claimant may, within five days after the levy of the attachment, apply to the judge who granted the warrant, or to the court, for an order to discharge the attachment, as to the whole or a part of the property attached. Upon such an application the claimant must give to the sheriff an undertaking with at least two sufficient sureties who must justify in double the value of the property claimed, as appraised in the inventory of the property attached. The undertaking must be conditioned to the effect that in an action to be brought on the undertaking, the claimant will establish that he was the owner of such goods or effects at the time of the levy thereon; and that in case of his failure to do so, he will pay to the sheriff the full value of the property so claimed with interest from the date thereof together with the costs of the action. Sections six hundred and ninety and six hundred and ninety-one shall apply to an undertaking given as prescribed in this section. Upon such an undertaking being given and after justification of the sureties if required, the court or judge must make an order discharging the property so claimed from the attachment, upon payment by the claimant of the sheriff's fees and necessary disbursements. Thereupon and upon such payment, the sheriff must discharge the same accordingly, notwithstanding that the plaintiff may have given an undertaking as provided in section six hundred and fifty-eight. The court or judge may, upon the application of the plaintiff or of the claimant at any time before the warrant is vacated or annulled, upon notice to all parties in interest, direct the sheriff to commence an action upon the undertaking, upon such terms and conditions and under such regulations as it or he deems just. In such an action, the claimant may show, in bar of a recovery, that he was the owner of the said property attached. If judgment passes against the claimant the plaintiff is entitled to recover the value of the said property with interest from the date of the undertaking with the costs of the action. Neither the giving of the undertaking as prescribed in this section, nor the recovery of any judgment thereon, shall affect in any manner, the right, if any, of the defendant in the attachment action in or to the property discharged from the attachment, nor shall this section be

construed as affecting or impairing any other right or remedy which any person might otherwise have in respect to the property attached.

L. 1904, ch. 203. In effect Sept. 1, 1904.

§ 659. Finding, not to prejudice right of claimant.

If the property is found to be in the defendant, the finding does not prejudice the right of the claimant to bring an action, to recover the goods or effects, or the value thereof.

§ 660. Proceedings on claim to domestic vessel.

Where a vessel, belonging to a port or place in the United States, or a share or interest therein, is attached, the court or judge, on the application, within thirty days thereafter, of a person claiming title thereto, or of his agent, must appoint three indifferent persons to make a valuation thereof.

2 R. S. 5, § 13 (2 Edm. 5).

§ 661. [Am'd, 1877.] Appraisers to be sworn; valuation to be returned.

A valuation of a vessel, or of a share, or interest therein, made as prescribed in this article, must be in writing, and subscribed by the appraisers; each of whom must take and subscribe an affidavit, annexed thereto, to the effect, that the valuation is, in all respects, just and fair, and that the value of the vessel, share, or interest, is truly stated therein, according to the deponent's belief. The valuation must be immediately returned to the court or judge; and, after an undertaking is given, or after the expiration of the time to give an undertaking, as prescribed in the next section, it must be delivered to the sheriff.

§ 662. Undertaking to be given.

Within two days after the valuation is returned, the claimant or his agent may execute an undertaking to the sheriff, with sufficient sureties, approved by the court or judge, who must justify in twice the appraised value, to the effect, that, in an action to be brought on the undertaking, the claimant will establish that he was the owner of the vessel, share, or interest, at the time of the levy thereupon; and that, in case of his failure to do so, he will pay the amount of the valuation, with interest from the date of the undertaking, to the sheriff; or, if the warrant is vacated or annulled, to the defendant, or his personal representative.

2 R. S. 5, § 14.

§ 663. Vessel; when to be discharged.

Upon such an undertaking being executed and delivered to the sheriff, the court or judge must make an order, directing the vessel or share to be discharged from the attachment. Thereupon the sheriff must discharge the same accordingly.

Id., § 15.

§ 664. When undertaking to be sued.

The court or judge may, upon the application of either party, at any time before the warrant is vacated or annulled, direct the sheriff to commence an action upon the undertaking, upon such terms and conditions, and under such regulations, between him and the applicant, as it or he deems just. And if the warrant of attachment is vacated or annulled, the defendant in the attachment, his assignee or personal representative, may commence and maintain an action upon the undertaking, or may be substituted, in place of the sheriff, in an action pending thereupon.

Substitute for 2 R. S. 5, § 16.

§ 665. Defence in such an action; plaintiff's recovery.

In such an action, the claimant may show, in bar of a recovery, that he was the owner of the vessel, share, or interest, at the time when it was attached. If judgment passes against him, the plaintiff is entitled to recover the amount of the valuation, with interest from the date of the undertaking.

Id., § 17, am'd.

§ 666. Foreign vessel; how valued.

Where a foreign vessel, or a share or interest therein, is attached, it must be valued, as prescribed in sections 660 and 661 of this act, upon the application of a person, who makes affidavit, to the effect that he is the owner thereof, or that he is the agent of a person, naming him and his residence, whom he believes to be the owner of the vessel, share, or interest attached.

Id., § 18.

§ 667. Notice thereof.

Such notice of the application must be given to the plaintiff, as the court or judge deems reasonable.

Id., § 19.

§ 668. Plaintiff to give undertaking with sureties.

Within three days after the valuation is returned, the plaintiff must give, to the person in whose behalf the claim is made, an undertaking, with sufficient sureties, approved by the court or judge, who must justify in twice the appraised value, to the effect that they will pay such damages as may be recovered for seizing the vessel, share, or interest, in an action brought against the sheriff, or the plaintiff in the attachment, within three months from the approval of the undertaking, if it appears therein that the vessel, share, or interest belonged, at the time of attaching it, to the person in whose behalf the claim is made.

Id., § 20.

§ 669. Vessel; when to be discharged.

Unless such an undertaking is given, the court or judge must grant an order discharging the vessel, share, or interest so claimed, from the attachment; whereupon the sheriff must discharge the same accordingly.

Id., § 21.

§ 670. Terms on which debtor may claim vessel

If, after such an undertaking is given by the plaintiff, the vessel is vacated or annulled, or the attachment is dissolved, the defendant or his agent is entitled to claim the same, or the proceeds thereof, if sold, only upon his showing, to the satisfaction of the court or judge, that the undertaking has been discharged; or the plaintiff an undertaking, with sufficient sureties, to the effect, that they will indemnify the plaintiff for all charges and expenses, in consequence of the undertaking.

2 R. S. 5, § 23, am'd.

§ 671. When vessel to be sold.

If the undertaking of the plaintiff is not discharged, or annulled, as prescribed in this article, within one month after the defendant becomes entitled to claim the vessel, or interest therein, as so prescribed, it may be sold by the sheriff, upon an order of the court or judge; and the proceeds of the sale must be paid to the persons who executed the undertaking, for their indemnity.

Id., § 24.

§ 672. The same.

If a claim is not made, by or in behalf of an owner of a vessel, or of a share or interest therein, within one month after it is attached, or if the proper undertaking is not given by the claimant; or if a claim is not made, within three months after it is attached, by or in behalf of the owner of a foreign vessel, or of a share or interest therein; the vessel, share, or interest, may be sold by the sheriff, under an order of the court or judge, upon application of the plaintiff, if, in the opinion of the court or judge, a sale is necessary.

Id., § 25.

§ 673. The same.

Where a share or interest in a vessel, foreign or domestic, is attached, if the proper claim to it is not made, by or in behalf of the owner thereof, within thirty days thereafter, it may be sold by the sheriff, under an order of the court or judge, upon application of a joint owner, or his agent.

Id., § 26.

§ 674. [Am'd, 1877.] Sheriff to keep property.

The sheriff must keep the property attached by him, until the proceeds of property sold, or of a demand collected, shall answer any judgment that may be obtained against the debtor in the action.

Ch. Proc., part of § 232.

§ 675. Sheriff may be directed to pay money

But the court, upon the application of either party to the action, may direct the sheriff, either before or after the expiration of his term of office, to pay into court the proceeds of property collected, or property sold; or to deposit them in a bank or trust company, to be drawn out only upon the order of the court.

§ 676. [Am'd, 1877.] When he may be directed to release or deliver property.

Where the proceeds of the property sold, and of the demands collected by the sheriff, exceed the amount of the plaintiff's demand, with the costs and expenses, and of all other warrants of attachment or executions in the sheriff's hands, chargeable upon the same; the court, or the judge who granted the warrant, upon the application of the defendant, or of an assignee of, or purchaser from the defendant, and upon notice to the plaintiff, and the plaintiffs in the other warrants or executions, may, at any time during the pendency of the action, make an order directing the sheriff to pay over the surplus to the applicant, and to release from the attachment the remaining real and personal property attached.

§ 677. [Am'd, 1889.] Plaintiff may bring action in name of himself and the sheriff.

The plaintiff, by leave of the court or judge, procured as prescribed in the next section, may bring and maintain, in the name of himself and the sheriff jointly, by his own attorney, and at his own expense, any action which, by the provisions of this title, may be brought by the sheriff, to recover property attached, or the value thereof, or a demand attached, or upon an undertaking given as prescribed in this title, by a person other than the plaintiff; the plaintiff, in his own name and the sheriff's jointly, may also bring and maintain any action which, by the provisions of subdivision two of section six hundred and fifty-five of article second of this title, may be brought by the sheriff. The sheriff must receive the proceeds of such an action, but he is not liable for the costs or expenses thereof. Costs may be awarded, in such an action, against the plaintiff in the warrant, but not against the sheriff.

Substitute for Co. Proc., § 238; L. 1889, ch. 504.

§ 678. How leave to bring such action procured.

The court or judge must grant leave to bring such an action, where it appears, that due notice of the application therefor has been given to the sheriff; but, before doing so, the court or judge may require that notice of the application be given to the plaintiff, in any other warrant against the same defendant. And such terms, conditions, and regulations may be imposed, in the order granting leave, as the court or judge thinks proper, for the due protection of the rights and interests of all persons, interested in the disposition of the proceeds of the action.

Id.

§ 679. Plaintiff may be joined with sheriff, after action commenced.

Leave may, in like manner and with like effect, be granted to the plaintiff in the warrant, to be joined with the sheriff, in an action brought by the sheriff, in a case where he might have procured leave to bring the action, as prescribed in the last two sections. Upon an application therefor, the court or judge may, in a proper case, require the plaintiff to provide for the expenses in the action, already incurred by the sheriff. The application must be denied, in case of an unreasonable delay in making it:

or where an application was made, before the action was commenced, and the plaintiff neglected or refused, without a good reason therefor, to comply with the terms, conditions or regulations imposed.

§ 680. Judge to direct as to management of action, etc.

The court or judge may, upon the application of the defendant in the warrant, during the pendency of the action, brought as prescribed in the last three sections, direct the conduct, discontinuance, or settlement of the same, or the application or disposition of the money or property therein, as justice requires.

§ 681. Return of inventory; how enforced.

Upon the application of either party, and proof of the sheriff, the court or judge may, by order, require the return of an inventory. Disobedience to such an order is punishable as a contempt of the court.

2 R. S. 13, § 66 (2 Edm. 14). See post, § 712.

ARTICLE THIRD.

Vacating or modifying the warrant; discharging the attachment.

Sec. 682. Motion to vacate or modify warrant, or increase security.

683. How motion must be made; opposing it by new proofs.

684-685. [Repealed.]

686. When prior motion not to prejudice subsequent motion.

687. Defendant may apply for discharge of attachment.

688. Undertaking to be given.

689. Application by one of several defendants.

690. Sureties to justify if required.

691. Sheriff may retain property until justification.

692. Foregoing provisions applicable to vessels.

693. Partners may apply to discharge attachment.

694. Undertaking to be given.

695. Court or judge may ascertain value.

696. When plaintiff entitled to notice of any application, etc.

§ 682. [Am'd, 1877.] Motion to vacate or modify warrant, or increase security.

The defendant, or a person who has acquired a lien upon, or interest in, his property, after it was attached, may, at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to vacate or modify the warrant, or to increase the security, given by the plaintiff, or for one or more of those forms of relief, together, or in the alternative.

Substitute for part of § 241, Co. Proc.

§ 683. How motion must be made; opposing it by new proofs.

An application, specified in the last section, may be founded only upon the papers upon which the warrant was granted; in which case, it must be made to the court, or, if the warrant was granted by a judge out of court, to the same judge, in court or out of court, and with or without notice, as he deems proper. Or it may be founded upon proof, by affidavit on the part of the defendant; in which case, it must be made to the court, or, if the warrant was granted by a judge out of court, to any judge of the court, upon notice; and it may be opposed by new proof, by affidavit, on the part of the plaintiff, tending to sustain any ground for the attachment, recited in the warrant, and no other, unless the defendant relies upon a discharge in bankruptcy, or upon a discharge or exoneration, granted in insolvent proceedings; in which case, the plaintiff may show any matter, in avoidance thereof, which he might show upon the trial.

§ 684. [Repealed, 1877.]

§ 685. [Repealed, 1877.]

§ 686. [Am'd, 1877.] When prior motion not to prejudice subsequent motion.

The denial of such an application does not prejudice a subsequent application, seasonably made, founded upon the failure of a complaint which had not been filed or served at the time of the former application, to set forth any of the causes of action mentioned in section 635 and section 637 of this act.

See § 558, ante.

§ 687. [Am'd, 1906.] Defendant may apply for discharge of attachment.

The defendant may, at any time after he has appeared in the action, apply to the judge who granted the warrant, or to the court, for an order to discharge the attachment, as to the whole or a part of the property attached.

Substitute for a portion of Co. Proc. § 240; L. 1906, ch. 507. In effect Sept. 1, 1906.

§ 688. [Am'd, 1906.] Undertaking to be given.

Upon such an application, the defendant must give an undertaking, with at least two sufficient sureties, to the effect that he will, on demand, pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding a sum specified in the undertaking, with interest. The sum so specified must be, at least equal to the amount of the plaintiff's demand, as specified in his affidavit; or, at the option of the defendant, equal to the appraised value, according to the inventory, of the property attached; or, if the application is to discharge the attachment, as to a part only of the property attached, to the appraised value of that portion. Upon such application being made after final judgment, the defendant must give the security required to perfect an appeal to the court of appeals from a final judgment, of the same amount or to the same effect, and to stay the execution thereof.

Substitute for the first two sentences of the Co. Proc. § 241; L. 1906, ch. 507. In effect Sept. 1, 1906.

§ 689. Application by one of several defendants.

Where there are two or more defendants, and an application is made, as prescribed in the last two sections, by one or more, but not by all of them, the undertaking must provide for the payment of any judgment, which may be recovered against any of the defendants in the action, unless the applicant makes proof, by affidavit, to the satisfaction of the court or judge, that the property, with respect to which the application is made, belongs to him separately; in which case, the undertaking must provide for the payment of any judgment, which may be recovered in the action against the applicant, either alone, or jointly with any other defendant. Where an application is made, as prescribed in this section, at least two days' notice thereof, with a copy of the affidavit, must be served upon the plaintiff's attorney, who may oppose the application by proof, by affidavit, that one or more of the other defendants own, or have an interest in the property.

§ 690. [Am'd, 1877.] Sureties to justify if required.

An undertaking, given as prescribed in the last two sections, must be forthwith filed with the clerk. A copy thereof, with a notice of the filing, must be forthwith served upon the plaintiff's attorney; who may, within three days thereafter, give notice to the sheriff, that he excepts to the sufficiency of the sureties. Thereupon the sureties must justify, upon the like notice, and in like manner, as bail upon an arrest; or a new undertaking must be given, with new sureties, who must justify in like manner. If the plaintiff does not except, as prescribed in this section, he is deemed to have waived all objection to the sureties.

Co. Proc., part of § 241, am'd.

§ 691. Sheriff may retain property until justification.

The sheriff is responsible for the sufficiency of the sureties; and he may retain possession of the property attached, and the proceeds thereof, until the objection to them is waived, as prescribed in the last section, or they, or the new sureties, justify.

Id., part of the same section.

§ 692. Foregoing provisions applicable to vessels.

The last five sections are applicable, where a vessel, or a share or interest therein, is attached. If it is necessary, to enable the defendant to discharge the attachment, the court or judge may, by order, stay any proceeding specified in article second of this title, or extend the time to do any act therein specified.

§ 693. [Am'd, 1912.] Partners may apply to discharge attachment.

If a warrant of attachment is levied upon the interest of one or more partners, in the property of a partnership, the other partners, or any of them, may at any time before final judgment, apply to the judge who granted the warrant, or to the court, upon an affidavit showing the facts, for an order to discharge the attachment, as to that interest.

Am'd by L. 1912, ch. 389, in effect Apr. 15, 1912.

§ 694. [Am'd, 1877, 1912.] Undertaking to be given.

Upon such an application, the applicant must give an undertaking, with at least two sufficient sureties, to the effect that they will pay to the sheriff, on demand, if judgment is recovered against the defendant whose interest in a partnership is so levied upon, an amount not exceeding a sum, specified in the undertaking, which must not be less than the value of the interest of the defendant, in the property seized by virtue of the attachment, as fixed by the court or judge. If the value, in the opinion of the court or judge, is uncertain, the sum shall be such as the court or judge determines.

Am'd by L. 1912, ch. 389, in effect Apr. 15, 1912.

§ 695. Court or judge may ascertain value.

For the purpose of fixing the sum, or determining the sufficiency of the sureties, the court or judge may receive affidavits or oral testimony, or may direct a reference.

§ 696. When plaintiff entitled to notice of any application, etc.

The court or judge may direct, that the plaintiff have notice of an application for a discharge of property, as prescribed in this article, or of the hearing under an order of reference, made as prescribed in the last section; and if the applicant does not appear, where notice has been given, the application may be dismissed or denied.

ARTICLE FOURTH.

Regulations where there are two or more warrants against the same defendant.

- Sec. 687. Preferences of two or more warrants.**
688. Rule as to levy under a junior warrant.
689-700. [Repealed.]
701. Undertaking, by junior attaching creditor, to prevent release of foreign vessel.
702. Rule as to subsequent attachment of foreign vessel.
703. Rights of junior plaintiff in action by senior plaintiff and sheriff jointly.
704. Junior plaintiff may be allowed to commence action jointly with sheriff.
705. Rights of third and other subsequent attaching creditors.

§ 697. Preferences of two or more warrants.

Where two or more warrants of attachment, against the same defendant, are delivered to the sheriff of the same county, to be executed, their respective preferences, and the rules, where a levy, or a levy and sale, have been made under a junior warrant, are the same, as where two or more executions, against the property of the same defendant, are delivered to the sheriff of the same county, to be executed.

See 2 R. S. 366, §§ 14 and 15 (2 Edm. 379).

§ 698. Rule as to levy under a junior warrant.

Where a domestic vessel, or share or interest therein, has been attached, and afterwards released, as prescribed in this title; or where the personal property of a partnership, of which the defendant was a member, has been attached, and the attachment afterwards discharged, upon the application of another partner, as prescribed in this title; another warrant, against the same defendant, shall not be levied on the same property, by the sheriff of the same or of any other county, until after the first warrant has been vacated or annulled. But, except as thus prescribed, where a second warrant, against the same defendant, is delivered to the same sheriff, he must execute it, by a levy upon property within his county, and he must thereupon take the same proceedings, as if the levy was made under the first warrant.

See ante, §§ 662 and 694.

§ 699. [Repealed, 1877.]

§ 700. [Repealed, 1877.]

§ 701. Undertaking by junior attaching creditor to prevent release of foreign vessel.

Where a foreign vessel, or a share or interest therein, has been attached and valued, as prescribed in article second of this title, and the plaintiff, in the first warrant of attachment, fails to give an undertaking to prevent the release thereof, the court or judge may grant to the plaintiff in a second warrant, then in the sheriff's hands for execution, an extension, of not more than three days thereafter, within which to furnish an undertaking, in all respects like the one to be furnished by the first plaintiff. And if he furnishes it, within that time, he has the same rights and privileges, and is subject to the same duties and liabilities, with respect to the vessel and its proceeds, and the subsequent proceedings relating thereto, as if his was the first warrant.

§ 702. Rule as to subsequent attachment of foreign vessel.

If a foreign vessel, or a share or interest therein, has been attached, and afterwards released, by reason of the failure of the

plaintiff, in the first or the second warrant, to give an undertaking to prevent the release, it shall not be again attached, under a warrant against the same defendant, which has been delivered to the sheriff of the same county, before the expiration of the time within which the undertaking should have been furnished. But it may be again attached, under a subsequent warrant against the same defendant; in which case, the plaintiff therein, and the plaintiff in each warrant subsequently delivered to the sheriff, have the same rights, and privileges, and are subject to the same duties and liabilities, with respect to the vessel and its proceeds, and the subsequent proceedings relating thereto, as if the warrant, under which it was attached, was the first warrant.

§ 703. Rights of junior plaintiff in action by senior plaintiff and sheriff jointly.

Where the plaintiff in a warrant of attachment has commenced an action, in the name of himself and the sheriff jointly, as prescribed in this title, a plaintiff in a junior warrant may apply to the court or judge, to direct as to the conduct, discontinuance, or settlement of the same, or to impose terms, conditions, and regulations as to the continuance thereof, in the interest of the applicant; and such order may be made thereupon, as justice requires. If the first warrant is vacated, or the attachment thereunder is released or discharged, without affecting the cause of action prosecuted by the plaintiff therein and the sheriff jointly, the plaintiff in the warrant next in order, may upon his own application, be substituted as joint plaintiff with the sheriff, by an order, made as upon an application for leave to bring such an action.

See §§ 677-680, ante.

§ 704. Junior plaintiff may be allowed to commence action jointly with sheriff.

A plaintiff in a second warrant may apply to the court or judge, upon notice to the plaintiff in the first warrant, and to the sheriff, for leave to bring and maintain, in the name of himself and the sheriff jointly, any action, which might be brought in the name of the senior plaintiff and the sheriff. If it appears that the plaintiff in the first warrant neglects or refuses to be joined with the sheriff in such an action, or to comply with the terms, conditions, and regulations, imposed, either upon granting him an order for that purpose, or upon the hearing of an application, made as prescribed in this section, the court or judge may grant to the plaintiff in the second warrant, leave to bring and maintain such an action, in the name of himself and the sheriff jointly, with like effect, as if his was the first warrant.

§ 705. Rights of third and other subsequent attaching creditors.

Where there are more than two warrants of attachment against the same defendant, the plaintiffs in the third and each subsequent warrant have, according to their respective priorities, the same rights and privileges, as against the plaintiffs in all senior warrants, which the plaintiff in the second warrant has, as against the plaintiff in the first, and are subject to the same duties and liabilities; except that a second extension of the time, within which to furnish an undertaking to prevent the release of a foreign vessel, or a share or interest therein, shall not be granted. And the plaintiffs in two or more junior warrants of attachment, may, by agreement among themselves, take jointly, and for their common benefit, any proceeding, permitted by this title to be taken, by the plaintiff in a second or subsequent warrant of attachment; provided that it does not interfere with the preferential or other right of an intermediate plaintiff.

ARTICLE FIFTH.

Proceedings after judgment; rights of parties and duties of sheriff, after the warrant is vacated or annulled, or the judgment discharged.

- 706. Execution to issue to sheriff who has levied.
- 707. When judgment enforceable only against attached property.
- 708. Judgment in the principal action; how satisfied.
- 709. When attachment discharged, etc., property to be returned to defendant.
- 710. Additional provision for his relief.
- 711. Cancelling notice attaching real property.
- 712. When sheriff to return warrant and his proceedings.

§ 706. Execution to issue to sheriff who has levied.

Where a levy, under a warrant of attachment in a case, has been made, an execution against property, upon a judgment in favor of the plaintiff therein, recovered after the expiration of the term of office of the sheriff, who made the levy, nevertheless be directed to and executed by that sheriff, or another person is designated by law to complete the business pertaining to his office; or, in that case, to the person so designated.

§ 707. [Am'd, 1877.] When judgment enforceable only against attached property.

Where a defendant, who has not appeared, is a non-resident of the State, or a foreign corporation, and the summons was served without the State, or by publication, pursuant to an order of the court, as prescribed in chapter fifth of the Code, the judgment can be enforced only against the property which has been levied upon, by virtue of the warrant of attachment, at the time when the judgment is entered. But this section does not declare the effect of such a judgment, with respect to the question of any statute of limitation.

§ 708. [Am'd, 1877, 1912.] Judgment in the principal action; how satisfied.

Where an execution against property is issued upon a judgment for the plaintiff, in an action in which a warrant of attachment has been levied, the sheriff must satisfy it, as follows:

1. He must pay over to the plaintiff all money attached, and the proceeds of all sales of perishable property, or of real estate or share or interest therein, or animals, sold by him to satisfy any debts, or other things in action collected or sold by him to satisfy the judgment.

2. If any balance remains due, he must sell, under the direction of the court, the other personal property attached, or so much thereof as is necessary; including rights or shares in the stock of any corporation, or a bond or other instrument for the payment of money, executed and issued, with the interest thereon, if any, by a government, state, county, public utility, municipal or other corporation, which is in terms negotiable, otherwise, whether past due, or yet to become due, not including any other debt or thing in action. If the proceeds of that property are insufficient to satisfy the judgment, and the execution requires him to satisfy it out of other personal property of the defendant, he must sell that other personal property, upon which he has levied by virtue of the

tion. If the proceeds of the personal property, applicable to the execution, are insufficient to satisfy the judgment, the sheriff must sell, under the execution, all the right, title, and interest, which the defendant had in the real property attached, at the time when the notice was filed, or at any time afterwards, before resorting to any other real property.

3. If personal property attached, belonging to the defendant, has passed out of the hands of the sheriff, without having been sold or converted into money, and the attachment has not been discharged as to that property, he must, if practicable, regain possession thereof; and, for that purpose, he has all the authority which he had, to seize the same under the warrant. A person, who wilfully conceals or withholds such property from him, is liable to double damages, at the suit of the party aggrieved.

4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking, which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment.

5. At any time after levying the attachment, the court, upon the petition of the plaintiff, accompanied with an affidavit, specifying fully all the proceedings of the sheriff, since the levy under the warrant, the property attached, and the disposition thereof; and the affidavit of the sheriff, showing that he has used diligence, in endeavoring to collect the debts and other things in action attached, and that a portion thereof remains uncollected: may direct the sheriff to sell the remaining portion, upon such terms, and in such manner, as it thinks proper. Notice of the application must be given to the defendant's attorney, if the defendant appeared in the action. If the summons was not personally served on the defendant, and he did not appear, the court may make such order as to the service of notice, as it thinks proper: or may grant the application without notice.

Co. Proc., § 237, am'd. Am'd by L. 1912, ch. 40, in effect Sept. 1, 1912.

§ 709. [Am'd, 1877.] When attachment discharged, etc., property to be restored to defendant.

Where a warrant of attachment is vacated, or annulled, or an attachment is discharged, upon the application of the defendant, the sheriff must, except in a case where it is otherwise specially prescribed by law, deliver over to the defendant, or to the person entitled thereto, upon reasonable demand, and upon payment of all costs, charges, and expenses, legally chargeable by the sheriff, all the attached personal property remaining in his hands, or that portion thereof, as to which the attachment is discharged; or the proceeds thereof, if it has been sold by him.

Id., last sentence of § 237, and part of §§ 239 and 240. See § 3343, subd. 12.

§ 710. Additional provision for his relief.

Where the sheriff is required by this title, to deliver attached property, or the proceeds thereof, to the defendant, he must also deliver to him, unless otherwise specially directed by the court or judge, all books of account, vouchers, evidences of debt, moneys of title, or other papers, relating to the property, either real or personal, or to its proceeds; together with all undertakings, relating thereto, which he has taken in the course of the proceedings, and which have not been fully satisfied; except an undertaking, given by the defendant, upon the discharge of property. He must also deliver a written assignment, duly acknowledged, of each undertaking, so delivered, and of each other instrument, to

which the defendant is thus entitled, an assignment of necessary to perfect or protect the defendant's title there defendant must also, but upon his own application only, stituted in place of the sheriff, or the sheriff and the jointly, in an action brought as prescribed in this title; court or judge may impose, as a condition of granting t of substitution, such terms as justice requires, with re indemnity and payment of expenses. The defendant without respect to property attached and not disposed of, undertaking, or other instrument, to which he is thus enti the same as those of the sheriff, while the warrant was force, except where his rights are specially defined or r by law.

§ 711. Cancelling notice attaching real property.

At any time after the warrant of attachment has been or annulled, or the attachment has been discharged as property attached, the court may, in its discretion, upon plication of any person aggrieved, and upon such noti deems just, direct, that any notice, filed for the purpose of ing the property, be cancelled of record, by the clerk county where it is filed and recorded. The cancellation made by a note, to that effect, on the margin of the recor ring to the order; and, unless the order is entered in tl clerk's office, a certified copy thereof must, at the same filed therein.

Co. Proc., part of § 132, am'd and enlarged.

**§ 712. When sheriff to return warrant and his p
ings.**

Where a warrant of attachment has been vacated or a the sheriff must forthwith file, in the clerk's office, the v with a return of his proceedings thereon. Upon the app of either party, and proof of the sheriff's neglect, the co direct him so to do, forthwith, or within a specified time.

Id., § 242, am'd, and consolidated with so much of 2 R. S. 18 Min. 14), as relates to the return of the warrant.

TITLE IV.**Other provisional remedies; general and miscellaneous provisions.**

- Article 1. Receivers.
2. Deposit, delivery, or conveyance, of property.
3. General and miscellaneous provisions.

ARTICLE FIRST.*Receivers*

- Sec. 713. Receiver; when appointed.
714. Appointment of receiver; notice of application.
715. Security.
716. Certain receivers may hold real property.

§ 713. [Am'd, 1895.] Receiver; when appointed.

In addition to the cases, where the appointment of a receiver is specially provided for by law, a receiver of property, which is the subject of an action, in the supreme court or a county court, may be appointed by the court, in either of the following cases:

1. Before final judgment, on the application of a party who establishes an apparent right to, or interest in, the property, where it is in the possession of an adverse party, and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured, or destroyed.

2. By or after the final judgment, to carry the judgment into effect, or to dispose of the property, according to its directions.

3. After final judgment, to preserve the property, during the pendency of an appeal.

The word, "property," as used in this section, includes the rents, profits, or other income, and the increase, of real or personal property.

L. 1895, ch. 946.

§ 714. [Am'd, 1879, 1903.] Appointment of receiver; notice of application.

Notice of an application, for the appointment of a receiver in an action, before judgment therein, must be given to the adverse party, unless he has failed to appear in the action, and the time limited for his appearance has expired. But where an order has been made, as prescribed in section four hundred and thirty-eight of this act, the court may, in its discretion, appoint a temporary receiver, to receive and preserve the property, without notice, or upon a notice given by publication or otherwise, as he thinks proper. But where the action is for the foreclosure of a mortgage, which mortgage provides that a receiver may be appointed without notice, notice shall not be required.

See § 827, post; L. 1903, ch. 217. In effect Sept. 1, 1903.

§ 715. [Am'd, 1896.] Security.

A receiver, appointed in an action or special proceeding, must, before entering upon his duties, execute and file with the proper clerk, a bond to the people, with at least two sufficient sureties, in a penalty fixed by the court, judge, or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver; and the execution of any such bond by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond by two sureties. And the court, or, where the order was made out of

court, the judge making the order, by or pursuant to which the receiver was appointed, or his successor in office, may, at any time, remove the receiver, or direct him to give a new bond, with new sureties, with the like condition. But the foregoing provisions of this section do not apply to a case where special provision is made by law, for the security to be given by a receiver, or for increasing the same, or for removing a receiver. A receiver who, having executed and filed a bond as provided for in this section, before presenting his accounts as receiver, must give notice to the surety or sureties on his official bond, of his intention to present his accounts, not less than eight days before the day set for the hearing on said accounting. The same notice must be given to such surety or sureties where the accounting is ordered on the petition of a person or persons other than the receiver, and in no case shall the receiver's accounts be passed, settled or allowed, unless the said notice provided for in this section shall have first been given to the surety or sureties on the official bond of such receiver.

See post, §§ 810-816; also §§ 729-730. In effect March 11, 1896. L. 1896, ch. 94.

§ 716. [Am'd, 1896, 1909.] Certain receivers may hold real property.

A receiver, appointed by or pursuant to an order or a judgment, in an action in the supreme court or a county court, may take and hold real property, upon such trusts and for such purposes as the court directs, subject to the direction of the court, from time to time, respecting the disposition thereof.

L. 1895, ch. 946; L. 1845, ch. 112, § 1 (4 Edm. 552), am'd. Am'd by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 28. See Consolidated Laws, tit. General Corporation Law, § 243. See note 43 of notes of Board of Statutory Consolidation at end of code.

ARTICLE SECOND.

Deposit, delivery or conveyance of property.

Sec. 717. Court may order a deposit or delivery of property in certain cases.
718. When sheriff may take and convey, etc., property.

§ 717. [Am'd, 1877.] Court may order a deposit or delivery of property in certain cases.

Where it is admitted, by the pleading or examination of a party, that he has, in his possession or under his control, money, or other personal property capable of delivery, which, being the subject of the action or special proceeding, is held by him as trustee for another party, or which belongs or is due to another party, the court may, in its discretion, grant an order, upon notice, that it be paid into, or deposited in court, or delivered to that party, with or without security, subject to the further direction of the court.

Co. Proc., part of § 244, am'd. See post, §§ 743-754.

§ 718. When sheriff may take and convey, etc., property.

Where the court has directed a deposit or delivery, as prescribed in the last section; or where a judgment directs a party to make a deposit or delivery, or to convey real property; if the direction is disobeyed, the court, besides punishing the disobedience as a contempt, may, by order, require the sheriff to take, and deposit or deliver the money or other personal property, or to convey the real property, in conformity with the direction of the court.

Id., § 244, the last sentence but one am'd.

ARTICLE THIRD.

General and miscellaneous provisions.

Sec. 719. Arrest, injunction, and attachment; when not to be granted together.

720. Counterclaim, provisional remedies.

§ 719. [Am'd, 1879.] Arrest, injunction, and attachment; when not to be granted together.

Where application for an order of arrest, an injunction, and a warrant of attachment, or two of them, is made, in the same action, against the same defendant; and it satisfactorily appears that, under the particular circumstances of the case, two or all of them are not necessary for the plaintiff's security, the court or judge may, in its or his discretion, require the plaintiff to elect between them. Where an application is made to obtain, vacate, modify, or set aside an order of arrest, injunction order, or warrant of attachment, the court or judge must finally decide the same, within twenty days after it is submitted for decision.

§ 720. [Am'd, 1879.] Counterclaim, provisional remedies.

Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, his right to a provisional remedy is the same as in an action brought by him against the plaintiff, for the cause of action stated in the counterclaim, and demanding the same judgment. And for the purpose of applying to such a case the provisions of this act, the defendant is deemed the plaintiff, the plaintiff is deemed the defendant, and the counterclaim so set forth in the answer is deemed the complaint.

CHAPTER VIII.

Miscellaneous Interlocutory Proceedings, and Regulations of Practice.

TITLE I.—Mistakes, Omissions, Defects, and Irregularities.

TITLE II.—Tender, and other Offers and Requests to the Adverse Party.

TITLE III.—Payment of Money into Court, and Care and Disposition Thereof.

TITLE IV.—Proceedings upon the Death or Disability of a Party, or the Transfer of his Interest.

TITLE V.—Motions and Orders Generally.

TITLE VI.—Miscellaneous Practice Regulations.

TITLE I.

Mistakes, omissions, defects, and irregularities.

Sec. 721. Defects cured by verdict, etc., and by judgment.

722. Such defects to be supplied.

723. Amendments by the court; disregarding immaterial errors, etc.

724. Relief against omissions, etc.; amendments to conform proceedings

725. Returns by officers, etc.

726. Papers lost or withheld; how supplied.

727. Order of court; when necessary to amend.

728. Disregarding defects in affidavits.

729. Certain bonds, etc., when sufficient.

730. Amending defects in bonds, etc.

§ 721. [Am'd, 1879.] Defects cured by verdict, etc., and by judgment.

In a court of record, where a verdict, report or decision has been rendered, the judgment shall not be stayed, nor shall any judgment of a court of record be impaired or affected, by reason of either of the following imperfections, omissions, defects, matters, or things, in the process, pleadings or other proceedings:

1. For want of a summons, or other writ.
2. For any fault or defect in process; or for misconceiving a process, or awarding it to a wrong officer.
3. For an imperfect or insufficient return of a sheriff or other officer; or because an officer has not subscribed a return, actually made by him.
4. For a variance between the summons and complaint.
5. For a misleading, insufficient pleading, or joinder.
6. For want of a warrant of attorney by either party.
7. For the appearance, by attorney, of an infant party, if the verdict, report, or decision, or the judgment, is in his favor.
8. For omitting to allege any matter, without proof of which the verdict, report, or decision ought not to have been rendered.
9. For a mistake in the name of a party or other person; or in a sum of money; or in the description of property; or in reciting or stating a day, month, or year; where the correct name, sum, description, or date has been once rightly stated, in any of the pleadings or other proceedings.
10. For a mistake in the name of a juror or officer.
11. For an informality in entering judgment, or making up the judgment-roll.
12. For an omission on the part of a referee to be sworn; or for any other default or negligence of the clerk, or any other

officer of the court, or of a party, his attorney or counsel, by which the adverse party has not been prejudiced.

2 R. S. 424, 425, § 7 (2 Edm. 442, 443), am'd.

§ 722. Such defects to be supplied.

Each of the omissions, imperfections, defects, and variances, specified in the last section, and any other of like nature, not being against the right and justice of the matter, and not altering the issue between the parties, or the trial, must, when necessary, be supplied, and the proceeding amended, by the court wherein the judgment is rendered, or by an appellate court.

Id., § 8.

§ 723. [Am'd, 1877, 1900.] Amendments by the court; disregarding immaterial errors, etc.

The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defence, by conforming the pleading or other proceedings to the facts proved. And, in every stage of the action, the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party. When amending a pleading or permitting the service of an amended or supplemental pleading in a case which is on the general calendar of issues of fact, the court may direct that the case retain the place upon such calendar which it occupied before the amendment or new pleading was allowed, and that the proceedings had upon the amended or supplemental pleadings shall not affect the place of the case upon such calendar, or render necessary the service of a new notice of trial.

Co. Proc., § 173, and the first clause of § 176; the second clause of the latter section being included in § 731, ante. L. 1900, ch. 591. In effect September 1, 1900.

§ 724. Relief against omissions, etc.; amendments to conform proceedings.

The court may likewise, in its discretion, and upon such terms as justice requires, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect; and may supply an omission in any proceeding. Where a proceeding, taken by a party, fails to conform to a provision of this act, the court may, in like manner, and upon like terms, permit an amendment thereof, to conform it to the provision.

Id., § 174, am'd. See §§ 781, 783, 784, 1282.

§ 725. Returns by officers, etc.

A court, to which a return is made by a sheriff or other officer, or by a subordinate court or other tribunal, may, in its discretion, direct the return to be amended, in matter of form, either before or after judgment.

2 R. S. 424 (2 Edm. 442).

§ 726. Papers lost or withheld; how supplied.

Where an original pleading or paper is lost, or withheld by any person, the court may authorize a copy to be filed and used, instead of the original.

Co. Proc., § 422.

§ 727. Order of court; when necessary to amend.

A process, pleading, or record, shall not be altered, by the clerk or any other officer of the court, or by any other person, without the direction of the court, or of another court of competent authority; except in a case where a party, or his attorney, is specially authorized by law to amend a pleading.

2 R. S. 426 (2 Edm. 443), am'd.

§ 728. Disregarding defects in affidavits.

The want of a title, or a defect in the title, of an affidavit, does not impair it, if it intelligibly refers to the action or special proceeding, in which it is made.

Co. Proc., § 403.

§ 729. Certain bonds, etc., when sufficient.

A bond or undertaking, required by statute to be given by a person, to entitle him to a right or privilege, or to take a proceeding, is sufficient, if it conforms substantially to the form therefor, prescribed by the statute, and does not vary therefrom, to the prejudice of the rights of the party, to whom, or for whose benefit, it is given.

2 R. S. 556 (2 Edm. 576), am'd.

§ 730. Amending defects in bonds, etc.

Where such a bond or undertaking is defective, the court, officer, or body, that would be authorized to receive it, or to entertain a proceeding in consequence thereof, if it was perfect, may, on the application of the persons who executed it, amend it accordingly; and it shall thereupon be valid, from the time of its execution.

Id., § 84, am'd.

TITLE II.**Tender, and other offers and requests to the adverse party.****Sec. 731. Tender after suit.**

732. Amount to be paid into court.

733. Effect of sufficient tender.

734. When to be deducted from recovery, etc.

735. Requiring admission of genuineness of paper.

736. Offer to liquidate damages conditionally.

737. Effect of refusal of offer.

738. Defendant's offer to compromise; proceedings thereon.

739. Plaintiff's offer to compromise counterclaim; proceedings thereon.

740. Offer and acceptance, by whom subscribed.

741-742. [Repealed.]

§ 731. Tender after suit.

Where the complaint demands judgment for a sum of money only; and the action is brought to recover a sum certain, or which may be reduced to certainty by calculation; or to recover damages for a casual or involuntary personal injury, or a like injury to property; the defendant, or his attorney, may, at any time before the trial, tender to the plaintiff, or his attorney, such a sum of money, as he conceives to be sufficient to make amends for the injury, or to pay the plaintiff's demand; together with the costs of the action, to that time.

2 R. S. 553, § 20 (2 Edm. 574), am'd.

§ 732. [Am'd, 1877.] Amount to be paid into court.

A tender, made as prescribed in the last section, does not avail the defendant, unless the money is accepted, or is paid into court, and notice thereof in writing served upon the plaintiff's attorney before the trial and within ten days after the tender. If the plaintiff takes out the amount paid in, he accepts the tender.

§ 733. Effect of sufficient tender.

If it appears, upon the trial, that the sum so tendered was sufficient to pay the plaintiff's demand, or to make amends for the injury, and also to pay the costs of the action, to the time of the tender, the plaintiff cannot recover costs or interest, from the time of the tender, but must pay the defendant's costs from that time.

2 R. S. 554, §§ 21 and 22 (2 Edm. 574), consolidated. See Co. Proc., § 385; post, § 738.

§ 734. When to be deducted from recovery, etc.

If the plaintiff proceeds in the action, after accepting the tender, the sum accepted must be deducted from the recovery, and judgment rendered for the residue, if any; and, if the tender and acceptance do not appear in the pleadings, a memorandum thereof must be annexed to the judgment-roll. The plaintiff's right to recover costs, and his liability to pay costs to the defendant, are determined by the amount of the residue.

Id., § 23.

§ 735. Requiring admission of genuineness of paper.

The attorney for a party may, at any time before the trial, exhibit to the attorney for the adverse party, a paper, material to the action, and request a written admission of its genuineness.

If the admission is not given, within four days after the request, and the paper is proved or admitted on the trial, the expenses, incurred by the party exhibiting it, in order to prove its genuineness, must be ascertained at the trial, and paid by the party refusing the admission; unless it appears, to the satisfaction of the court, that there was a good reason for the refusal.

Co. Proc., part of § 888.

§ 736. Offer to liquidate damages conditionally.

In an action to recover damages for breach of a contract, the defendant's attorney may, with the answer, serve upon the plaintiff's attorney, a written offer, that, if the defendant fails in his defence, the damages may be assessed at a specified sum. If the plaintiff serves notice, that he accepts the offer, with or before the notice of trial, and damages are awarded to him on the trial, they must be assessed accordingly.

Id., § 386.

§ 737. [Am'd, 1877.] Effect of refusal of offer.

If the plaintiff does not accept the offer, he cannot prove it, upon the trial. But if the damages, awarded to him, do not exceed the sum offered, the defendant is entitled to recover the expenses, necessarily incurred by him in preparing for the trial of the question of damages. The expenses must be ascertained, and the amount thereof determined by the judge, or the referee, by or before whom the cause is tried.

Id., § 387.

§ 738. [Am'd, 1877.] Defendant's offer to compromise; proceedings thereon.

The defendant may, before the trial, serve upon the plaintiff's attorney, a written offer, to allow judgment to be taken against him, for a sum, or property, or to the effect, therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken. If the plaintiff, within ten days thereafter, serves upon the defendant's attorney, a written notice that he accepts the offer, he may file the summons, complaint, and offer, with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If notice of acceptance is not thus given, the offer cannot be given in evidence upon the trial; but, if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time.

Id., part of § 385.

§ 739. [Am'd, 1877.] Plaintiff's offer to compromise counterclaim; proceedings thereon.

Where the defendant sets up a counterclaim, to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, the plaintiff may serve, upon the defendant's attorney, a written offer, to allow judgment to be taken against him, for a specified sum, with costs, or against the defendant for a specified sum; and against the plaintiff for costs. If the defendant, within ten days thereafter, serves, upon the plaintiff's attorney, notice that he accepts the offer, either party may file the summons, complaint, answer, and offer, or copies thereof, and proof of acceptance; and thereupon the clerk must enter judgment accordingly. If

notice of acceptance is not thus given, the offer cannot be given in evidence, upon the trial; but, if the recovery is not more favorable to the defendant than that so offered, he will not be entitled to recover costs from the time of the offer, but must pay costs from that time.

Co. Proc., remainder of § 285, am'd.

§ 740. Offer and acceptance, by whom subscribed.

Unless an offer or an acceptance, made as prescribed in either of the last four sections, is subscribed by the party making it, his attorney must subscribe it, and annex thereto his affidavit, to the effect, that he is duly authorized to make it, in behalf of the party.

§ 741. [Repealed, 1877.]

§ 742. [Repealed, 1877.]

TITLE III.

Payment of money into court, and care and disposition thereof.

- Sec. 743. Party bringing money into court is discharged.
 744. Comptroller to supervise administration of funds, etc.; enforcing judgments, etc.
 744-a. Comptroller may examine books, etc., of banks, etc.; payment of money to county treasurers, etc.
 745. Transfer of moneys and securities to county treasurers.
 746. Funds; where and how deposited or invested.
 747. Power of each court to direct payment or reinvestment of its funds.
 748. Application of preceding section.
 749. Powers of certain officers, touching securities, etc.
 750. Provision relating to death, removal, etc., of officer.
 751. Funds or property not to be surrendered without order.
 752. Custodian's books of account.
 753. Annual reports to comptroller.
 754. These provisions applicable in New-York to the chamberlain.

§ 743. Party bringing money into court is discharged.

A party bringing money into court, pursuant to the direction of the court, is discharged thereby from all further liability, to the extent of the money so paid in.

2 R. S. 171, § 21 (2 Edm. 177).

§ 744. [Repealed by L. 1909, chs. 16 and 58. See Consolidated Laws, tits. County Law, § 240, State Finance Law, § 4.]

Am'd. 1916
Ch. 42 **§ 744-a.** [Added, 1908.] Comptroller may examine books, etc., of banks, etc.; payment of money, etc., to county treasurers, etc.

The comptroller may examine the books, accounts and vouchers of every bank and trust company in the state, in anywise relating to moneys and securities paid into court, under an order of any court of record; and where the same has not been paid to the chamberlain of the city of New York or to any county treasurer of the state, the comptroller upon an application duly made shall be entitled to an order directing the payment and transfer of all such money and securities, from any of such banks and trust companies, to the treasurer of the proper county, and in the city of New York to the city chamberlain.

Added, L. 1908, ch. 182. In effect Sept. 1, 1908.

§ 745. [Am'd, 1908.] Transfer of moneys and securities to county treasurers.

All moneys and securities paid, transferred, or deposited into court, must be paid or transferred, either directly or by the officer who is required by law first to receive it, to the county treasurer of the county, where the action is triable, or to such other county treasurer as the court specially directs. Where money is paid, or a security is delivered to an officer, other than the county treasurer, he must pay or transfer it to the county treasurer within two days after he receives it. In the city of New York he must pay it to the chamberlain within two days after he receives it. A bond, mortgage or other security, or a certificate or transfer of stock, taken upon the investment of

money paid into court, must be taken to the county treasurer of the county where the fund belongs, in his name of office; or to such other county treasurer as the court specially directs.

Substance of so much of L. 1848, ch. 277, § 1 (4 Edm. 593), as properly belongs to this title, and is not obsolete; and the first two sentences of Rule 82. See, also, 2 R. S. 171, 172, part 3, ch. 1, tit. 2, §§ 17, 18, and 24 (3 Edm. 177 et seq.); also L. 1847, ch. 280, § 71 (3 R. S., 5th ed. 285; 4 Edm. 575). Am'd, L. 1908, ch. 183. In effect Sept. 1, 1908.

§ 746. [Am'd, 1892, 1909.] Funds; where and how deposited or invested.

All funds or moneys paid into court shall be deposited in such savings bank, trust company, bank, banking association or with such banker, as shall be designated by the comptroller, as soon as received by the custodian thereof. But the money must be deposited in the county where the fund belongs, where it can be done conveniently and safely and with advantage to the parties interested.

L. 1892, ch. 651. Am'd by L. 1909, ch. 65. Partly repealed by L. 1909, ch. 10. See Consolidated Laws, tit. Banking Law, § 44. See note 44 of notes of Board of Statutory Consolidation at end of code.

§ 747. [Am'd, 1892, 1908.] Power of each court to direct payment or reinvestment of its funds.

Each court may direct that money paid into that court in any action or proceeding brought therein, or any bond, mortgage or other security which represents property belonging to any suit or party interested therein, may be paid out, transferred, invested or reinvested in any manner or form that appears to it best for the interests of the owners thereof. But such directions must be embodied in an order or decree of said court, founded upon proper and sufficient evidence satisfactory to the court that such disposition of the property is best for the interests of the owners thereof or parties interested therein.

L. 1892, ch. 651; L. 1908, ch. 183. In effect Sept. 1, 1908.

§ 748. [Am'd, 1892.] Application of preceding section.

The provisions of the last preceding section shall apply to all courts of record of the state.

L. 1892, ch. 651.

§ 749. [Am'd, 1877.] Powers of certain officers, touching securities, etc.

A county treasurer, or other officer, or a guardian, committee, or other trustee, in whose name is taken a bond, mortgage, or other security, or public stock, representing money, paid into court, in an action; or to whom stock or a security, or an account deed, voucher, receipt, or other paper, representing or relating to such money, is transferred, delivered, made, or given, pursuant to law, is vested with title for the purposes of the trust, and may bring an action upon or in relation to the same, in his official or representative character.

§ 750. Provision relating to death, removal, etc., of officer.

On the expiration of the official term of a county treasurer, or where a vacancy occurs in his office, by death or otherwise, all public stock, bonds, mortgages, and other securities held by him, as prescribed in this title, vest in his successor in office; and

all money deposited, as prescribed in this title, in a bank, trust company or other depository, to his credit, vests in, and must be carried to, the account of his successor in office.

2 R. S. 172, §§ 26 and 27 (2 Edm. 178), consolidated and abridged.

§ 751. [Am'd, 1892.] Funds or property not to be surrendered without order.

No money, security or other property which shall have been placed in the custody of the court shall be surrendered without the production of a properly certified copy of an order of the court, in whose custody said money, security or other property shall have been placed, duly made and entered, directing such disposition. Each order must be countersigned by the presiding judge by whose direction it is made.

L. 1892, ch. 651.

See sentence repealed L. 1914 ch. 367

§ 752. [Am'd, 1892, 1909.] Custodian's books of account.

Every officer having charge of moneys, securities or other property in the custody of the court, shall keep a book or books in which he shall make an exact account thereof. Such book or books shall state the name of the court, the title of the case, the date of receipt, from whom received, the amount of money, if any, and a description of the securities or other property received, if any, and each addition of interest; also the date and description of each order for payment and the dates and amounts of payments thereunder and to whom paid; also an account of each change of investment, if any.

L. 1892, ch. 651. Am'd by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 10. See Consolidated Laws, tit. Banking Law, § 45. See note 45 of notes of Board of Statutory Consolidation at end of code.

§ 753. [Am'd, 1892.] Annual reports to comptroller.

Every treasurer or financial officer who has in charge or possession or under his control, money, bonds, stocks, mortgages, or any other securities or property as prescribed in this title, must, once in each year, make a report to the comptroller at the time and in the form and manner which he may prescribe, containing a true statement of his accounts for the preceding year or from the time of the last report. This report must be verified by the oath of such officer, and must be accompanied by the certificate of the proper officer of each bank or trust company, stating the exact amount on deposit with such corporation to the credit of each case separately. Such officer or bank or trust company shall furnish any additional report to the comptroller or to the court at such time and in such detail as may be required.

L. 1892, ch. 651.

[§§ 8 and 9, L. 1892, ch. 651, do not amend the Code of Civ. Proc., but relate to same subject as the Code section amended by that act, and are inserted here for convenience of attorneys.]

§ 8. The comptroller is authorized to employ such special clerk or clerks as he may deem necessary, to carry out the provisions of this act; and he shall cause an examination of the accounts of the officers referred to in this act to be made at least once in each year, and shall enforce the provisions thereof.

§ 9. Whenever any sum of money, paid into court, shall have remained in the hands of any county treasurer, or of the cham

berlain of the city of New York, for the period of twenty years, it shall be paid over by such officer with all accumulations of interest thereon, after deducting his legal fees, to the treasurer of the state of New York. The said treasurer shall pay such sum to the owner or owners thereof upon the presentation to him of the warrant of the comptroller therefor. The comptroller shall draw his warrant for such sum upon the presentation to him of an order of the court made in accordance with section seven hundred and fifty-one of the Code of Civil Procedure and upon due notice to said comptroller.]

§ 754. These provisions applicable in New-York to the chamberlain.

Each provision of this title, relating to a county treasurer, applies to the chamberlain of the city of New-York, with respect to money paid into court, in an action triable in the city and county of New-York, or with respect to money, or a bond, mortgage or other security, or public stock, representing money paid into court; except where special provision, with respect to the same, is otherwise made by law.

TITLE IV.**Proceedings upon the death or disability of a party or the transfer of his interest.**

- Sec. 755. Action; when not to abate.
756. Proceedings upon transfer of interest, or devolution of liability.
757. Id.; when sole party dies and action survives.
758. Id.; when one of several parties dies.
759, 760. Id.; when part of cause of action survives.
761. When court may order action abated.
762. Special cases excepted.
763. Death of party after verdict, etc.
764. Action for a wrong not to abate after verdict, etc.
765. No verdict, etc., can be taken after a party's death.
766. Death, etc., of public officer or trustee.

§ 755. [Am'd, 1891.] Action; when not to abate.

An action does not abate by any event, if the cause of action survives or continues. A special proceeding does not abate by any event, if the right to the relief sought in such special proceeding survives or continues, but this provision as to special proceeding applies only to cases where a party dies after this act takes effect.

L. 1891, ch. 284.

§ 756. Proceedings upon transfer of interest, or devolution of liability.

In case of a transfer of interest, or devolution of liability, the action may be continued, by or against the original party; unless the court directs the person, to whom the interest is transferred, or upon whom the liability is devolved, to be substituted in the action, or joined with the original party, as the case requires.

Co. Proc., § 121, the third sentence.

§ 757. [Am'd, 1879, 1891.] Id.; when sole party dies and action survives.

In case of the death of a sole plaintiff or a sole defendant, if the cause of action survives or continues, the court must, upon a motion, allow or compel the action to be continued, by or against his representative or successor in interest. In case of the death of a sole party to a special proceeding after this act takes effect, if the right to the relief sought in such proceeding survives or continues, the court must, upon a motion, allow or compel such proceeding to be continued by or against his representative or successor in interest. This provision as to a special

proceeding does not apply where provision for such continuance has been otherwise made by law.

L. 1891, ch. 284. See 2 R. S. 448, § 2.

§ 758. [Am'd, 1877.] Id.; when one of several parties dies.

In case of the death of one of two or more plaintiffs, or one of two or more defendants, if the entire cause of action survives to or against the others, the action may proceed in favor of or against the survivors. But the estate of a person or party jointly liable upon contract with others shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent, when it is necessary so to do, for the proper disposition of the matter; and, where the liability is several as well as joint, may order a severance of the action so that it may proceed separately against the representative of the decedent, and against the surviving defendant or defendants.

2 R. S. 386, § 1 (2 Edm. 401).

§ 759. Id.; when part of cause of action survives.

In case of the death of one of two or more plaintiffs, or one of two or more defendants, if part only of the cause of action, or part or some of two or more distinct causes of action, survives to or against the others, the action may proceed, without bringing in the successor to the rights or liabilities of the deceased party; and the judgment shall not affect him, or his interest in the subject of the action. But where it appears proper so to do, the court may require or compel the successor, or a person who claims to be the successor, to be brought in as a party, upon his own application or upon the application of a party to the action.

Substitute for 2 R. S. 184, 186, portions of §§ 108, 109, 115, 117, 120, and 121.

§ 760. [Am'd, 1879.] The same.

In a case specified in the foregoing sections of this title, where such a person applies in his own behalf, the court may direct that he be made a party, by amendment of the pleadings, or otherwise as the case requires. Where an application is made by the plaintiff, to bring in such a person as defendant, the court may direct that a supplemental summons issue, and that supplemental pleadings be made. Where an application is made by a defendant to bring in such a person, the court may, and where the protection of the applicant's rights requires it, must, permit the defendant to commence a cross action for that purpose. The cross action must be brought in the same court, unless the order otherwise specially directs. If it directs that the action be commenced in another court, the latter court may, by order at any time after the cross action is commenced, remove to itself the original action, with like effect as if it had been brought therein. Unless the court otherwise directs, the original

action and the cross action must be tried, and judgment rendered therein, as if they were one action.

Id. (2 Edm. J91).

§ 761. When court may order action abated.

At any time after the death of the plaintiff, or after the marriage of the plaintiff, where it affects the rights of either party, the court may, in its discretion, upon notice to such persons as it directs, and upon the application of the adverse party, or of a person whose interest is affected, direct that the action abate, unless it is continued by the proper parties, within a time specified in the order, not less than six months, nor more than one year, after the granting thereof.

Co. Proc., § 121, fifth sentence, am'd. See § 1736.

§ 762. Special cases excepted.

The foregoing provisions of this title do not apply to a case, where special provision is otherwise made by law.

§ 763. Death of party after verdict, etc.

If either party to an action dies, after an accepted offer to allow judgment to be taken, or after a verdict, report, or decision, or an interlocutory judgment, but before final judgment is entered, the court must enter final judgment, in the names of the original parties; unless the offer, verdict, report, or decision, or the interlocutory judgment, is set aside.

2 R. S. 387, § 4, am'd.

§ 764. [Am'd, 1904.] Action for a wrong not to abate after verdict, etc.

An action commenced by a father to recover damages for the seduction of his minor daughter does not abate by his death, but survives to the mother of such daughter, who may recover both actual and exemplary damages therein to the same extent as though the original party plaintiff had lived. After verdict, report or decision in an action to recover damages for a personal injury, the action does not abate by the death of a party, but the subsequent proceedings are the same as in a case where the cause of action survives. And in case said verdict, report or decision is reversed upon questions of law only, said action does not abate by the death of the party against whom the same was rendered.

L. 1904, ch. 379. In effect Sept. 1, 1904.

§ 765. No verdict, etc., can be taken after a party's death.

This title does not authorize the entry of a judgment against a party, who dies before a verdict, report, or decision is actually rendered against him. In that case, the verdict, report, or decision is absolutely void.

2 R. S. 387, § 5 (2 Edm. 402), am'd.

§ 766. Death, etc., of public officer or trustee.

Where an action or special proceeding is authorized or directed by law, to be brought by or in the name of a public officer, or

by a receiver, or other trustee, appointed by virtue of a statute, *his* death or removal does not abate the action or special proceeding; but the same may be continued by his successor, who must, upon his application, or that of a party interested, be substituted for that purpose, by the order of the court, a copy of which must be annexed to the judgment-roll.

2 R. S. 388, § 14; and L. 1832, ch. 295, § 3 (3 Edm. 674), consolidated.

TITLE V.**Motions and orders generally.**

Sec. 767. Definition and form of an order.

768. An application for an order is a motion.

769. Motions in supreme court; where to be heard.

770. Motions in New York city.

771. In absence of judge, motion may be transferred to another judge.

772. 773. What judges may make orders out of court, without notice.

774. Review of order made by a judge of another court.

775. When stay of proceedings not to exceed twenty days.

776. Subsequent application for order after denial, etc., of prior application.

777. Id.; as to application for judgment.

778. Penalty for violating last two sections.

779. Costs of a motion; how collected.

§ 767. [Am'd, 1911, 1912.] Definition and form of an order.

A direction of a court or judge, made, as prescribed in this act, in an action or special proceeding, must be in writing, unless otherwise specified in the particular case. Such a direction, unless it is contained in a judgment, is an order. In determining a motion, the court shall cause its determination, together with a recital of the papers read on the motion on either side to be indorsed on or appended to the back of the motion papers and shall sign the same and such indorsement and signature shall constitute the order of the court; but nothing herein contained shall prevent the court, upon the application of either party, from resettling such order in the form of the written order heretofore in use. Upon such resettlement of the order, where the right to appeal depends upon whether or not such order was made in the exercise of discretion, or whether or not the decision upon which it is based involves a question of law, such order shall so state the ground upon which it was made.

Co. Proc., § 400, am'd. Am'd by L. 1911, ch. 368; L. 1912, ch. 66. In effect Sept. 1, 1912.

§ 768. [Am'd, 1900, 1911.] An application for an order is a motion.

Such application or motion must be made to a court, or to a judge or justice thereof. When the defendants have made default in appearing in an action or proceeding, any application or motion therein may be made to the court or to a judge or justice thereof out of court. Where any of the defendants in an action or proceedings have appeared, all motions or applications thereafter made in such action, or proceedings, except a motion made for an extension of time on two days' notice under rule twenty-four of the general rules of practice which may be made to a judge, and except where it is otherwise authorized by law, must be made to the court, unless such defendants consent to the making of such motion or application to a judge or justice out of court. Except in the first judicial department an order which is authorized by statute to be made at chambers may be made by the court. Any proceeding which is required by statute to be instituted by petition may also be instituted by an affidavit

setting forth the matter which it is required that the petition shall contain, accompanying a notice of an application for the relief which would properly be prayed for in the petition; and in like manner a proceeding which is required by statute to be instituted by affidavit may be instituted by petition. The party making a motion may, in the notice thereof, specify one or more kinds of relief in the alternative or otherwise, and the adverse party must, where at least eight days' notice of the motion shall be given, at least one day prior to the time at which the motion is noticed to be heard, serve upon the attorney for the moving party copies of the affidavits and papers which he expects to read in opposition to the motion; he may, at least three days prior to the time at which the motion is noticed to be heard, serve upon the attorney for the moving party a notice, with or without affidavits or other papers in support thereof, specifying any kind or kinds of relief in the alternative or otherwise to which he claims to be entitled in the action whether the relief so asked for be responsive or not to the relief asked for by the moving party. Upon the hearing of a motion relief shall not be denied to any party because of defects or insufficiencies in the moving papers which can be cured upon the hearing or before the entry of the order thereon, but the court or judge shall direct that such defects or insufficiencies be cured or supplied forthwith, and shall proceed to hear and consider the motion, or may direct the motion to stand over to be heard at a subsequent time or place. In either case it may award against the party in whose moving papers or application such defect or insufficiency appears, costs in favor of the adverse party. Whenever a motion is made to set aside or vacate an order, judgment or decree or any paper filed or proceeding taken, because of technical defects therein, or because of defects or insufficiencies in the papers or proceedings upon which it was made or entered and such defects or insufficiencies can, without prejudice to intervening rights, be cured or supplied, it shall be the duty of the court to direct upon the hearing of such motion, that such defects or insufficiencies in the order, judgment or decree, or in the papers or proceedings, be cured or supplied *nunc pro tunc*, awarding against the party in whose order, judgment or decree, or in whose papers or proceedings such defects or insufficiencies appear, costs in favor of the adverse party. The pleadings in an action shall at all times when a motion is made therein be deemed to be before the court although not specifically referred to in the notice of motion.

Id., § 401, subd. 1, L. 1900, ch. 147; L. 1911, ch. 763, in effect Sept. 1, 1911.

§ 769. [Am'd, 1879.] **Motions in supreme court; where to be heard.**

A motion, upon notice, in an action in the supreme court must be made within the judicial district in which the action is triable, or in a county adjoining that in which it is triable; except that where it is triable in the first judicial district,* the motion must be made in that district; and a motion upon notice, cannot be made in that district in an action triable elsewhere. But this section does not apply to a case where it is specially prescribed

* The words, "the motion must be made in that district," omitted by error in engrossing.

by law that a motion may be made in the county, where the applicant, or other person to be affected thereby, or the attorney, resides.

Id., § 401, subd. 4, am'd.

§ 770. Motions in New York city.

In the first judicial district, a motion which elsewhere must be made in court, may be made to a judge out of court, except for a new trial on the merits.

Id., subd. 2.

§ 771. In absence of judge, motion may be transferred to another judge.

Where notice of a motion is given, or an order to show cause is returnable, before a judge, out of court, who, at the time fixed for the motion, is or will be absent, or unable, for any other cause, to hear it, the motion may be transferred, by his order, made before or at that time, or by the written stipulation of the attorneys for the parties, to another judge, before whom it might have been originally made.

Co. Proc., § 404, am'd. See § 26, ante.

§ 772. [Am'd, 1895.] What judges may make orders out of court, without notice.

Where an order, in an action, may be made by a judge of the court, out of court, and without notice, and the particular judge is not specially designated by law, it may be made by any judge of the court, in any part of the State; or, except to stay proceedings after verdict, report, or decision, by a justice of the supreme court, or by the county judge of the county where the action is triable, or in which the attorney for the applicant resides. Where such an order grants a provisional remedy, it can be vacated only in the mode specially prescribed by law; in any other case, it may be vacated or modified, without notice, by the judge who made it, or, upon notice, by him, or by the court.

Id., § 401, subd. 3; and *id.*, § 324, consolidated and am'd. See ante, § 241; L. 1895, ch. 946.

§ 773. The same.

The limitation, contained in the last section, of the county judges who may make an order, does not apply to a case where it is prescribed in this act, in general words, that a particular order may be made by a county judge, or by any county judge.

§ 774. [Am'd, 1877.] Review of order, made by a judge of another court.

An action, made by a judge of a court, other than the court in which the action is pending, may be reviewed in the same manner, as if it was made by a judge of the court, in which the action is pending.

Co. Proc., § 403, last clause, am'd. See § 327, ante.

§ 775. [Am'd, 1877.] When stay of proceedings not to exceed twenty days.

An order to stay proceedings in an action, for a longer time than twenty days, shall not be made by a judge, out of court, except to stay proceedings under an order or judgment appealed from, or where it is made upon notice of the application, to the adverse party, or in cases where special provision is otherwise made by law.

Id., § 401, subd. 6. See Rule 67.

§ 776. Subsequent application for order after denial, etc., of prior application.

If an application for an order, made to a judge of the court, or to a county judge, is wholly or partly refused, or granted conditionally, or on terms; a subsequent application, in reference to the same matter, and in the same stage of the proceedings, shall be made only to the same judge, or to the court. If it is made to another judge, out of court, an order granted thereupon must be vacated by the judge who made it; or, if he is absent, or otherwise unable to hear the application, by any judge of the court, upon proof, by affidavit, of the facts.

2 R. S. 281, § 27 (2 Edm. 297); and Id. 178, §§ 32, 33 and 34 (2 Edm. 179).

§ 777. Id.; as to application for judgment.

Where an application is made to the court for judgment, it cannot be withdrawn, without the express permission of the court; and a subsequent application for judgment shall not be made, at a term held by another judge, except where the first application is so withdrawn: or where the directions, given thereupon, require an act to be done, before judgment can be rendered; or where the fact of the former application is stated, and the proceedings thereupon, and subsequent thereto, are fully set forth, in the papers upon which the application is made.

§ 778. Penalty for violating last two sections.

A person making an application, forbidden by the last two sections, with knowledge of the previous application, shall be punished by the court, for a contempt.

2 R. S. 281, § 28.

§ 779. [Am'd, 1879, 1882 and 1884.] Costs of a motion; how collected.

Where costs of a motion, or any other sum of money, directed by an order to be paid, are not paid within the time fixed for that purpose by the order, or if no time is so fixed within ten days after the service of a copy of the order, an execution against the personal property only of the party required to pay the same, may be issued by any party or person to whom the said costs or sum of money is made payable by said order, or in case permission of the court shall be first obtained by any party or person having an interest in compelling payment thereof, which execution shall be in the same form, as nearly as may be, as an execution upon a judgment, omitting the recitals and directions relating to real property; and all proceedings on the part of the party required to pay the same, except to review or vacate the order, are stayed without further direction of the court, until

the payment thereof. But the adverse party may, at his election, waive the stay of proceedings. Where the order directs that the costs of a motion abide the event of the action, or where costs of a motion, awarded by an order, have not been collected when final judgment is entered, they may be taxed as part of the costs of the action or set off against costs awarded to the adverse party, as the case requires. But nothing herein contained shall be so construed as to relieve a party or person from punishment as for contempt of court for disobedience to an order in any case when the remedy of enforcement by such proceedings now exist.

See Code of Proc., as am'd in 1876; L. 1884, ch. 181; § 3233, post.

TITLE VI.

Miscellaneous practice regulations.

- Article 1. General regulations respecting time.
 2. Preferred and deferred causes.
 3. Service of papers.
 4. Discovery of books and papers.
 5. General regulations respecting bonds and undertakings.
 6. Other matters.

ARTICLE FIRST.

General regulations respecting time.

- Sec. 780. Notice of motion, to be eight days.
 781. How time enlarged, before its expiration.
 782. Copy of affidavit must be served.
 783. Relief, after time has expired.
 784. When time cannot be extended.
 785. Qualification of last section.
 786. Orders in certain actions; how published.
 787. Time for publication of notice; how computed.
 788. [Repealed.]

§ 780. Notice of motion, to be eight days.

Where special provision is not otherwise made by law, or by the general rules of practice, if notice of a motion, or of any other proceeding in an action, before a court or a judge, is necessary, it must, if personally served, be served at least eight days before the time appointed for the hearing; unless the court or a judge thereof, or a county judge of the county where the action is triable or in which the attorney for the applicant resides, upon an affidavit showing grounds therefor, makes an order to show cause, why the application should not be granted; and, in the order, directs that service thereof, less than eight days before it is returnable, be sufficient.

See L. 1890, ch. 219. See also Rules 37, 67.

§ 781. How time enlarged, before its expiration.

Where the time, within which a proceeding in an action, after its commencement, must be taken, has begun to run, and has not expired, it may be enlarged, upon an affidavit showing grounds therefor, by the court, or by a judge authorized to make an order in the action.

Co. Proc., part of § 406, am'd.

§ 782. Copy of affidavit must be served.

In a case specified in the last two sections, the affidavit, upon which the order was granted, or a copy thereof, must be served with a copy of the order; otherwise, the order may be disregarded.

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§ 783. Relief, after time has expired.

After the expiration of the time, within which a pleading must be made, or any other proceeding in an action, after its commencement, must be taken, the court, upon good cause shown, may, in its discretion, and upon such terms as justice requires, relieve the party from the consequences of an omission to do the act, and allow it to be done; except as otherwise specially prescribed by law.

Substitute for part of Co. Proc., § 174.

§ 784. When time cannot be extended.

A court, or a judge, is not authorized to extend the time, fixed by law, within which to commence an action; or to take an appeal; or to apply to continue an action, where a party thereto has died, or has incurred a disability; or the time fixed by the court, within which a supplemental complaint must be made, in order to continue an action; or an action is to abate, unless it is continued by the proper parties. A court, or a judge, cannot allow either of those acts to be done, after the expiration of the time fixed by law, or by the order, as the case may be, for doing it; except in a case specified in the next section.

See Co. Proc., § 405.

§ 785. [Am'd, 1877.] Qualification of last section.

Where a party entitled to appeal from a judgment or order, or to move to set aside a final judgment for error in fact, dies either before or after this chapter takes effect, and before the expiration of the time within which the appeal may be taken, or the motion made, the court may allow the appeal to be taken, or the motion to be made, by the heir, devisee, or personal representative of the decedent, at any time within four months after his death.

§ 786. Orders in certain actions; how published.

Where an action is brought for the collective benefit of the creditors of a person, or of an estate, or for the benefit of a person or persons, other than the plaintiff, who will come in and contribute to the expense of the action, notice of a direction of the court, contained in a judgment or order, requiring the creditors, or other person or persons to exhibit their demands, or otherwise to come in, must be published, once in each week, for at least three successive weeks, and as much longer as the court directs. in the newspaper, published at Albany, in which legal notices are required to be published, and in a newspaper, published in the county where the act is required to be done.

2 R. S. 183, § 108 (2 Edm. 190).

§ 787. Time for publication of notice; how computed.

The period of publication of a legal notice, in an action or special proceeding, brought in a court, either of record or not of record, or before a judge of such a court, must be computed, so as to exclude the first day of publication, and include the day, on which the act or event, of which notice is given, is to happen, or which completes the full period of publication.

Co. Proc., § 425.

§ 788. [Repealed, 1892, ch. 677.]

judge thereof, that she has no sufficient means of support aside from the estate in controversy, an action for the partition of real property.

7. [Am'd, 1882.] An action against a corporation or joint-stock association, issuing bank notes or any kind of paper credits, to circulate as money; or by or against a receiver of such a corporation or association; an action in which a county or town is sole plaintiff or defendant.

8. [Am'd, 1879.] An action against a corporation, founded upon a note or other evidence of debt for the absolute payment of money. An action upon an undertaking given upon an appeal to the court of appeals or to stay the execution on an appeal to the court of appeals.

9. [Am'd, 1887.] In an action against a sheriff, in his official capacity, or an action by a sheriff or late sheriff, to recover for a breach of the obligation of a bond or bonds, or an instrument or instruments of indemnity, or an undertaking or undertakings given to him in his official capacity.

10. A cause entitled to preference, by the general rules of practice, or by the special order of the court, in the particular case.

11. [Added, 1898.] In any court an action for libel or slander. L. 1898, ch. 136. In effect Sept. 1, 1898.

12. [Added, 1899.] In the court of appeals, all appeals from judgments of affirmance rendered by the appellate division of the supreme court in cases enumerated in subdivision two of section one hundred and ninety-one of this act, where the decision of the appellate division has been unanimous and an appeal has been taken or allowed as in said subdivision of said section provided.

L. 1899, ch. 255. In effect Sept. 1, 1899.

13. [Added, 1902.] An action for absolute divorce in which an order has been made granting temporary alimony.

L. 1902, ch. 337. In effect Sept. 1, 1902.

Where an issue of law and an issue of fact, or two or more other questions of different natures, come before the same term of the court for trial or hearing, the preference given by this section affects only the order in which the issues or questions of the same nature are to be disposed of.

§ 792. [Am'd, 1895.] *Id.*; in mandamus or prohibition.

Where a writ of mandamus or of prohibition has been issued from the appellate division of the supreme court, to a special term, or a judge of the same court, the cause may, in the discretion of the court, or, where an appeal is taken therein to the court of appeals, in the discretion of that court, be preferred over any of the causes specified in the last section.

L. 1895, ch. 946.

§ 793. [Am'd, 1895, 1896, 1900, 1904.] Where an order is necessary.

Where the right to a preference depends upon facts which do not appear in the pleadings or other papers upon which the cause is to be tried or heard, the party desiring a preference must procure an order therefor from the court, or a judge thereof, upon notice to the adverse party. A copy of the order must be served with or before the notice of trial or argument. Such an order is

subdivision, has been served by their attorney, at the time of service of the notice of trial or argument. The provisions of the last subdivision, relating to moving the trial or argument, apply to a cause within this subdivision.

L. 1898, ch. 136. In effect Sept. 1, 1898.

3. In the court of appeals or the supreme court, an appeal taken by either party, in an action or special proceeding other than as specified in subdivision first of this section, where the people of the State, or a board of State officers, are sole parties, or a State officer is sole party, plaintiff or defendant.

3a. [Added, 1899.] In the court of appeals or the supreme court, an appeal taken by either party in an action or special proceeding from a judgment or order declaring a legislative enactment unconstitutional, is entitled on motion of the appellant, to a preference over any business irrespective of its place upon the calendar, except as to preferences provided for in sections seven hundred eighty-nine, seven hundred ninety and the preceding subdivisions of this section.

L. 1899, ch. 535. In effect Sept. 1, 1899.

4. In the court of appeals, an action, a party to which has died, pending the action, where the pendency of the action prevents a final settlement of the estate of the deceased party.

5. [Am'd, 1895, 1899, 1900, 1906.] In any court, an action or special proceeding in which an executor or an administrator, or testamentary trustee, or an infant, or a trustee of a fund for the support and maintenance of an infant, or a receiver appointed by the court, or by the comptroller of the currency of the United States, or a trustee in bankruptcy, or a general assignee for the benefit of creditors, or the committee of a lunatic or an idiot, or a creditor of a deceased insolvent debtor suing for the benefit of himself and other creditors interested in the estate or property of such deceased debtor where a right of action is given by express provision of law, is the sole plaintiff or sole defendant; an action or special proceeding for the construction of, or an adjudication upon or to determine the validity of the probate of a will, in which the administrator, with the will annexed, or the executor of the will is joined, as plaintiff or defendant, with one or more other parties, and an appeal from the judgments or decision in any of the foregoing actions or proceedings and in the court of appeals or the supreme court, an appeal from the decree or decision of a surrogate's court, determining a will to be valid and admitting it to probate, or determining an instrument offered for probate as a will to be invalid or not entitled to probate as such, or granting general letters of administration or directing the distribution of a fund or payment of money by an executor or an administrator in pursuance of an order or decree made on an intermediate, final or judicial accounting or otherwise by an administrator or an executor.

L. 1899, ch. 535; L. 1900, ch. 144; L. 1906, ch. 6. In effect Sept. 1, 1906.

6. [Am'd, 1895.] An action for dower where the plaintiff makes proof by affidavit, to the satisfaction of the court, or a

judge thereof, that she has no sufficient means of support aside from the estate in controversy, an action for the partition of real property.

7. [Am'd, 1882.] An action against a corporation or joint-stock association, issuing bank notes or any kind of paper credits, to circulate as money; or by or against a receiver of such a corporation or association; an action in which a county or town is sole plaintiff or defendant.

8. [Am'd, 1879.] An action against a corporation, founded upon a note or other evidence of debt for the absolute payment of money. An action upon an undertaking given upon an appeal to the court of appeals or to stay the execution on an appeal to the court of appeals.

9. [Am'd, 1887.] In an action against a sheriff, in his official capacity, or an action by a sheriff or late sheriff, to recover for a breach of the obligation of a bond or bonds, or an instrument or instruments of indemnity, or an undertaking or undertakings given to him in his official capacity.

10. A cause entitled to preference, by the general rules of practice, or by the special order of the court, in the particular case.

11. [Added, 1896.] In any court an action for libel or slander.

L. 1896, ch. 136. In effect Sept. 1, 1896.

12. [Added, 1899.] In the court of appeals, all appeals from judgments of affirmance rendered by the appellate division of the supreme court in cases enumerated in subdivision two of section one hundred and ninety-one of this act, where the decision of the appellate division has been unanimous and an appeal has been taken or allowed as in said subdivision of said section provided.

L. 1899, ch. 385. In effect Sept. 1, 1899.

13. [Added, 1902.] An action for absolute divorce in which an order has been made granting temporary alimony.

L. 1902, ch. 357. In effect Sept. 1, 1902.

Where an issue of law and an issue of fact, or two or more other questions of different natures, come before the same term of the court for trial or hearing, the preference given by this section affects only the order in which the issues or questions of the same nature are to be disposed of.

§ 792. [Am'd, 1895.] *Id.*; in mandamus or prohibition.

Where a writ of mandamus or of prohibition has been issued, from the appellate division of the supreme court, to a special term, or a judge of the same court, the cause may, in the discretion of the court, or, where an appeal is taken therein to the court of appeals, in the discretion of that court, be preferred over any of the causes specified in the last section.

L. 1895, ch. 946.

§ 793. [Am'd, 1895, 1896, 1900, 1904.] Where an order is necessary.

Where the right to a preference depends upon facts which do not appear in the pleadings or other papers upon which the cause is to be tried or heard, the party desiring a preference must procure an order therefor from the court, or a judge thereof, upon notice to the adverse party. A copy of the order must be served with or before the notice of trial or argument. Such an order is

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ch. 148*

not appealable, but it may be vacated by the judge or judges holding the term at which the preferred cause is noticed for trial or hearing, or by such other justice, or at such other term of court, or at such other time as shall be prescribed by the general or special rules of practice. But a preliminary order is not requisite in a case embraced within subdivision first or second of the last section but one, and the order in a case embraced within subdivision six thereof may be made *ex parte*, and is conclusive. Where no order is required, a claim for preference, specifying the provision of law under which the claim is made, may be inserted in the note of issue to be filed with the clerk, and it shall then be the duty of such clerk to place such cause in its proper place among the preferred causes at the head of the calendar; except that in the counties of New York, Kings, Queens and Erie, and the seventh judicial district, no action or special proceeding shall be placed as a preferred cause upon the calendar of any circuit court or trial term or special term of any court as herein provided, but the party desiring a preference of any cause shall serve upon the opposite party, with his notice of trial, a notice that an application will be made to the court at the opening thereof, or to such justice or other term of court or at such other time as shall be prescribed by the general or special rules of practice, for leave to move the same as a preferred cause, and if the right to a preference depends upon facts which do not appear in the pleadings or other papers upon which the case is to be tried the notice must be accompanied by an affidavit showing such facts. In said counties of New York, Kings, Queens and Erie and in the seventh judicial district, the application for a preference shall be made at the opening of the court, or to such justices or other term of court, or at such other time as shall be prescribed by the general or special rules of practice, and if it shall appear that the cause is entitled to a preference and is intended to be moved for trial at or for the term for which the application is made, the court or justice must designate a day certain, during that term, on which day the said cause shall then be heard; if there be two or more causes so designated for trial for the same day, the said causes shall be heard in the order of their date of issue.

L. 1895, ch. 410; L. 1896, ch. 140; L. 1900, ch. 172; L. 1904, ch. 173. In effect Sept. 1, 1904.

§ 794. [Repealed Jan. 1, 1896; L. 1895, ch. 946.]

§ 795. [Repealed Jan. 1, 1896; L. 1895, ch. 946.]

ARTICLE THIRD.

Service of papers.

- Sec. 796. Paper may be served personally.
 797. Other modes of service.
 798. Double time when served through the post-office.
 799. When paper to be served on attorney; when service not required.
 800. When service may be made on clerk, for non-resident.
 801. Service through branch post-office in New York city.
 801-a. Service in certain actions when name of deceased person is stated as defendant.
 802. This article not applicable to service of summons or certain other process.

§ 796. [Am'd, 1888.] Paper may be served personally.

A notice or other paper in an action may be served on a party or an attorney, either by delivering it to him personally, or in the manner prescribed in the next section. All papers so served or required to be filed in an action, shall be plainly and legibly written or printed in black ink upon durable paper of good material, and, if imprinted by type-writer, such paper shall be of linen quality, equal in weight to sixteen pounds to the double cap ream, of seventeen by twenty-eight inches in size, and service or filing of papers printed or written upon such paper with such ink shall be deemed a compliance with the terms of this section. The transcribed minutes of a stenographer, taken in any civil or criminal action, or in any hearing or special proceeding, civil or criminal, shall be written or type-written on paper of the size hereinafter specified; and all cases, briefs, points or other papers required or used on an appeal from any judgment, determination or order of any court or board shall be printed (when required to be printed by the rules of any court) on paper of a uniform size, as follows: The paper must be ten and one-half inches by eight inches, and bound on the edge of the greatest length.

Co. Proc., § 408, am'd; L. 1888, ch. 496. See Rule 19.

§ 797. [Am'd, 1897.] Other modes of service.

Where the service is not personal, it may be made as follows:

1. Upon a party or an attorney, through the post-office, by depositing the paper, properly inclosed in a post-paid wrapper, in the post-office or in any post-office box regularly maintained by the government of the United States and under the care of the post-office of the party, or the attorney serving it, directed to the person to be served at the address, within the state, designated by him for that purpose, upon the preceding papers in the action; or, where he has not made such a designation, at his place of residence, or the place where he keeps an office, according to the best information which can conveniently be obtained concerning the same.

2. Upon an attorney, during his absence from his office, by leaving the paper with his partner or clerk therein, or with a person having charge thereof.

3. Upon an attorney, if there is no person in charge of his office, and the service is made between six o'clock in the morning and nine o'clock in the evening, either by leaving it, in a conspicuous place in his office, or by depositing it, inclosed in a sealed wrapper, directed to him in his office letter-box; or, if the office is not open, so as to admit of leaving the paper therein, and there is no office letter-box, by leaving it at his residence, within the state, with a person of suitable age and discretion.

4. Upon a party, by leaving the paper at his residence within the state, between six o'clock in the morning and nine o'clock in the evening, with a person of suitable age and discretion.

Substitute for Co. Proc., §§ 409, 410, 411; L. 1897, ch. 40. In effect Sept. 1, 1897.

§ 798 [Am'd, 1909, 1910.] Time added when served through the post-office.

Where it is prescribed in this act, or in the general rules of practice, that a notice must be given, or a paper must be served, within a specified time, before an act is to be done; or that the adverse party has a specified time, after notice or service, within which to do an act; if service is made through the post-office, three days shall be added to the time specified except that service of notice of trial may be made, through the post-office, not less than sixteen days before the day of trial, including day of service.

Co. Proc., § 412, am'd. Am'd by L. 1909, ch. 423; L. 1910, ch. 577. In effect Sept. 1, 1910.

§ 799. When paper to be served on attorney; when service not required.

Where a party has appeared, a notice or other paper, required to be served in an action, must be served upon his attorney. If a defendant has not appeared, service of a notice or other paper, in the ordinary proceedings in the action, need not be made upon him, unless he is actually confined in jail, for want of bail.

Id., §§ 414 and 417, consolidated.

§ 800. When service may be made on clerk, for non-resident.

Where a party to an action, who has appeared in person, resides without the State, or his residence cannot, with reasonable diligence, be ascertained, and he has not designated an address, within the State, upon the preceding papers, service of a paper upon him may be made, by serving it on the clerk.

Id., § 415.

§ 801. Service through branch post-office in New-York city.

In the city of New-York, where a paper is served, or a return is made, through the post-office, the deposit of the package in a branch post-office has the same effect, as a deposit in the general or principal post-office of that city.

§ 801-a. [Added, 1909.] Service in certain actions when name of deceased person is stated as defendant.

In case any action or proceeding shall be brought, founded in whole or in part upon any transaction growing out of a business conducted as provided by subdivision three of section twenty and section twenty-one of the partnership law, and the name of the deceased person is stated as a defendant, the process and papers therein may be served on any person or persons using such name with like effect as though such person or persons had been named as defendant by his or their own respective

names, and with the same effect as though all such persons were served with process, and the process and all papers may be amended by substituting the name or names of the person or persons using the name of such deceased, and no action or proceeding shall fail, abate or be in any manner hindered by the name of such deceased being so used.

Added by L. 1909, ch. 65. Derivation — L. 1880, ch. 561, § 5. See note 3 of notes of Board of Statutory Consolidation at end of code.

§ 802. [Am'd, 1909.] This article not applicable to service of summons, or certain other process.

This article except the last section does not apply to the service of a summons, or other process; or of a paper to bring a party into contempt; or to a case where the mode of service is specially prescribed by law.

Id., § 418 and part of id., § 408. Am'd by L. 1909, ch. 65, § 3. See note 46 of notes of Board of Statutory Consolidation at end of code.

ARTICLE FOURTH.

(See 43 Hun. 95.)

Discovery of books and papers.

- Sec. 803.** Court may direct discovery of books, etc.
804. Rules to prescribe the cases, etc.
805. Petition for discovery, and order thereupon.
806. Order, when and by whom vacated.
807. Proceedings upon the return of the order.
808. Penalty for disobedience.
809. Effect of papers, etc., produced.

§ 803. [Am'd, 1909, 1913.] The court may direct discovery of books, et cetera.

A court of record, other than a justices' court in a city, has power to compel a party to an action pending therein, to produce and discover, or to give to the other party, an inspection and copy, or permission to take a copy or photograph of a book, document, or other paper, or to make discovery of any article or property, in his possession or under his control, relating to the merits of the action, or of the defense therein.

2 R. S. 1909, § 21, consolidated with Co. Proc., § 388. Am'd by L. 1909, ch. 173; L. 1913, ch. 86. In effect Sept. 1, 1913.

§ 804. Rules to prescribe the cases, etc.

The general rules of practice must prescribe the cases in which a discovery or inspection may be so compelled, and the proceedings for that purpose, where the same are not prescribed in this act.

Id., § 22, am'd. See Rules 14-16.

§ 805. Petition for discovery, and order thereupon.

To entitle a party to procure such a discovery or inspection, he must present a petition, praying therefor, and verified by affidavit, to the court, or to a judge, authorized to make an order in the action; upon which an order may be made, directing the party, against whom the discovery or inspection is sought, to allow it, or, in default thereof, to show cause before the court, at a time and place, and upon a notice, therein specified, why the prayer of the petition should not be granted; and, if necessary or proper, that his proceedings be stayed until the hearing of the application, although the stay exceeds twenty days.

Id., §§ 23 and 25.

§ 806. Order, when and by whom vacated.

An order, made as prescribed in the last section, may be vacated, by the judge who granted it, or by the court, upon satisfactory proof, by affidavit:

1. That it ought not to have been granted, or that it has been complied with; or,
2. That the party required to make the discovery, or permit the inspection, has not the possession or control of the book, document, or other paper, directed to be produced or inspected.

Id., § 24.

§ 807. Proceedings upon the return of the order.

Upon the return of the order to show cause, the court may make such an order, with respect to the discovery or inspection prayed for, as justice requires. Where either is directed, a

referee may be appointed by the order, to direct and superintend it; whose certificate, unless set aside by the court, is presumptive, and, except in proceedings for contempt, conclusive evidence of compliance or non-compliance with the terms of the order. A fixed sum, not exceeding twenty dollars, may be added to the costs of the motion, for the fees of the referee.

Substitute for 2 R. S. 200, § 26, and part of Co. Proc., § 388.

§ 808. Penalty for disobedience.

Where an order, made as prescribed in the last section, directs a discovery or inspection, the party in whose behalf it was made, may, upon proof, by affidavit, that the adverse party has failed to obey it, and upon notice to him, apply to the court, for an order to punish him for the failure. Upon the hearing of the application, the court may, upon the payment of such a sum, for the expenses of the applicant, as the court fixes, and upon compliance with such other terms, as it deems just to impose, permit the party in default to comply with the order for a discovery and inspection; and, for that purpose, it may direct that the application to punish him stand over to a future time. Upon the final hearing of the application to punish the party in default, the court, in a proper case, may direct that his complaint be dismissed, or his answer or reply be stricken out, and that judgment be rendered accordingly; or it may make an order, striking out one or more causes of action, defences, counterclaims, or replies, interposed by him; or that he be debarred from maintaining a particular claim or defence, in relation to which the discovery or inspection was sought. Where the party has failed to obey an order, allowing an inspection by the adverse party, and requiring him to furnish a copy, or permit a copy to be taken, the court may also direct that the book, document, or other paper, be excluded from being given in evidence; or it may punish the party for a contempt; or both.

Substitute for 2 R. S. 200, § 26, and part of Co. Proc., § 388.

§ 809. Effect of papers, etc., produced.

A book, document, or other paper, produced under an order made as prescribed in this article, has the same effect, when used by the party requiring it, as if it was produced upon notice, according to the practice of the court.

2 R. S. 200, § 27 (2 Edm. 206).

ARTICLE FIFTH.*General regulations respecting bonds and undertakings.*

Sec. 810. Bonds, undertakings, etc., must be acknowledged.

811. Party need not join with his sureties; when one surety is sufficient.

812. Form of bond or undertaking; affidavit of sureties; approval by court or judge.

813. When several sureties may justify each in a smaller sum.

813-a. Further protection for undertakings in certain cases.

814. Bonds, etc., to the people or a public officer for the benefit of a suitor.

815. Bonds, etc., not affected by change of parties.

816. Id.; to be filed.

§ 810. [Am'd, 1877.] Bonds, undertakings, etc., must be acknowledged.

A bond or undertaking, given in an action or special proceeding, as prescribed in this act, must be acknowledged or proved, and certified, in like manner as a deed to be recorded.

See Rule 5.

§ 811. [Am'd, 1895.] Party need not join with his sureties; when one surety is sufficient.

Where a provision of this act requires a bond or undertaking, with sureties, to be given by, or in behalf of, a party or other person, he need not join with the sureties in the execution thereof, unless the provision requires him to execute the same; and the execution thereof by one surety is sufficient, although the word "sureties," is used, unless the provision expressly requires two or more sureties; and the execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this State to transact business, shall be equivalent to the execution of said bond or undertaking by two sureties, and such company, if excepted to, shall justify through its officers or attorney in the manner required by law of fidelity and surety companies. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking.

L. 1895, ch. 510.

§ 812. [Am'd, 1895, 1899, 1901.] Form of bond or undertaking; affidavit of sureties; approval by court or judge.

A bond or undertaking, executed by a surety or sureties, as prescribed in this act, must where two or more persons execute it, be joint and several in form; and, except when executed by a fidelity or surety company, or when otherwise expressly prescribed by law, it must be accompanied with the affidavit of each surety, subjoined thereto, to the effect that he is a resident of and a householder or a freeholder within the state, and is worth the penalty of the bond, or twice the sum specified in the undertaking, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy

and sale under an execution. A bond or undertaking given by a party without a surety must be accompanied by his affidavit to the same effect. The bond or undertaking, except as otherwise expressly prescribed by law, must be approved by the court before which the proceeding is taken, or a judge thereof, or the judge before whom the proceeding is taken. The approval must be endorsed upon the bond or undertaking. The surety or sureties or the representatives of any surety or sureties upon the bond heretofore or hereafter executed, of any trustee, committee, guardian, assignee, receiver, executor, administrator or other fiduciary, shall be entitled as a matter of right to be, and shall be, discharged from liability as hereinafter provided, and to that end may on notice to the principal named in such bond apply to the court that accepted such bond or to the court of which the judge that accepted such bond was a member or to any judge thereof, praying to be relieved from liability as such surety or sureties for the act or omission of such principal occurring after the date of the order relieving such surety or sureties hereinafter provided for and that such principal be required to account and give new sureties. Such notice of such application may be served on said principal personally within or without the state, or, not less than five days prior to the date on which such application is to be made, unless it satisfactorily appears to the court, or a judge thereof, that personal notice cannot be given with due diligence within the state, in which case notice may be given in such manner as the court or a judge thereof directs. Pending the hearing of such application the court or judge may restrain such principal from acting except to preserve the trust estate until further order. Upon the hearing of such application if the principal does not file a new bond in the usual form to the satisfaction of the court or judge the court or judge must make an order requiring the principal to file a new bond within such reasonable time not exceeding five days as the court or judge in such order fixes. If such new bond shall be filed upon such hearing or within the time fixed by said order the court or judge must thereupon make a decree or order requiring the principal to account for all his acts and proceedings to and including the date of such order and to file such account within a time fixed, not exceeding twenty days, and releasing the surety or sureties making such application from liability upon the bond for any act or default of the principal subsequent to the date of such decree or order. If the principal fail so to file such new bond within the time specified, a decree or order must be made revoking the appointment of such principal or removing him and requiring him to so account and file such account within twenty days. If the principal fail to file his account as in this section provided such surety or sureties, or representatives thereof, may make and file such account with like force and effect as though made and filed by such principal, and upon the settlement thereof credit shall be given for all commissions, costs, disbursements, and allowances to which the principal would be entitled were he accounting, and allowance shall be made to such surety or sureties or representative for the expense incurred in so filing such account and procuring the settlement thereof. And after the filing of an account as required, or, permitted, in this section the court or judge must upon the petition of the principal or surety or sureties or the representa-

tives of any such surety or sureties, issue an order requiring all persons interested in the estate or trust funds to attend a settlement of such account at a time and place therein specified and upon the trust fund or estate being found or made good and paid over or properly secured, the surety or sureties shall be discharged from any and all further liability and the court or judge shall settle, determine and enforce the rights and liabilities of all parties to the proceedings in like manner and to the same extent as in actions for an accounting in the supreme court. And upon demand made in writing by the principal such surety or sureties, or representatives thereof, shall return any compensation that has been paid for the unexpired portion of such suretyship.

L. 1895, ch. 511; L. 1899, ch. 726; L. 1901, ch. 524. In effect Sept. 1, 1901.

§ 813. [Am'd, 1894.] When several sureties may justify each in a smaller sum.

But where the penalty of the bond, or twice the sum specified in the undertaking is five thousand dollars or upwards, the court or judge may, in its or his discretion, allow the sum in which a surety is required to justify to be made up by the justification of two or more sureties each in a smaller sum. But in that case a surety cannot justify, in a sum less than five thousand dollars, and when two or more sureties are required by law to justify, the same person cannot so contribute to make up the sum for more than one of them. It shall be lawful for any party of whom a bond or undertaking is required to agree with his sureties for the deposit of any or all moneys for which such sureties are or may be held responsible with a trust company authorized by law to receive deposits, if such deposit is otherwise proper, and for the safe-keeping of any or all other depositable assets for which such sureties may be held responsible, with a safe-deposit company authorized by law to do business as such, in such a manner as to prevent the withdrawal of such moneys and assets, or any part thereof, except with the written consent of such sureties, or an order of the court made on such notice to them, as it may direct.

L. 1894, ch. 200.

§ 813-a. [Added, 1913.] Further protection for undertakings in certain cases.

Where an undertaking has been or shall be given in any action or proceeding the court may in its discretion, if justice so requires, order further or other security to be given in addition to such security. Upon cause shown the court may permit an examination or re-examination of any surety upon any such undertaking. Upon such examination or re-examination, if justice so requires, the court may require a new surety or sureties to be furnished or further or other security to be given in addition to the security already given. The court may enforce such order by any disposition of the action or proceeding that may be proper.

Added by L. 1913, ch. 85. In effect Sept. 1, 1913.

§ 814. [Am'd, 1895.] Bonds, etc., to the people or a public officer for the benefit of a suitor.

Where a bond or undertaking has been given, as prescribed by law, in the course of an action or a special proceeding, to the

people or to a public officer, for the benefit of a party or other person interested, and provision is not specially made by law for the prosecution thereof; the party or other person, so interested, may maintain an action in his own name, for a breach of the condition of the bond, or of the terms of the undertaking; upon procuring an order, granting him leave so to do. The order may be made by the court, in which the action is or was pending; the city court of the city of New-York, or a county court, if the bond or undertaking was given in a special proceeding, pending before a judge of that court; or, in any other case, by the supreme court. Notice of the application therefor must be given, as directed by the court or judge, to the persons interested in the disposition of the proceeds.

L. 1895, ch. 946.

§ 815. Bonds, etc., not affected by change of parties.

A bond or undertaking, given in an action or special proceeding, as prescribed in this act, continues in force, after the substitution of a new party in place of an original party, or any other change of parties; and has thereafter the same force and effect, as if then given anew, in conformity to the change of parties.

§ 816. Id.; to be filed.

A bond or undertaking, required to be given by this act, must be filed with the clerk of the court; except where, in a special case, a different disposition thereof is directed by the court, or prescribed in this act.

Co. Proc., § 423, am'd. See Rule 4.

ARTICLE SIXTH.

- Sec. 817. Consolidating causes in same court.
 818. Id.; in different courts.
 819. Id.; by plaintiff.
 820. Interpleader by order in certain cases.
 820-a. Suit by debtor, demanding judgment of interpleader.
 821. Dismissal of complaint for neglect to serve summons.
 822. Id.; for neglect to proceed.
 823. Feigned issues abolished, and order for trial substituted.
 824. Summons and pleadings, to be filed within ten days after service.
 825. Papers in special proceedings; where to be filed.
 826. Publication, where no newspaper, etc., in county.
 827. Special references in certain cases.

§ 817. Consolidating causes in same court.

Where two or more actions, in favor of the same plaintiff against the same defendant, for causes of action which may be joined, are pending in the same court, the court may, in its discretion, by order, consolidate any or all of them, into one action.

2 B. S. 883, § 36 (2 Edm.' 398).

§ 818. Id.; in different courts.

Where one of the actions is pending in the supreme court, and another is pending in another court, the supreme court may, by order, remove to itself the action in the other court, and consolidate it with that in the supreme court.

Id., § 37.

§ 819. Id.; by plaintiff.

Where separate actions are commenced against two or more joint and several debtors, in the same court, and for the same cause of action, the plaintiff may, in any stage of the proceedings, consolidate them into one action.

Id., § 38.

§ 820. [Am'd. 1894.] Interpleader by order in certain cases.

A defendant against whom an action to recover upon a contract, or an action of ejectment, or an action to recover a chattel, is pending, may, at any time before answer, upon proof, by affidavit, that a person, not a party to the action, makes a demand against him for the same debt or property, without collusion with him, apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property, or its value, to such person as the court directs; or upon it appearing that the defendant disputes, in whole or in part, the liability as asserted against him by different claimants, or that he has some interest in the subject-matter of the controversy which he desires to assert, his application may be for an order joining the other claimant or claimants as co-defendants with him in the action. The court may, in its discretion, make such order, upon such terms as to costs and payments into court of the amount of the debt, or part thereof, or delivery of the possession of the property, or its value or part thereof, as may be just, and thereupon the entire controversy may be determined in the action.

L. 1894, ch. 240. See Banking Law, § 115.

§ 820-a. [Added, 1908.] Suit by debtor, demanding judgment of interpleader.

When any sum of money shall be due and payable under or on account of a contract, and the whole, or any part thereof, exceeding fifty dollars in amount, shall be claimed or demanded by adverse claimants thereto, the debtor may bring suit in any court having jurisdiction thereof, and of the parties, demanding judgment of interpleader, and that the debtor be permitted to pay the amount of the debt into court, and that such debtor upon such payment into court be discharged from any further liability to any of the parties to the action. When service of the summons and complaint shall have been made upon all such claimants, the plaintiff may make application, by petition or upon affidavits for an order permitting and directing the plaintiff to pay the amount of the debt into court, and that the plaintiff, upon the payment into court of the amount of the debt as required by the order, be discharged from any further liability to any of the defendants in such action, and the court, upon satisfactory proof by affidavit or otherwise, as the court may require, of the facts alleged in the complaint, and that the whole or part of the debt is claimed adversely by the defendants without any collusion on the part of the plaintiff, and that the amount thereof is not in dispute may make such an order, upon such terms as to costs and disbursements payable out of the money so adversely claimed as to the court may seem just, and upon the payment into court of the amount of such debt, and complying with the terms of such order, the plaintiff shall stand discharged from any further liability to any of the defendants in said action upon account of such debt and contract. Notice of such application, together with copies of the papers upon which the same is made, shall be personally served on each of the defendants, at least five, and not more than fifteen days before the return day thereof.

Added, L. 1908, ch. 285. In effect Sept. 1, 1908.

§ 821. [Am'd, 1877.] Dismissal of complaint for neglect to serve summons.

Where, in an action against two or more defendants, the plaintiff unreasonably neglects to serve the summons upon one or more of them, without whose presence a complete determination of the controversy cannot be had, the court may, in its discretion, upon the application of a defendant, who has appeared in the action, dismiss the complaint as against him, and render judgment accordingly.

Substitute for Co. Proc., part of § 274.

§ 822. [Am'd, 1879.] Id.; for neglect to proceed.

Where the plaintiff unreasonably neglects to proceed in the action against the defendant, or one or more defendants against whom a separate judgment may be taken, the court may in its discretion, upon the application of the defendant or defendants, or any of them, against whom he so neglects to proceed, dismiss the complaint as against the moving party or parties, and render judgment accordingly.

Id. See Rule 36.

§ 823. Feigned issues abolished, and order for trial substituted.

Feigned issues have been abolished. In a case where neither party can, as of right, require a trial by jury of an issue of fact

arising upon the pleadings, or where a question of fact, not in issue upon the pleadings, is to be tried, an order for the trial thereof by a jury may be made, stating, distinctly and plainly, the questions of fact to be tried. Such an order is the only authority necessary for the trial.

Co. Proc., § 72. See Rule 31.

§ 824. Summons and pleadings, to be filed within ten days after service.

The summons, and each pleading in an action, must be filed with the clerk, by the party in whose behalf it is served, within ten days after the service thereof. If the party fails so to file it, the adverse party, on proof of the failure, is entitled, without notice, to an order from a judge, that it be filed within a time specified in the order, or be deemed abandoned.

Id., § 416.

§ 825. Papers in special proceedings; where to be filed.

A return or other paper in a special proceeding, where no other disposition thereof is prescribed by law, must be filed, and an order therein must be entered, with the clerk of the county in which the special proceeding is taken, if it is before a county officer, or a judge of a court established in a city; if before a justice of the supreme court, with the clerk of a county designated by the justice; or, if no designation is made by him, of a county where one of the parties resides.

L. 1847, ch. 470, § 20, am'd.

§ 826. [Am'd, 1877.] Publication, where no newspaper, etc., in county.

Where a notice, or other proceeding, is required by law to be published in a newspaper published in a county, and no newspaper is published therein, or to be published oftener than any newspaper is regularly published therein, the publication may be made in a newspaper of an adjoining county, except where special provision is otherwise made by law.

2 B. S. 552, § 10.

§ 827. [Am'd, 1877.] Special references in certain cases.

Where a provision of this act authorizes the court to approve an undertaking, or the sureties thereto; or to make an examination or inquiry; or to appoint an appraiser, receiver, or trustee; it may direct a reference to one or more persons designated in the order, either to make the approval, examination, inquiry or appointment, or to report the facts to the court, for its action thereupon. And where, according to the practice of the court of chancery, on the 31st day of December, 1846, a matter was referable to the clerk, or to a master in chancery, a court having authority to act thereupon, may direct a reference to one or more persons, designated in the order, with the powers which were possessed by the clerk, or the master in chancery, except where it is otherwise specially prescribed by law.

Modelled upon first sentence of L. 1847, ch. 230, § 77.

CHAPTER IX.**Evidence.**

TITLE I.—General Regulations respecting Evidence, and the Competency and Mode of Examination of a Witness.

TITLE II.—Compelling the Attendance and Testimony of a Witness.

TITLE III.—Depositions.

TITLE IV.—Documentary Evidence.

TITLE V.—Miscellaneous Provisions.

TITLE I.

General regulations respecting evidence, and the competency and mode of examination of a witness.

- Article 1. Competency of a witness; evidence in particular cases.
2. Administration of an oath or affirmation.

ARTICLE FIRST.

Competency of a witness; evidence in particular cases.

- Sec. 828. No witness to be excluded by reason of interest, etc.
829. When party, etc., cannot be examined.
830. Testimony of party or witness since deceased or insane or who, being a nonresident, has departed from the state, together with all exhibits or documents proved during such testimony.
831. When husband and wife not competent witnesses. When competent.
832. Conviction for crime not to exclude witness; how conviction proved.
833. Clergymen, etc., not to disclose confessions.
834. Physicians not to disclose professional information.
835. Attorneys and counsellors not to disclose communications.
836. Application of the last three sections.
837. When witness not excused from testifying.
838. Evidence of party may be rebutted.
839. Admission by member of corporation.
840. Seal, presumptive evidence of consideration.
841. Presumption of death in certain cases.
841a. Testimony of surveyor and proof of standard of measurement.
841b. Trial and burden of proof of contributory negligence.
841b. Recitals as to heirship in deeds.

§ 828. No witness to be excluded by reason of interest, etc.

Except as otherwise specially prescribed in this title, a person shall not be excluded or excused from being a witness, by reason of his or her interest in the event of an action or special proceeding; or because he or she is a party thereto; or the husband or wife of a party thereto, or of a person in whose behalf an action or special proceeding is brought, prosecuted, opposed, or defended.

Co. Proc. § 398; and L. 1867, ch. 887, § 1.

§ 829. [Am'd, 1881.] When party, etc., cannot be examined.

Upon the trial of an action or the hearing upon the merits or a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness, in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by as-

signment or otherwise; concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee, or person so deriving title or interest, is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence, concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof.

Substitute for Co. Proc., § 399.

§ 830. [Am'd, 1893, 1896, 1899, 1911.] **Testimony of party or witness since deceased or insane or who, being a non-resident, has departed from the state, together with all exhibits or documents proved during such testimony.**

Where a party or witness has died or become insane or, being a nonresident of this state, has departed from the state since or during the trial of an action now or hereafter pending, or since or during the hearing upon the merits of a special proceeding now or hereafter pending, the testimony of the decedent or insane person or of such nonresident who has departed from the state, or of any person who is rendered incompetent by the provisions of the last section, taken or read in evidence at the former trial or hearing, or at the same trial or hearing, either in court or before the same or a new referee, together with all exhibits and documents read in evidence in connection with, or as a part of the giving of such testimony, may be given or read in evidence at a new trial or hearing or at a continuation of the same trial or hearing either in court or before the same or a new referee, or upon any subsequent trial or hearing, either in court or before the same or a new referee, of the same subject-matter in the same or another action or special proceeding between the same parties to such former trial or hearing or their legal representatives, by either party to such new trial or hearing, or to such continuation of the same trial or hearing either in court or before the same or a new referee, or to such subsequent action or special proceeding either in court or before the same or a new referee, subject to any other legal objection to the competency of the witness, or to any other legal objection to his testimony or any question put to him, or to any other legal objection to such exhibits and documents. Such testimony, exhibits and documents proven by oath to have been so previously taken or read in evidence may be so given or read in evidence; or the original stenographic notes of such testimony taken by a stenographer who has since died or become incompetent may be so read in evidence by any person whose competency to read the same accurately is established to the satisfaction of the court or officer presiding at the trial of such action or special proceeding.

L. 1893, ch. 505; L. 1896, ch. 563; L. 1899, ch. 352; L. 1911, ch. 764, in effect Sept. 1, 1911.

§ 831. [Am'd, 1879, 1880, 1887.] **When husband and wife not competent witnesses. When competent.**

A husband or a wife is not competent to testify against the other upon the trial of an action, or the hearing upon the merits of a special proceeding founded upon an allegation of adultery, except to prove the marriage, or disprove the allegation of adultery. A husband or wife shall not be compelled, or without consent of the other, if living, allowed, to disclose a confidential communication, made by one to the other, during marriage. In an action for criminal conversation, the plaintiff's wife is not a com-

petent witness for the plaintiff, but she is a competent witness for the defendant as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff.

L. 1887, ch. 887, §§ 2 and 3 (7 Edm. 198), am'd; L. 1887, ch. 108.

§ 932. [Am'd, 1879.] Conviction for crime not to exclude witness; how conviction proved.

A person, who has been convicted of a crime or misdemeanor is notwithstanding a competent witness in a civil or criminal action or special proceeding; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any question, relevant to that inquiry; and the party cross-examining him is not concluded, by his answer to such a question.

See § 2008, post. See Penal Code. § 714.

§ 933. Clergymen, etc., not to disclose confessions.

A clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline, enjoined by the rules or practice of the religious body, to which he belongs.

2 B. S. 406, § 72, am'd.

§ 934. [Am'd, 1904, 1905.] Physicians or professional registered nurses not to disclose professional information.

A person duly authorized to practice physic or surgery, or a professional or registered nurse, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity; unless, where the patient is a child under the age of sixteen, the information so acquired indicates that the patient has been the victim or subject of a crime, in which case the physician or nurses may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry.

§ 2. L. 1905, ch. 331. Nothing in this act contained shall affect any actions or proceedings now pending.

Id., § 73; L. 1904, ch. 331; L. 1905, ch. 331. In effect Sept. 1, 1905.

§ 935. [Am'd, 1896.] Attorneys and counsellors not to disclose communications.

An attorney or counsellor at law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person employed by such attorney or counsellor be allowed to disclose any such communication or advice given thereon.

L. 1896, ch. 561. In effect Sept. 1, 1896.

§ 936. [Am'd, 1893, 1899, 1904.] Application of the last three sections.

The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. But a physician or surgeon or a professional or registered nurse, may upon a trial or examination disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patient professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, when the provisions of section eight hundred and thirty-four have

been expressly waived on such trial or examination by the personal representatives of the deceased patient, or if the validity of the last will and testament of such deceased patient is in question, by the executor or executors named in said will, or the surviving husband, widow or any heir-at-law or any of the next of kin, of such deceased, or any other party in interest. But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness, as to its preparation and execution in case such attorney is one of the subscribing witnesses thereto. In an action for the recovery of damages for a personal injury the testimony of a physician or surgeon, or of a professional or registered nurse attached to any hospital, dispensary or other charitable institution as to information which he acquired in attending a patient in a professional capacity, at such hospital, dispensary, or other charitable institution shall be taken before a referee appointed by a judge of the court in which such action is pending; provided, however, that any judge of such court at any time in his discretion may, notwithstanding such deposition, order that a subpoena issue for the attendance and examination of such physician or surgeon or professional or registered nurse, upon the trial of the action. In such case a copy of the order shall be served, together with the subpoena. Sections eight hundred and seventy-two, eight hundred and seventy-three, eight hundred and seventy-four, eight hundred and seventy-five, eight hundred and seventy-six, eight hundred and seventy-nine, eight hundred and eighty, eight hundred and eighty-four and eight hundred and eighty-six of this code apply to the examination of a physician or surgeon or a professional or registered nurse, as prescribed in this section. The waivers herein provided for must be made in open court, on the trial of the action, or proceeding, and a paper executed by a party prior to the trial, providing for such waiver shall be insufficient as such a waiver. But the attorneys for the respective parties, may prior to the trial, stipulate for such waiver, and the same shall be sufficient thereof.

L. 1893, ch. 295; L. 1899, ch. 53; L. 1904, ch. 331. In effect Sept. 1, 1904.

§ 837. When witness not excused from testifying.

A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish the fact, that he owes a debt, or is otherwise subject to a civil suit. But this provision does not require a witness to give an answer, which will tend to accuse himself of a crime or misdemeanor or to expose him to a penalty or forfeiture; nor does it vary any other rule, respecting the examination of a witness.

2 B. S. 405, § 71 (2 Edm.) 422.

§ 838. Evidence of party may be rebutted.

The testimony of a party, taken at the instance of the adverse party, orally or by deposition, may be rebutted by other evidence.

Co. Proc., § 298.

§ 839. [Am'd, 1903.] Admission by member of corporation.

The admission of a member of an aggregate corporation, who is not a party, shall not be received as evidence against the corporation unless it was made concerning and while engaged in a transaction in which he was the authorized agent of the corporation; or unless it was made while a member of such corporation and testifying as a witness concerning a transaction of the corporation, when the official record of such testimony shall be received.

2 R. S. 407, § 80; L. 1903, ch. 384. In effect May 6, 1903.

§ 840. [Am'd, 1877.] Seal, presumptive evidence of consideration.

A seal upon an executory instrument, hereafter executed, is only presumptive evidence of a sufficient consideration, which may be rebutted, as if the instrument was not sealed.

Substitute for 2 R. S. 406, § 77.

§ 841. [Am'd, 1891.] Presumption of death in certain cases.

A person upon whose life an estate in real property depends, who remains without the United States, or absents himself in the state or elsewhere for seven years together, is presumed to be dead in an action or special proceeding concerning the property in which his death comes in question, unless it is affirmatively proved that he was alive within that time. And where in any action of partition in this state any portion of the proceeds of the sale of real property is or has been paid into court, or paid to the treasurer of any county for any unknown heirs, and has remained unclaimed for twenty-five years, after such payment by any person entitled thereto, the lapse of twenty-five years after such payment raises the presumption of the death of such unknown heirs at the time of the sale of such real property and before such payment, and after the lapse of twenty-five years after such payment it shall be presumed that there were no such unknown heirs living at the time of such sale or payment, and in any action or proceeding taken for the purpose of distributing and paying over such proceeds, all such unknown heirs are pre-

sumed and they shall be presumed to have been dead at the time of such sale and before such payment into court, or to the treasurer of any county.

1 R. S. 749, § 6, am'd; L. 1891, ch. 364.

§ 841-a. [Added, 1909.] Testimony of surveyor and proof of standard of measurement.

No surveyor shall give evidence in any cause depending in any of the courts of this state, or before arbitrators, respecting the survey or measurement of lands which he may have made, unless if required, either such surveyor shall make oath, or it shall otherwise be shown that the chain or measure used by him was conformable to the standards of the state which were the standards of the state at the time such survey was made. An official certificate of any state, county, city, village or town sealer elected or appointed pursuant to the laws of this state, or the oath of such surveyor, that such chain or measure conformed to the state standard which shall have been furnished any such sealer pursuant to the provisions of the laws of this state, shall be prima facie evidence of such conformity, and an official certificate made by any such sealer that the implement used in measuring such chain or other measure was the one provided under such laws for such purposes, shall be prima facie evidence of that fact.

Added by L. 1909, ch. 65, Derivation — L. 1851, ch. 134, § 33, as am'd by L. 1893, ch. 101, § 1. See note 4 of notes of Board of Statutory Consolidation at end of code.

§ 841-b. [Added, 1913.] Trial and burden of proof of contributory negligence.

On the trial of any action to recover damages for causing death the contributory negligence of the person killed shall be a defense, to be pleaded and proven by the defendant.

Added by L. 1913, ch. 228. In effect Sept. 1, 1913.

§ 841-b. [Added, 1913.] Recitals as to heirship in deeds.

Hereafter, in any proceeding, suit or action pending or hereafter brought, in any of the courts of this state, any deed, mortgage, lease, release, power of attorney, or other instrument more than thirty years old, executed for the purpose of transferring the title to or interest in lands, tenements or hereditaments situated within this state, which contains recitals that the grantors, grantees, or either, or both, are the heirs-at-law of a prior owner of the title or interest described in said instrument, shall be pre-

c. 9, t. 1, a. 1 COMPETENCY OF WITNESS.

sumptive evidence of said heirship as therein recited, if such instrument be duly acknowledged or witnessed and proved in any manner required or permitted at the date of the execution thereof, and be duly recorded in any county where any part of the lands described therein shall be located, or duly recorded in the office of the secretary of state of the state of New York.

Added by L. 1913, ch. 395. In effect Sept. 1, 1913.

199b

ARTICLE SECOND.

Administration of an oath or affirmation.

Sec. 842. Before whom oaths and affidavits may be taken.

842. Id.; in special cases.

844. Id.; without the State.

845. General mode of swearing.

846. When kissing the gospels dispensed with.

847. When affirmation to be made.

848. Other modes of swearing.

849. Swearing persons not Christians.

850. Court may examine witness.

851. Swearing falsely in any form, perjury.

cf. 146 § 842. [Am'd, 1911.] Before whom oaths and affidavits may be taken.

An oath or affidavit, required or authorized by law; except an oath to a juror or a witness upon a trial, an oath of office, and an oath or acknowledgment required by law to be taken before a particular officer; may be taken before a judge, clerk, deputy-clerk, or special deputy-clerk, of a court, a notary public, mayor, justice of the peace, a city magistrate of any of the cities of this state, or police justice thereof, surrogate, special county judge, special surrogate, county clerk, deputy county clerk, special deputy county clerk, or commissioner of deeds, within the district in which the officer is authorized to act; and, when certified by the officer, to have been taken before him, may be used in any court, or before any officer or other person.

2 R. S. 284, § 49, am'd; am'd by L. 1911, ch. 670, in effect Sept. 1, 1911.

§ 843. [Am'd, 1877.] Id.; in special cases.

Where an officer, person, board, or committee, has been heretofore, or is hereafter authorized by law, to take or hear testimony or to hear or receive an affidavit, or to take a deposition, in relation to a matter, concerning which he or it has a duty to perform, the officer or person, or a member of the board or committee, may administer an oath, for that purpose. Where an officer, person, board, or committee, to whom or to which application is made to do an act in an official capacity, requires information or proof, to enable him or it to decide upon the propriety of doing the act, he or it may receive an affidavit for that purpose.

Id. 552, § 11.

§ 844. Id.; without the State.

An oath or affidavit required, or which may be received, in an action, special proceeding, or other matter, may be taken, without the State, except where it is otherwise specially prescribed by law, before an officer authorized by the laws of the State, to take and certify the acknowledgment and proof of deeds, to be recorded in the State; and, when certified by him to have been taken before him, and accompanied with the like certificates, as to his official character and the genuineness of his signature, as are required to entitle a deed acknowledged before him to be recorded within the State, may be used, as if taken and certified in this State, by an officer authorized by law to take and certify the same.

§ 845. [Am'd, 1899.] General mode of swearing.

Except as otherwise specially prescribed in this article, when an oath is administered, the witness shall lay his hand on the gospels and express assent to the oath, and it shall be according to the present practice except that the witness need not kiss the gospels.

2 R. S. 407, § 82; L. 1899, ch. 840 In effect Sept. 1, 1899.

§ 846. [Am'd, 1899.] When kissing the gospels dispensed with.

The oath must be administered in the following form, to a person who so desires, the laying of the hand upon the gospels being omitted: "You do swear, in the presence of the ever-living God." While so swearing, he may or may not hold up his hand, at his option.

1 R. S. 407, § 83; L. 1899, ch. 340. In effect Sept. 1, 1899.

§ 847. When affirmation to be made.

A solemn declaration or affirmation, in the following form, must be administered to a person who declares that he has conscientious scruples against taking an oath, or swearing in any form: "You do solemnly, sincerely, and truly, declare and affirm."

Id., § 84.

§ 848. [Am'd, 1877, 1899.] Other modes of swearing.

If the court or officer, before which or whom a person is offered as a witness, is satisfied, that any peculiar mode of swearing, in lieu of, or in addition to laying the hand upon the gospels, is, in his opinion, more solemn and obligatory, the court or officer may, in its or his discretion, adopt that mode of swearing the witness.

Id., § 85; L. 1899, ch. 340. In effect Sept. 1, 1899.

§ 849. Swearing persons not Christians.

A person believing in a religion, other than the Christian, may be sworn according to the peculiar ceremonies, if any, of his religion, instead of as prescribed in section 845 or section 846 of this act.

Id., § 86.

§ 850. Court may examine witness.

The court or officer may examine an infant, or a person apparently of weak intellect, produced before it or him, as a witness, to ascertain his capacity and the extent of his knowledge; and may inquire of a person, produced as a witness, what peculiar ceremonies in swearing he deems most obligatory.

Id., § 89, am'd.

§ 851. [Repealed by L. 1900, ch. 88. See Penal Law, § 1622.]

TITLE II.**Compelling the attendance and testimony of a witness.****Sec. 852. Mode of serving subpoena issued out of a court.**

853. Penalty for disobedience.

854. Subpoena to be issued by judge, etc.

855. Penalty for disobeying subpoena. Warrant for witness.

856. When witness to be imprisoned.

857. Contents of warrant.

858. To whom directed; how executed.

859. Qualification of preceding sections.

860. Witness exempt from arrest.

861. When to be discharged from arrest.

862. By whom witnesses may be discharged.

863. Arrest, when void; penalty.

864. Sheriff not to be liable unless affidavit is made.

865. Application of foregoing provisions to judgments.

866. Records not to be removed by virtue of subpoena.

867. Production, etc., of book of account.

868. Books, etc., of corporation, how produced.

869. When personal attendance not required by subpoena duces tecum.

§ 852. Mode of serving subpoena issued out of a court.

A subpoena, issued out of the court, to compel the attendance of a witness, and, where the subpoena so requires, to compel him to bring with him a book or paper, must be served as follows:

1. The original subpoena must be exhibited to the witness.

2. A copy of the subpoena, or a ticket containing its substance, must be delivered to him.

3. The fees, allowed by law, for traveling to, and returning from, the place where he is required to attend, and for one day's attendance, must be paid or tendered to him.

2 B. S. 400, § 42, with amendments.

§ 853. Penalty for disobedience.

A person so subpoenaed, who fails, without reasonable excuse, to obey the subpoena, or a person who fails, without reasonable excuse, to obey an order, duly served upon him, made by the court, or a judge, in an action, before or after final judgment therein, requiring him to attend, and be examined, or so to attend, and bring with him a book or paper, is liable, in addition to punishment for contempt, for the damages sustained by the party aggrieved in consequence of the failure, and fifty dollars in addition thereto. Those sums may be recovered in one action, or in separate actions. If he is a party to the action in which he was subpoenaed, the court may, as an additional punishment, strike out his pleading.

Id., § 43, am'd.

§ 854. [Am'd, 1900.] Subpoena to be issued by judge, etc.

When a judge, or an arbitrator, referee, or other person, or a board or committee, or a committee of either house of the legislature, or a joint committee thereof, duly empowered by resolution or act to sit and take testimony during the session thereof, or after the adjournment thereof, has been heretofore or is hereafter expressly authorized by law to hear, try, or determine a matter, or to do any other act in an official capacity, in relation to which proof may be taken, or the attendance of a person as a witness may be required; or to require a person to attend, either before him or it, or before another judge, or officer, or a person designated in a commission issued by a court of another State or country, to give testimony, or to have

his deposition taken, or to be examined; a subpoena may be issued, by and under the hand of the judge, arbitrator, referee, or other person, or the chairman or a majority of the board or committee, requiring the person to attend; and also, in a proper case, to bring with him a book or a paper. The subpoena must be served, as prescribed in section eight hundred and fifty-two of this act. This section does not apply to a matter arising, or an act to be done, in an action in a court of record.

2 R. S. 401. § 44, am'd L. 1900, ch. 587. In effect April 23, 1900. See L. 1907, ch. 545.

§ 855. [Am'd, 1879.] Penalty for disobeying subpoena. Warrant for witness.

A person who is duly subpoenaed, as prescribed in the last section, must obey the subpoena. If he fails so to do, without a reasonable excuse, he is liable, in addition to any other punishment which may be lawfully inflicted therefor, for the damages sustained by the person aggrieved, in consequence of the failure, and fifty dollars in addition thereto, to be recovered as prescribed in section eight hundred and fifty-three of this act. If he fails to attend, the person issuing the subpoena, if he is a judge of a court of record or not of record, or if not, then any judge of such a court, upon proof by affidavit of the failure to attend, must issue a warrant to the sheriff of the county commanding him to apprehend the defaulting witness, and bring him before the officer, person, or body, before whom or which his attendance was required.

Id., §§ 45 and 46, consolidated.

§ 856. [Am'd, 1879.] When witness to be imprisoned.

If the person subpoenaed and attending or brought as prescribed in the last section, before an officer or other person or a body refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book or paper, which he was directed to bring by the terms of the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts by warrant commit the offender to jail, there to remain, until he submits to do the act which he was so required to do or is discharged according to law.

Id., § 47, am'd verbally. See § 876, post.

§ 857. Contents of warrant.

A warrant of commitment, issued as prescribed in the last section, must specify particularly the cause of the commitment; and, if the witness is committed for refusing to answer a question, the question must be inserted in the warrant.

Id., § 48. See § 876, post.

§ 858. To whom directed; how executed.

A warrant to apprehend or commit a person, issued as prescribed in this title, must be directed to the sheriff of the county where the person is, and must be executed by him, in the same manner, as a similar mandate issued, by a court of record, in an action.

Id. 402, § 49. See § 876, post.

§ 859. Qualification of preceding sections.

The foregoing sections of this title do not apply to a subpoena issued by a justice of the peace; or to a witness subpoenaed to

attend a court held by a justice of the peace; or to a case where special provision is otherwise made by law, for compelling the attendance of a witness.

2 R. S. 402, § 50.

§ 860. [Repealed by L. 1909, ch. 14. See Consolidated Laws, tit. Civil Rights Law, § 25.]

§ 861. [Am'd, 1909.] **When to be discharged from arrest.**

The court, from which a subpoena, served in good faith, was issued, or by which an order was made, requiring a person to attend, for the purpose of being examined; or a judge thereof, upon proof, by affidavit, of the facts, must make an order, directing the discharge of a witness or other person, from an arrest made in violation of section twenty-six of the civil rights law.

Id., § 52, am'd. Am'd by L. 1909, ch. 65, § 3. See note 47 of notes of Board of Statutory Consolidation at end of code.

§ 862. [Am'd, 1895, 1909.] **By whom witnesses may be discharged.**

A justice of the supreme court, in any part of the State, or a county judge, has the like authority as a judge of the court, to make an order for a discharge, in a case specified in the last section. Upon satisfactory proof, by affidavit, of the facts, he must also make an order, directing the discharge of a person arrested, in violation of section twenty-six of the civil rights law, where a subpoena, served in good faith upon the person arrested, was issued as prescribed in section eight hundred and fifty-four of this act.

Am'd by L. 1895, ch. 946; L. 1909, ch. 65, § 3. See note 48 of notes of Board of Statutory Consolidation at end of code.

§§ 863-864. [Repealed by L. 1909, ch. 14. See Consolidated Laws, tit. Civil Rights Law, §§ 25-26.]

§ 865. **Application of foregoing provisions to judgments.**

The foregoing provisions of this title, relating to a person required, by an order of a court, to attend, apply, where such an attendance is required by the terms of a judgment.

§ 866. [Am'd, 1895, 1904.] **Records not to be removed by virtue of subpoena.**

The record of a conveyance of real property, or any other record or document, whereof a transcript duly certified may by law be read in evidence, shall not be removed, by virtue of a subpoena duces tecum, from the office in which it is kept, except temporarily, by the clerk having it in custody, to a term or sitting of the court of which he is clerk, or by the officer, having it in custody, to a term or sitting of a court, or a trial before a referee, held in the city or town where the office is situated; but the records kept by the register of the county of New York and the register of the county of Kings shall not be removed except by an order of court made as in this section provided. Where any such record is required at any other place, or any record kept by the register of the county of New York or the register

of the county of Kings, is required at a term or sitting of a court or a trial before a referee, it may be removed, by order of the supreme court, or a county court, made in court, and entered in the minutes; specifying that the production of the original instead of the transcript, is necessary.

L. 1893, ch. 946; L. 1904, ch. 84. In effect March 18, 1904.

§ 867. [Am'd, 1879.] Production, etc., of book of account.

A person shall not be compelled to produce, upon a trial or hearing, a book of account, otherwise than by an order requiring him to produce it, or a subpoena duces tecum. Such a subpoena must be served at least five days before the day when he is required to attend. At any time after service of such a subpoena or order, the witness may obtain, upon such a notice as the judge, referee, or other officer prescribes, an order relieving him wholly or partly from the obligations imposed upon him by the subpoena or the order for production, upon such terms as justice requires touching the inspection of the book or any portion thereof, or taking a copy thereof or extracts therefrom, or otherwise. An order may be made, as prescribed in this section, by a judge of the court, or in a special proceeding pending out of court before an officer, by the officer, or, in either case, by a referee duly appointed in the cause, and authorized to hear testimony. A justice of the peace, or other judge of a court not of record, may make such an order in an action brought in his court, at any time after the commencement thereof.

§ 868. Books, etc., of corporation, how produced.

The production, upon a trial, of a book or paper, belonging to or under the control of a corporation, may be compelled, in like manner as if it was in the hands, or under the control, of a natural person. For that purpose, a subpoena duces tecum, or an order, made as prescribed in the last section, as the case requires, must be directed to the president, or other head of the corporation, or to the officer thereof, in whose custody the book or paper is.

§ 869. When personal attendance not required by subpoena duces tecum.

In a case specified in the last section, or where a subpoena duces tecum, or an order, made as prescribed in section 868 or section 867 of this act, requires a public officer to attend, and bring a book or paper under his control, the subpoena or order is deemed to be sufficiently obeyed, if the book or paper is produced by a subordinate officer or employee of the corporation, or in the public office, who possesses the requisite knowledge to identify it, and to testify respecting the purposes for which it is used. If the personal attendance of a particular officer of the corporation or public officer is required, a subpoena, without a duces tecum clause, must also be served upon him.

TITLE III.

Depositions.

- Article 1. Depositions, taken and to be used within the State.
 2. Depositions, taken without the State, for use within the State.
 3. Depositions, taken within the State, for use without the State.

ARTICLE FIRST.

Depositions, taken and to be used within the State.

- Sec. 870. Deposition of a party or person who expects to be a party.
 871. Deposition of a witness not a party.
 872. Application; contents of affidavit.
 873. Order for examination.
 874. Punishment for disobeying order.
 875. Service of order, etc.
 876. Examination of adverse party.
 877. Party confined in prison.
 878. [Repealed.]
 879. Deposition by consent.
 880. Rules for examination of party or expected party. Manner of taking and returning depositions. Refusal of persons examined to answer.
 881. When to be read in evidence.
 882. Proof of witness's inability to attend.
 883. Effect of deposition.
 884. Original affidavits, evidence.
 885. Deposition to be used on motion.
 886. Where witness may be compelled to attend.

§ 870. [Am'd, 1878, 1904, 1909.] Deposition of a party or person who expects to be a party.

The deposition of a party to an action pending in a court of record, or of a person who expects to be a party to an action about to be brought in such a court may be taken at his own instance or at the instance of an adverse party, or by a plaintiff or codefendant at any time before or during the trial as prescribed in this article.

See L. 1878, ch. 299; Co. Proc., part of §§ 390, 391, 392 and 397; L. 1904, ch. 696; L. 1909, ch. 65, § 3; see note 49 of notes of Board of Statutory Consolidation at end of code,

§ 871. [Am'd, 1877, 1909.] Deposition of a witness not a party.

The deposition of a person not a party, whose testimony is material and necessary to a party to an action, pending in a

court of record, or to a person who expects to be a party to an action about to be brought in such a court, by a person other than the person to be examined, may also be taken, as prescribed in this article.

2 R. S. 891, portions of §§ 1, 2, 83 and 84 (2 Edm. 407, 414, 415). Am'd by L. 1909, ch. 66, § 3. See note 49 of notes of Board of Statutory Consolidation at end of code.

§ 872. [Am'd, 1877, 1879, 1880, 1893, 1895, 1911, 1913.] Application; contents of affidavit.

The person desiring to take a deposition as prescribed in this article, may present to a judge of the court in which the action is pending; or, if it is pending in the supreme court, to a county judge; or, if an action is not pending, but is expected to be brought, to a judge of the supreme court, or to a county judge; an affidavit, setting forth as follows:

1. The names and residences of all the parties to the action, and whether or not they have appeared, and if either of them has appeared by attorney, the name, and the residence or office address of the attorney; or, if no action is pending, the names and residences of the expected parties thereto.

2. If an action is pending, the nature of the action, and the substance of the judgment demanded, and if the application is made by the defendant before answer, or by either party after answer, the nature of the defense.

3. If no action is pending, the nature of the controversy which is expected to be the subject thereof.

4. The name and residence of the person to be examined, and that the testimony of such person is material and necessary for the party making such application, or the prosecution or defense of such action, and if the action is to recover damages for personal injuries, that the defendant is ignorant of the nature and extent of such personal injuries, and, at the option of the applicant the place where he is sojourning, or where he regularly transacts business.

See Rule 82.

5. If an action is pending, that the person to be examined is about to depart from the State; or that he is so sick or infirm, as to afford reasonable ground to believe that he will not be able to attend the trial; or that any other special circumstances exist, which render it proper that he should be examined as prescribed in this article. But this subdivision does not apply to a case, where the person to be examined is a party to the action.

See 101 App. Div. 466.

6. If no action is pending, that the person expected to be the adverse party is of full age, and a resident of the State, or sojourning within the State; or that he has an office within the State, where he regularly transacts business in person, specifying the place, and, if it is in a city, the street and street number, or other designation of the particular locality; or, if two or more persons are expected to be adverse parties, that each is of full age, and so resident or sojourning, or has an office; also the circumstances which render it necessary for the protection of the

applicant's rights, that the witness's testimony should be perpetuated.

7. Any other fact necessary to show that the case comes within one of the two last sections. And if the party sought to be examined is a corporation, joint stock or other unincorporated association, the affidavit shall state the name of the officers, directors, or managing agents thereof, or any of them whose testimony is necessary and material, or the books and papers as to the contents of which an examination or inspection is desired, and the order to be made in respect thereto shall direct the examination of such persons and the production of such books and papers, and on such examination the books or papers, or any part or parts thereof, may be offered and received in evidence in addition to the use thereof by the witness to refresh his memory.

L. 1887, ch. 416; L. 1879, ch. 542; L. 1880, ch. 536; L. 1893, ch. 721; L. 1895, ch. 946; L. 1911, ch. 781; L. 1913, ch. 278. In effect Sept. 1, 1913. See Rule 82.

The judge to whom such an affidavit is presented must grant an order for the examination, if an action is pending; if no action is pending he must grant it if there be reasonable ground to believe that an action will be brought, as stated in the affidavit, and that the application is made in good faith to preserve the expected testimony; otherwise he must dismiss the application. Where the person to be examined is a party to a pending action, or is expected to be a party to an action to be brought, the order may, in the discretion of the judge, designate and limit the particular matters as to which he shall be examined. In every action to recover damages for personal injuries, the court or judge, in granting an order for the examination of the plaintiff before trial may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination by one or more physicians or surgeons, to be designated by the court or judge, and such examination shall be had and made under such restrictions and directions as to the court or judge shall seem proper. In any action brought to recover damages for personal injuries, where the defendant shall present to the court or judge satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the court or judge shall order that such physical examination be made; and if the party to be examined shall be a female she shall be entitled to have such examination before physicians or surgeons of her own sex. The order must require the party or persons to be examined to appear before the judge, or before a referee named in the order, for the purpose of taking the examination, at a time and place therein specified. The order must also direct the time of service of a copy thereof; which must be made within the State, not more than twenty, nor less than five days, before the time fixed for the examination, unless special circumstances, making a different time of service necessary, are shown in the affidavit, and that fact is recited in the order.

L. 1894, ch. 429.

§ 874. [Am'd, 1877 and 1882.] **Punishment for disobeying order.**

Witness fees, at the rate prescribed by law in an action in the supreme court, must be paid or tendered when the order is served upon the party or other person required to attend. If the party or person so served fails to obey the order, his attendance may be compelled, and he may be punished in like manner, and the

proceedings thereon are the same, as if he failed to obey a subpoena, issued from the court, in which the action is pending; or, if no action is pending, from the court of which the judge is a member.

§ 875. [Am'd, 1879.] Service of order, etc.

A copy of the order, and of the affidavit upon which it was granted, must be served upon the attorney for each party to the action, in like manner as a paper in the action; or, if a party has not appeared in the action, they must be served upon him, as directed by the order. If no action is pending, they must be personally served upon each of the persons, named therein as expected adverse parties.

§ 876. [Am'd, 1879.] Examination of adverse party.

Upon proof, by affidavit, that service of a copy of the order and of the affidavit has been duly made, as directed in the order, the judge or the referee must proceed to take the deposition of the witness, at the time and place specified in the order. He may, from time to time, adjourn the examination to another day, and to another place, within the same county. Sections eight hundred and fifty-six, eight hundred and fifty-seven and eight hundred and fifty-eight of this act apply to the examination of a party or a person expected to be an adverse party, taken as prescribed in this article.

2 B. S. 392, § 5, and *Id.* 390, § 36.

§ 877. [Repealed in 1877, re-enacted in 1882.] Party confined in prison.

Where the party or other person to be examined is confined in a prison or jail within the State, under a sentence for a felony, that fact must be stated in the affidavit, and his deposition may be taken as prescribed in the foregoing sections, as if he was not so confined, except that in such a case, the granting or refusing the order, and, if granted, the appointment of a referee to take the testimony, is always in the discretion of the judge. The order must require the production of the prisoner by the person in charge of the prison or jail at the prison or jail; but it may prescribe such regulations and restrictions with respect thereto as the judge deems proper.

§ 878. (Repealed, 1877.)

§ 879. [Am'd, 1882.] Deposition by consent.

The parties to an action may stipulate, in writing, that the deposition of a competent witness, to be used therein, may be taken before a judge or referee, at a time and place specified in the stipulation, either orally, or upon interrogatories, to be agreed upon in like manner. The witness may be subpoenaed to attend the examination, as upon a trial; and the judge or referee may take his deposition, as if an order had been made by the court,

directing it to be so taken. But this section does not apply to a case specified in section eight hundred and seventy-seven of this act.

L. 1847, ch. 280, §§ 78 and 79, amended.

§ 880. [Am'd, 1879.] Rules for examination of party or expected party. Manner of taking and returning depositions. Refusal of persons examined to answer.

The examination of a party, or an expected party, is subject to the same rules as if he was examined upon the trial. The judge or referee, upon every other examination taken as prescribed in this article, must insert therein every answer or declaration of the person examined, which either party requires to be inserted. The deposition, when completed, must be carefully read to and subscribed by the person examined; must be certified by the judge or referee taking it; and, within ten days thereafter, must be filed in the office of the clerk; or, if no action is pending, in the office of the clerk of the county in which it was taken; together with the stipulation or order, under which it was taken; the affidavit upon which the order was granted; and proof of the service of a copy of the order and of the affidavit. If, upon an examination before a referee, the person examined refuses to answer any question, the referee must report the fact to the court or judge, who must determine whether the question is relevant, and whether the witness is bound to answer it.

2 R. S. 392, § 6, and part of § 5 (2 Edm. 408); and *Id.* 399, § 37 (2 Edm. 415).

§ 881. [Am'd, 1911.] When to be read in evidence.

The deposition, or a certified copy thereof, may be read in evidence by either party, at the trial of, or upon the assessment of damages, by writ of inquiry, or upon a reference, or otherwise, in the action or in any special proceeding specified in the original affidavit or stipulation, or in any other action or special proceeding thereafter brought between the same parties, or between any parties claiming under them or either of them, or, if no action or special proceeding is then pending, in an action or special proceeding thereafter brought between the persons named in the original affidavit as expected parties, or between persons claiming under them or either of them, including the case where one of the parties is the executor of the will or administrator of the estate of the witness and is given a cause of action by reason of section nineteen hundred and two of this act. And except in the cases prescribed to the contrary in section eight hundred and eighty-two of this act, the said deposition, or a certified copy thereof, may be read in evidence by either party to the action or special proceeding in which it is taken, and as between the defendant in said action and the legal representatives and privies in interest and estate of the plaintiff, and as between the plaintiff and the legal representatives and privies in interest and estate of the defendant, and as between the legal representatives and privies in interest and estate of the defendant and the legal representatives and privies in interest and estate of the plaintiff.

2 R. S. 392, part of § 7, and *Id.* 399, part of § 30; am'd by L. 1911, ch. 850, in effect Sept. 1, 1911.

§ 882. [Am'd, 1882.] **Proof of witness's inability to attend.**

But such a deposition, except that of a party, taken at the instance of an adverse party, or a deposition taken in pursuance of a stipulation, as prescribed in this article, shall not be so read in evidence until it has been satisfactorily proved that the witness is dead, or is unable personally to attend by reason of his insanity, sickness or other infirmity, or that he is confined in a prison or jail; or that he has been and is absent from the State, so that his attendance could not, with reasonable diligence, be compelled by subpoena.

2 R. S. 392, 399, remainder of §§ 7 and 39.

§ 883. **Effect of deposition.**

A deposition, so read in evidence has the same effect, and no other, as the oral testimony of the witness would have; and an objection to the competency or credibility of the witness, or to the relevancy or substantial competency of a question put to him, or of an answer given by him; may be made as if the witness was then personally examined and without being noted upon the deposition.

Id., §§ 9 and 40, am'd.

§ 884. **Original affidavits, evidence.**

The original affidavits, filed with such a deposition, or certified copies thereof, are presumptive evidence of the facts therein contained, to show a compliance with the provisions of this article.

Id., § 38.

§ 885. [Am'd, 1877, 1901, 1909.] **Deposition to be used on motion.**

Where a party intends to make or oppose a motion in a court of record and it is necessary for him to have the affidavit or deposition of a person not a party, to use upon the motion, the court or a judge authorized to make an order in the case may in its or his discretion make an order appointing a referee to take the deposition of that person. The order must be founded upon proof by affidavit that the applicant intends to make the motion, or that notice of a motion has been given which the applicant intends to oppose. The affidavit must specify the nature of the action and must show that the affidavit or deposition is necessary thereon and that such person has refused to make an affidavit of the facts which the applicant verily believes are within his knowledge. If the defendant has appeared in the action and the application is made on the part of the plaintiff at least one day's notice of such application must be given to the attorney of the defendant, and if the application is made on the part of the defendant similar notice must be given to the attorney of the plaintiff. The person to be examined may be subpoenaed and compelled to attend as upon the trial and may be cross examined by the party on whose attorney the notice has been served. The deposition must be taken by question and answer and be subscribed by the witness, and must be delivered to the attorney for the party who procured the order, unless such order provides for a different disposition thereof.

Substitute for Co. Proc., § 401, subd. 7: L. 1901, ch. 526; L. 1909, ch. 65, § 3. See note 49 of notes of Board of Statutory Consolidation at end of code.

§ 886. Where witness may be compelled to attend.

Where a person to be examined, as prescribed in this article, is a resident of the State, he shall not be required to attend in any county, other than that in which he resides, or where he has an office for the regular transaction of business, in person. Where he is not a resident, he shall not be required to attend in any other county, than that wherein he is served with a subpoena, unless, for special reasons, stated in the affidavit, the order otherwise directs.

Co. Proc. § 391, last clause, with amendments.

ARTICLE SECOND.

Depositions, taken without the State, for use within the State.

- Sec. 887. 888. When commission to issue.
 889. How and upon what terms granted.
 890. Order made by judge.
 891. Interrogatories; how settled.
 892. Id.; to be annexed; directions for return.
 893. Commission to examine wholly or partly upon oral questions.
 894. When open commission may issue, or depositions may be taken.
 895. Depositions where adverse party is an infant or committee.
 896. Notice of examination upon oral questions.
 897. Open commission.
 898. Order directing depositions to be taken.
 899. Before whom depositions may be taken; notice of taking.
 900. How depositions taken.
 901. Commission or order to take depositions; how executed and returned.
 902. Certificate of execution.
 903. Certificate, a sufficient return.
 904. Return by agent.
 905. If agent is sick or dead.
 906. 907. Filing deposition, etc., so returned.
 908. Commission, etc., by consent.
 909. Where return to be kept; parties may inspect, it, etc.
 910. When deposition may be suppressed.
 911. Deposition, etc., evidence.
 912. When interrogatories and deposition may be in a foreign language.
 913. Letters rogatory.

§ 887. [Am'd, 1879.] When commission to issue.

In a case specified in the next section, where it appears, by affidavit, on the application of either party, that the testimony of one or more witnesses, not within the State, is material to the applicant; a commission may be issued, to one or more competent persons, named therein; authorizing them, or any one of them, to examine the witness or witnesses named therein, under oath, upon the interrogatories annexed to the commission; to take and certify the deposition of each witness; and to return the same, and the commission, according to the directions given in or with the commission. The applicant, or any other party to the action, may be thus examined.

From L. 1862, ch. 375, § 1, am'd.

§ 888. [Am'd, 1895.] The same.

Such a commission may be issued, in either of the following cases:

1. Where a party to an action, brought in a court of record, is in default for want of an appearance or pleading, and the testimony is required upon the assessment of damages, by a writ of inquiry, or upon a reference; or otherwise, to enable the court to render the proper final judgment.
2. Where final judgment has been rendered against the adverse party in an action brought in a court of record; and the testimony is required in order to carry the judgment into effect.
3. Where an appeal from a final judgment, rendered in the supreme court, the city court of the city of New-York, or a county court, or a motion for a new trial in either of those courts, is pending, and the testimony will be material and necessary to the applicant, in the prosecution or defence of the action, if a new trial is granted.

* See L. 1882, ch. 410, § 1264; post, § 3171.

4. Where the application is made before the joinder of issue, in an action brought in either of the courts specified in the last subdivision; and there is reason to apprehend that before issue is joined, and an application for a commission can thereafter be made, the witness will die, or become unable to give his testimony, or remove, so that his testimony cannot be taken.

5. Where an issue of fact has been joined, in an action pending in a court of record, and the testimony is material to the applicant, in the prosecution or defence thereof.

6. In special proceedings.

L. 1885, ch. 946.

§ 889. How and upon what terms granted.

In a case specified in subdivision third of the last section, if the appeal has been taken to another court, the application must be made to the court in which the judgment was rendered; and an order, directing the commission to be issued, may be granted or refused, in the discretion of that court. In a case specified in either of the other subdivisions of that section, the application may be made to the court, or a judge thereof, or, in the supreme court, to the county judge of the county, where the action is triable; and it must be granted, upon satisfactory proof of the facts authorizing it, unless the court or judge has reason to believe, that the application is not made in good faith, or unless an order for an open commission, or for taking depositions, is made as prescribed in this article. Notice of the application must be given to the adverse party, unless he is in default for want of an appearance. Upon granting the order, the court or judge may, in any case, impose such terms as justice requires.

From L. 1862, ch. 375, § 1, and 2 R. S. 393, §§ 11 and 12, with amendments. See also L. 1847, ch. 470, § 15 (4 Edm. 533).

§ 890. Order made by judge.

Where the order is made by a judge, out of court, it must be entered in the office of the clerk. It shall be granted, only in a case, where the court would grant it, and upon the same terms; and it is subject to the control of the court.

§ 891. Interrogatories; how settled.

Unless the interrogatories, to be annexed to the commission, are settled by consent of the parties, they must be settled, upon notice, by a judge of the court, or, in the supreme court, by the county judge of the county, where the action is triable, as prescribed in the general rules of practice.

2 R. S. 393, § 14, as am'd by L. 1875, ch. 420.

§ 892. Id.; to be annexed; directions for return.

The interrogatories, when settled, must be annexed to the commission. Either party must be allowed to insert therein any question, pertinent to the issue, which he proposes. Unless the parties stipulate in writing, or the order granting the commission prescribes, how it shall be returned, the judge must indorse, upon the commission, the proper direction for that purpose. Unless the court or judge thinks proper to direct it to be returned by an agent, it must be returned through the post-office.

Id., § 15, with amendments.

§ 893. [Am'd, 1895.] Commission to examine wholly or partly upon oral questions.

Where an issue of fact, joined in an action, is pending in the supreme court, the city court of the city of New-York, or a county court, the parties may stipulate, in writing, or the court to which, or the judge to whom an application for a commission is made, may in its or his discretion, direct, in the order, that a commission issue without written interrogatories, and that the depositions be taken upon oral questions; or that a commission issue, to take the deposition of one or more witnesses, designated in the order, partly upon oral questions and partly upon written interrogatories, or to take the deposition of one or more witnesses, designated in the order, upon oral questions, and one or more witnesses, designated in the order, upon written interrogatories.

L. 1895, ch. 946.

§ 894. When open commission may issue, or depositions may be taken.

Where an issue of fact, joined in an action, is pending in either of the courts specified in the last section, the parties may stipulate, in writing, or the court, or a judge thereof, or, in the supreme court, the county judge of the county where the action is triable, may, in its or his discretion, upon the application of either party, and upon satisfactory proof, by affidavit, that one or more witnesses, not within the State, are material and necessary in the prosecution or defence of the action, make an order, upon such terms as it or he deems proper, directing that an open commission issue, or that depositions be taken, as prescribed in the following sections of this article.

§ 895. [Am'd, 1879, 1897.] Depositions where adverse party is an infant or committee.

The last two sections are not applicable, where the adverse party is an infant, or the committee of a person judicially declared to be incapable of managing his affairs, by reason of lunacy, idiocy or habitual drunkenness. Nor can the applicant be examined in his own behalf, as prescribed in those sections, except by consent of the parties.

L. 1897, ch. 995. In effect May 19, 1897.

§ 896. Notice of examination upon oral questions.

Where a commission is issued, to take testimony without written interrogatories, as prescribed in section 893 or section 894 of this act, notice of the time and place of the examination of a witness, by virtue thereof, naming the witness, must be served as prescribed in section 890 of this act.

See § 890, post.

§ 897. Open commission.

An open commission must be directed to one or more persons, named therein, and must authorize them, or any one of them, to examine any witness who may be produced by either party, on or before a day specified therein, upon oral questions to be put to the witness, when he is produced; to take and certify the deposition of each witness so examined; and to return the same, and the commission, immediately after the expiration of the time limited for the production of witnesses, according to the directions, given in or with the commission.

§ 896. Order directing depositions to be taken.

An order, directing that depositions be taken, must specify the time within which they must be taken, and the manner in which they must be returned. It may also contain such additional directions, not inconsistent with the next section, with respect to the time and manner of giving notice, as the court or judge deems proper. The order must be entered in the clerk's office; and a certified copy thereof must be annexed to each deposition, or set of depositions, returned as prescribed in the following sections of this article.

From L. 1853, ch. 387, § 4, am'd.

§ 899. Before whom depositions may be taken; notice of taking.

A deposition may be taken, pursuant to such an order, before a person mutually agreed upon by the parties, or a chancellor, or a judge of a court of record, or the mayor or other chief magistrate of a city, or a justice of the peace of the state or territory, where the witness is; who is not counsel or attorney for either party, and would not be disqualified, by reason of affinity or consanguinity to a party, or interest in the event, from serving as a juror upon the trial of the action, within the State. Written notice of the time and place of taking a deposition, specifying the name of the witness, and the person before whom it will be taken, must be served by the party, at whose instance it is taken, upon the attorney for the adverse party. The time for serving such a notice must be, at least, five judicial days before the deposition is taken; and one judicial day, in addition, for each fifty miles, by the usual route of travel, between the residence of the attorney for the adverse party, and the place where the deposition is to be taken.

L. 1853, ch. 387, part of § 4, and § 5, am'd.

§ 900. How depositions taken.

Upon the examination of a witness, without written interrogatories, by virtue of a commission, or of an order to take depositions, the commissioner, or the person before whom the deposition is taken, must take down, or cause to be taken down, as prescribed in the next section, the substance of the witness's testimony; unless he is directed, in the commission or the order, or required by the person appearing for either party, to insert in the deposition any or all of the questions or answers, word for word. Unless the commission or order otherwise directs, the person, appearing for either party, may ask any question, which he deems proper, and the witness's answer must be taken accordingly, the objections thereto being reserved, without being specified at the time of examination. A copy of this section must be annexed to each commission to take testimony without written interrogatories, and to each certified copy of an order to take a deposition.

§ 901. Commission or order to take depositions; how executed and returned.

The person, to whom a commission is directed, or before whom a deposition is taken, unless otherwise expressly directed in the commission, or in the order for taking the depositions, must execute the commission, or the order, as follows:

1. He must publicly administer, to each witness examined, an oath or affirmation to testify the truth, the whole truth, and

nothing but the truth, as to the matters respecting which the witness is to be examined.

2. He must reduce the examination of each witness to writing, or cause it to be reduced to writing, by a disinterested person. After it has been carefully read, to or by the witness, it must be subscribed by the witness.

3. If an exhibit is produced and proved, the exhibit, or, if the witness, or other person having it in his custody, does not surrender it, a copy thereof, must be annexed to the deposition to which it relates, subscribed by the witness proving it, and numbered or otherwise identified, in writing thereupon, by the commissioner, or person taking the deposition, who must subscribe his name thereto.

4. The commissioner, or person taking the deposition, must subscribe his name to each half sheet of the deposition; he must annex all the depositions and exhibits to the commission, or to a certified copy of the order for taking the deposition, with the certificate specified in the next section; and he must close them up under his seal, and address the packet to the clerk of the court, at his official residence.

5. If there is a direction, on the commission, or in the order, to return the same through the post-office, he must immediately deposit the packet, so addressed, in the post-office, and pay the postage thereon.

6. If there is a direction on the commission, or in the order, to return the same by an agent of the party, at whose instance it was issued or granted, the packet so addressed must be delivered to the agent.

7. Where a commission is directed to two or more persons, one or more of them may execute it, as prescribed in this and the next section.

A copy of this and of the next section must be annexed to each commission, or order to take depositions, authorized by this article.

2 R. S. 394, § 16, and L. 1853, ch. 387, §§ 6, 7 and 8.

§ 902. Certificate of execution.

The commissioner or other person, before whom one or more depositions are taken, must subscribe, and annex to each deposition, a certificate, substantially in the following form, the blanks being properly filled up:

"State" (or "territory") "of _____" } ss.:

"County" (or "parish") "of _____" }
 "I, _____, do certify that _____, the witness, personally appeared before me on the _____ day of _____, at _____ o'clock in the _____ noon, at the _____, in the state" (or "territory") "or _____, and after being sworn" (or "affirmed," as the case may be), "to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did, in my presence, subscribe the same, and indorse the exhibits annexed thereto. And I further certify that I have subscribed my name to each half-sheet thereof, and to each exhibit. And I further certify that _____ appeared in behalf of the _____, and that _____ appeared in behalf of the _____."

From L. 1853, ch. 387, § 7.

§ 903. Certificate, a sufficient return.

The certificate, specified in the last section, is a sufficient return to a commission.

§ 904. Return by agent.

If the packet, specified in section 901 of this act, is delivered to an agent, he must deliver it to the clerk, to whom it is addressed, or to a judge of the court, either of whom must receive and open it, upon the agent making affidavit, that he received it from the hands of the commissioner, or the person who took the deposition, and that it has not been opened or altered, since he so received it.

2 B. S. 394, § 17.

§ 905. If agent is sick or dead.

If the agent is dead, or, from sickness or other casualty, is unable to deliver the packet personally, as prescribed in the last section, it must be received, by the clerk or judge, from the hands of any other person, upon the latter making an affidavit, that he received it from the agent; that the agent is dead, or otherwise unable to deliver it; that it has not been opened or altered since he received it; and that he believes that it has not been opened or altered, since it came from the hands of the commissioner, or the person who took the deposition.

Id., § 18.

§ 906. Filing deposition, etc., so returned.

The clerk or judge, who receives and opens the packet, as prescribed in the last two sections, must indorse thereupon, and sign, a note of the time of the receipt and opening thereof, and immediately file it in the office of the clerk; together with the affidavit of the person, who delivered it to him.

Id., § 19, am'd.

§ 907. The same.

If the packet is transmitted through the post-office, the clerk, to whom it is addressed, must receive it from the post-office, open it, indorse thereupon, and sign, a like note of the time of the receipt and opening thereof, and immediately file it in his office.

Id., § 20.

§ 908. Commission, etc., by consent.

A commission may issue, or an order to take depositions may be made, by consent, in a case where either may be directed by the court or a judge, as prescribed in this article. On filing a stipulation to that effect, signed by the attorneys for the parties, the clerk must enter an order accordingly; and thereupon the attorney for the party, procuring the order, may insert in the commission, or indorse upon or annex to it, or the order, the necessary directions for the execution and return thereof, according to the stipulation.

Id., § 21, remodelled.

§ 909. Where return to be kept; parties may inspect it, etc.

A commission, or copy of an order to take depositions, with the certificates, returns, depositions, and exhibits thereto annexed, must remain on file in the office of the clerk, unless otherwise provided by the stipulation of the parties, or unless the court, by a special order, directs them to be filed in the office of another clerk. They are always open to the inspection of the parties,

either of whom is entitled to a copy of them, or of any part thereof, on payment of the fees allowed by law.

2 R. S. 304, § 22.

§ 910. When deposition may be suppressed.

Where it appears, by affidavit, that a deposition has been improperly or irregularly taken or returned; or that the personal attendance of the witness, upon the trial, could have been procured, with due diligence, by a subpoena; or that the attorney for either party has practiced any fraud, or unfair or overreaching conduct, to the prejudice of the adverse party, in the course of the proceedings; an order, for the suppression of the deposition, may be made by the court, upon the application of the party aggrieved, upon notice to the adverse party.

L. 1853, ch. 887, § 14, am'd.

§ 911. Deposition, etc., evidence.

A deposition, taken and returned as prescribed in this article, or an exemplified copy thereof, if the original is filed in another county, may, unless it is suppressed as prescribed in the last section, be read in evidence by either party. It has the same effect, and no other, as the oral testimony of the witness would have; and an objection to the competency or credibility of the witness, or to the relevancy, or substantial competency, of a question put to him, or of an answer given by him, may be made, as if the witness was then personally examined, and without being noted upon the deposition.

Id., § 13, and 2 R. S. 396, § 23, with amendments. See 4 T. & C. 666.

§ 912. [Am'd, 1895.] When interrogatories and deposition may be in a foreign language.

Upon an application, made in the supreme court, the city court of the city of New-York, or a county court, for a commission to be issued to a foreign country, if it satisfactorily appears, by affidavit, that the witness does not understand the English language, the order for the commission may, in the discretion of the court or judge, direct that written interrogatories annexed thereto, by way of direct or cross-examination be framed in the English language, and also in a foreign language; that only the interrogatories framed in the foreign language be put to the witness; and that his answers be taken, and the certificates be made out, in the same language. Where such an order is made, it must provide for the payment, by the applicant, to the adverse party, of a reasonable sum, fixed therein, for the expense of procuring the interrogatories, in his behalf, to be translated. The judge, who settles the interrogatories, must settle them in the foreign language, and in the English language; and, for that purpose, he may call in the assistance of one or more experts, whose compensation must be fixed by the judge, and paid by the applicant. When the deposition is read in evidence, it, and the interrogatories, must be interpreted into the English language, as if the witness, being unable to speak the English language, was personally present and testifying.

L. 1895, ch. 946.

§ 913. Letters rogatory.

Letters rogatory may be issued from either of the courts specified in the last section, in its discretion, in a case where a commission may be issued, as prescribed in this article, upon satis-

factory proof, by affidavit, that there is good reason to believe, that the ends of justice will be better promoted thereby, than by the issuing of a commission, notwithstanding that a commission can be executed, in the country to which they are sent. Letters rogatory can be issued only to examine one or more witnesses, upon written interrogatories, annexed thereto; which must be framed and settled, and the depositions must be returned, as prescribed in this article, with respect to the interrogatories annexed to a commission, and the depositions taken thereunder.

ARTICLE THIRD.

Depositions, taken within the state for use without the state.

Sec. 914. In what cases deposition may be taken.

915. Subpoena to witness.

916. Repealed.

917. Repealed.

918. Repealed.

919. Taking and return of deposition.

920. Repealed.

§ 914. [Am'd, 1899.] In what cases deposition may be taken.

A party to an action, suit, or special proceeding, civil or criminal, pending in a court without the state, either in the United States, or in a foreign country, may obtain, by the special proceeding prescribed in this article, the testimony of a witness, and, in connection therewith, the production of books and papers, within the state, to be used in the action, suit or special proceeding.

2 R. S. 397, § 29 (2 Edm. 414), as am'd by L. 1867, ch. 68, § 1 (7 Edm. 52) ; L. 1899, ch. 502. In effect Sept. 1, 1899.

§ 915. [Am'd, 1899.] Subpoena to witness.

Where a commission to take testimony, within the state, has been issued from the court in which the action, suit, or special proceeding is pending; or where a notice has been given, or any other proceeding has been taken, for the purpose of taking the testimony, within the state, pursuant to the laws of the state or country, wherein the court is located, or pursuant to the laws of the United States, if it is a court of the United States, the supreme court, or the county court, or a judge of either court, shall, in a proper case, on the presentation of a verified petition issue a subpoena to the witness, commanding him to appear before the commissioner, named in the commission; or before a commissioner, within the state, for the state, territory, or foreign country, in which the notice was given, or the proceeding taken; or before the officer designated in the commission, notice, or other paper, by his title of office; at a time and place specified in the subpoena, to testify, in the action, suit, or special proceeding. If the witness shall fail to obey the subpoena, or refuse to have an oath administered, or to testify, or to produce a book or paper pursuant to a subpoena, or to subscribe his deposition, the court or judge issuing the subpoena shall, if it is determined that a contempt has been committed, prescribe the punishment as in the case of a recalcitrant witness in the supreme court. The general rules of practice must prescribe rules for such proceedings.

Id., 308, § 30, and part of § 31, as am'd by L. 1867, ch. 68, § 1 (7 Edm. 52), am'd ; L. 1899, ch. 502. In effect Sept. 1, 1899.

§ 916. [Repealed May 3, 1899; L. 1899, ch. 502. In effect Sept. 1, 1899.]

§ 917. [Repealed May 3, 1899; L. 1899, ch. 502. In effect Sept. 1, 1899.]

§ 918. [Repealed May 3, 1899; L. 1899, ch. 502. In effect Sept. 1, 1899.]

§ 919. [Am'd, 1899.] Taking and return of deposition.

The officer, or commissioner, before whom a witness appears, in a case specified in this article, must take down his testimony, in writing, and must annex thereto copies of all books and papers produced or such parts thereof as shall be required, and must certify and transmit it to the court in which the action, suit, or special proceeding is pending, as the practice of that court requires.

L. 1899, ch. 502. In effect Sept. 1, 1899.

§ 920. [Repealed May 3, 1899; L. 1899, ch. 502. In effect Sept 1, 1899.]

TITLE IV.

Documentary evidence.

Article 1. Documentary evidence, as a substitute for oral testimony.

2. Proof of a document, executed or remaining within the State.

3. Proof of a document, remaining in a court or public office of the United States, or executed or remaining without the State.

ARTICLE FIRST.

Documentary evidence, as a substitute for oral testimony.

Sec. 921. Certain official certificates, evidence.

922. Certificate, etc., on file, evidence.

923. Notary's certificate, evidence.

924. Notary's protest and memorandum; when evidence.

925. Proof of presentment, etc., of foreign bills.

926. Affidavit of printer, etc., evidence.

927. Id.; of service of notice.

928. Marriage certificate, evidence.

929. Book of foreign corporation; when evidence.

930. When a copy thereof is evidence.

931. How copy to be verified.

931a. Copy of designation of person upon whom to make service, as evidence.

931b. Recital in order, resolution or record of public officers, board or body presumptive evidence of certain facts.

931c. Extracts from books and records of comptroller's office as evidence.

§ 921. Certain official certificates, evidence.

Where the officer, to whom the legal custody of a paper belongs, certifies, under his hand and official seal, that he has made diligent examination, in his office, for the paper, and that it cannot be found, the certificate is presumptive evidence of the facts so certified, as if the officer personally testified to the same.

2 R. S. 552, § 12 (2 Edm. 573). See post, § 901.

§ 922. Certificate, etc., on file, evidence.

Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit, touching an act performed by him, or to a fact ascertained by him, in the course of his official duty; and to file or deposit it in a public office of the State; the certificate or affidavit, so filed or deposited, or an exemplified copy thereof, is presumptive evidence of the facts therein alleged, except where the effect thereof is declared or regulated, by special provision of law.

§ 923. [Am'd. 1877.] Notary's certificate, evidence.

The certificate of a notary public of the State, under his hand and seal of office, of the presentment by him for acceptance or payment, or of the protest, for non-acceptance or non-payment, of a promissory note or bill of exchange, or of the service of notice thereof on a party to the note or bill; specifying the mode of giving the notice, the reputed place of residence of the party to whom it was given, and the post-office nearest thereto; is presumptive evidence of the facts certified, unless the party against whom it is offered, has served upon the adverse party, with his pleading, or within ten days after joinder of an issue of fact, an original affidavit, to the effect, that he has not received notice of non-acceptance, or of non-payment of the note or bill. A verified answer is not sufficient as an affidavit, within the meaning of this section.

L. 1833, ch. 271, § 8 (4 Edm. 619).

§ 924. Notary's protest and memorandum; when evidence.

In case of the death or insanity of a notary public of the State, or of his absence or removal, so that his personal attendance, or his testimony, cannot be procured, in any mode prescribed by law, his original protest, under his hand and official seal, the genuineness thereof being first duly proved, is presumptive evidence of a demand of acceptance, or of payment, therein stated; and a note or memorandum, personally made or signed by him, at the foot of a protest, or in a regular register of official acts, kept by him, is presumptive evidence that a notice of non-acceptance or non-payment was sent or delivered, at the time, and in the manner, stated in the note or memorandum.

2 R. S. 283-284, §§ 46 and 47 (2 Edm. 294), consolidated.

§ 925. Proof of presentment, etc., of foreign bills.

Proof of the presentment, for acceptance or payment, of a promissory note or bill of exchange, payable in another state, or in a territory, or foreign country, or of a protest of the note or bill, for non-acceptance or non-payment, or of the service of notice thereof, on a party to the note or bill, may be made, in any manner authorized by the laws of the state, territory, or country where it was payable.

L. 1865, ch. 309, second and third sentences of § 1 (6 Edm. 467), am'd.

§ 926. [Am'd, 1877.] Affidavit of printer, etc., evidence.

The affidavit of the printer or publisher of a newspaper, published within the State, or of his foreman or principal clerk, showing the publication of a notice or other advertisement, authorized or required, by a law of the State, to be published in that newspaper, annexed to a printed copy of the notice or other advertisement, may be read in evidence; and is presumptive evidence of the publication, and, also, of the matters stated therein, showing that the deponent is authorized to make the affidavit. But this section does not apply to a case, where the affidavit is required by law to be filed, unless it has been duly filed; or to a case, where the mode of proving a publication is otherwise specially prescribed by law.

L. 1835, ch. 159, § 1 (4 Edm. 635), am'd.

§ 927. [Am'd, 1902.] Affidavit of service of notice.

Where it is necessary, upon the trial of an action, to prove the service, posting or affixing, of a notice, an affidavit, showing the service, posting or affixing, to have been made by the person making the affidavit, is presumptive evidence of the service, posting or affixing, upon first proving that he is dead or insane, or that his personal attendance cannot be compelled, with due diligence.

L. 1858, ch. 244, § 1 (4 Edm. 645), am'd by adding the last clause; L. 1902, ch. 93. In effect Sept. 1, 1902.

§ 928. [Am'd, 1879.] Marriage certificate, evidence.

An original certificate of a marriage, within the State, made by the minister or magistrate by whom it was solemnized; the original entry thereof made, pursuant to law, in the office of the clerk of a city or a town, within the State; or a copy of the certificate, or of the entry, duly certified, is presumptive evidence of the marriage.

2 R. S. 141, § 17 (2 Edm. 146).

§ 929. Book of foreign corporation; when evidence.

Where a party wishes to prove an act or transaction of a foreign corporation, the book or books of the corporation may be used for that purpose, as presumptive evidence, whether any or all of the parties are or are not members of the corporation.

Substitute for L. 1863, ch. 206, part of § 1, as am'd by L. 1869, ch. 589.

§ 930. When a copy thereof is evidence.

If an original book is not produced at the trial, as prescribed in the last section, a copy thereof, or of an entry therein, verified as prescribed in the next section, may be used, with like effect as the original book; provided that the party, intending to use the copy, gives the adverse party at least ten days' notice of his intention, specifying briefly the nature of the evidence proposed to be given. But this and the next section do not apply, where the foreign corporation is a party to the action, and seeks to prove its own act or transaction, in its own behalf.

L. 1863, ch. 206, parts of §§ 1 and 2, am'd.

§ 931. How copy to be verified.

The copy must be verified by the deposition, taken as prescribed by law, or the oral testimony, taken at the trial, of the person who made it, or of a person who has examined and compared it with the original book, or the entry therein. The witness must testify that the copy produced is correct: that he made it, or compared it with the original; and that he then knew that the original book so copied, or containing the entry, was the book of the corporation: or that it was then acknowledged to him to be such, by an officer or receiver of the corporation, or a person having the custody thereof, naming the person who made the acknowledgment: and he must specify where, and in whose custody, the original was then kept.

Id., part of § 1.

§ 931a. [Added, 1909.] Copy of designation of person upon whom to make service, as evidence.

An exemplified copy of a designation of a person upon whom to make service filed by a foreign corporation as provided in section sixteen of the general corporation law accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it.

Added by L. 1909, ch. 65. Derivation — Code Civil Procedure, § 432, subd. 2, pt. For remainder of section see Code of Civil Procedure, § 432, and General Corporation Law, § 16. See note 5 of notes of Board of Statutory Consolidation at end of code.

§ 931b. [Added, 1909.] Recital in order, resolution or record of public officers, board or body presumptive evidence of certain facts.

A recital in any order, resolution or other record of any proceeding of a meeting referred to in section forty-one of the general construction law that such meeting had been held or adjourned as provided in said section or that it had been held upon notice to the members, as therein provided, shall be presumptive evidence thereof.

Added by L. 1909, ch. 65. Derivation — Statutory Construction Law, § 19, pt. For remainder of section see General Construction Law, § 41. See note 6 of notes of Board of Statutory Consolidation at end of code.

§ 931c. [Added, 1909.] Extracts from books and records of comptroller's office as evidence.

The state comptroller is hereby authorized to furnish extracts from the books and records of his office in reference to any lot, piece or parcel of land, certifying that such extract contains all that is stated in such book or record relating to such lot, piece or parcel of land, and such certified extract may be read in evidence in all courts and proceedings with the same effect as the original book or record.

Added by L. 1909, ch. 425. In effect May 21, 1909.

ARTICLE SECOND.

Proof of a document, executed or remaining within the state.

Sec. 932. Statutes, etc.; how proved.

933. Copies of records and papers in certain offices, presumptive evidence.

934. Id.; of papers filed with town clerk.

935. Conveyance, when acknowledged, or record, or transcript of record, evidence.

936. Such evidence may be rebutted.

937. What instruments may be acknowledged.

938. Justice's docket and transcript evidence before him.

939. Transcript from justice's docket, evidence generally.

940. Other proof of proceedings before justice.

941. Ordinances, etc., of cities, villages, etc.

941a. Proof of colonial statutes.

§ 932. [Am'd, 1895.] Statutes, etc., how proved.

A statute or joint resolution, passed by the legislature of the State, may be read in evidence from a newspaper, designated as prescribed by law, to publish the same, until six months after the close of the session at which it was passed; and, at any time, from a volume printed under the direction of the secretary of State. To entitle any copy of a law published, other than those published under the direction of the secretary of State, to be read in evidence, there shall be contained in the same book or pamphlet, a printed certificate of the secretary of State, that such copy is a correct transcript of the text of the original laws. For such certificate the secretary of State shall collect such a fee as he shall deem just and reasonable.

L. 1895, ch. 594; 1 R. S. 184, §§ 8 and 12 (1 Edm. 184), consolidated and am'd.

§ 933. [Am'd, 1879.] Copies of records and papers in certain offices, presumptive evidence.

A copy of a paper filed, kept, entered, or recorded, pursuant to law, in a public office of the State, the officer having charge of which has, pursuant to law, an official seal; or with the clerk of a court of the State; or with the clerk or secretary of either house of the legislature, or of any other public body or public board created by authority of a law of the State, and having, pursuant to law, a seal; or a transcript from a record, kept, pursuant to law, in such a public office, or by such a clerk or secretary, is evidence, as if the original was produced. But, to entitle it to be used in evidence, it must be certified by the clerk of the court, under his hand and the seal of the court; or by the officer having the custody of the original, or his deputy, or clerk, appointed pursuant to law, under his official seal, and the hand of the person certifying; or by the presiding officer, secretary, or clerk of the public body or board, appointed pursuant to law, under his hand, and, except where it is certified by the clerk or secretary of either house of the legislature, under the official seal of the body or board.

§ 934. Id.; of papers filed with town clerk.

A copy of a paper filed, pursuant to law, in the office of a town clerk, or a transcript from a record kept therein, pursuant to law, certified by the town clerk, is evidence, with like effect as the original.

1 R. S. 350, § 16 (1 Edm. 323).

§ 935. Conveyance, when acknowledged, or record, or transcript of record, evidence.

A conveyance, acknowledged or proved, and certified, in the manner prescribed by law, to entitle it to be recorded in the county where it is offered, is evidence, without further proof thereof. Except as otherwise specially prescribed by law, the record of a conveyance, duly recorded, within the State, or a transcript thereof, duly certified, is evidence, with like effect as the original conveyance.

1 R. S. 759, ch. 3, § 16, and first sentence of § 17 (1 Edm. 719), am'd.

§ 936. Such evidence may be rebutted.

The certificate of the acknowledgment, or of the proof of a conveyance, or the record, or the transcript of the record, of such a conveyance, is not conclusive; and it may be rebutted, and the effect thereof may be contested, by a party affected thereby. If it appears that the proof was taken upon the oath of an interested or incompetent witness, the conveyance, or the record or transcript thereof, shall not be received in evidence, until its execution is established by other competent proof.

Id., remainder of § 17.

§ 937. What instruments may be acknowledged.

Any instrument, except a promissory note, a bill of exchange, or a last will, may be acknowledged, or proved, and certified, in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property; and thereupon it is evidence, as if it was a conveyance of real property.

L. 1833, ch. 271, § 9 (4 Edm. 620).

§ 938. Justice's docket and transcript evidence before him.

The docket-book of a justice of the peace, within the State, or a transcript thereof, certified by him, is evidence before him, of any matter required by law to be entered by him therein.

2 R. S. 269, § 245 (2 Edm. 278).

§ 939. Transcript from justice's docket, evidence generally.

A transcript from the docket-book of a justice of the peace, within the State, subscribed by him, and authenticated, by a certificate of the clerk of the county in which the justice resides, under his hand and official seal, to the effect, that the person, subscribing the transcript, was, at the date of the judgment therein mentioned, a justice of the peace of that county; and that the clerk is acquainted with his handwriting, and verily believes that the signature to the transcript is genuine; is evidence of any matter stated in the transcript, which is required by law to be entered by the justice in his docket-book.

Id., §§ 246 and 247, consolidated.

§ 940. [Am'd, 1877.] Other proof of proceedings before justice.

The proceedings in an action brought, or a special proceeding instituted, before a justice of the peace, within the State, may also be proved by the oath of the justice. In case of his death or absence, they may be proved by the original minutes of the

proceedings, kept by him, pursuant to law, accompanied with proof of his handwriting; or by a copy of the minutes, sworn to, by a competent witness, as having been compared with the original entries, with proof that those entries were in the handwriting of the justice.

2 R. S. 289, § 248.

§ 941. [Am'd, 1854.] Ordinances, etc., of cities, villages, etc.

An act, ordinance, resolution, by-law, rule or proceeding of the common council of a city, or of the board of trustees of an incorporated village, or of a local board of health of a city, town or incorporated village or of a board of supervisors, within the state, may be read in evidence, either from a copy thereof, certified by the city clerk, village clerk, clerk of the common council, clerk or secretary of the local board of health, or clerk of the board of supervisors; or from a volume printed by authority of the common council of the city, or the board of trustees of the village or the local board of health of the city, town or village, or the board of supervisors.

L. 1894, ch. 208.

§ 941a. [Added, 1909.] Proof of colonial statutes.

A statute contained in the compilation of the colonial statutes transmitted to the legislature by the commissioners of statutory revision, pursuant to chapter one hundred and twenty-five of the laws of eighteen hundred and ninety-one, shall be evidence in any action or proceeding, and of the same force and effect as though the original was produced, if it appears from such publication that such statute was copied from the original.

Added by L. 1909, ch. 65. Derivation — L. 1891, ch. 125, § 5, pt., as am'd by L. 1897, ch. 403, § 1. See note 7 of notes of Board of Statutory Consolidation at end of code.

ARTICLE THIRD.

Proof of a document, remaining in a court or public office of the United States, or executed or remaining without the state.

Sec. 942. Printed copies of laws of another State, etc.

943. Copies of records of United States courts.

944. Copies of documents on file in departments or United States presumptive evidence.

945. Record of bill of sale, etc., of vessels.

946. Conveyance of land without the State.

947. Exemplification of record of conveyance of land without the State.

948. Transcript of docket, etc., of justice of adjoining State.

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953. Other proof.

954. This article does not declare effect of record, etc.

955. Public records in New York county.

956. Documents from foreign countries; how authenticated.

§ 942. Printed copies of laws of another State, etc.

A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree, or ordinance, by the executive power thereof, contained in a book or publication, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted, as evidence of the existing law, in the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree, or ordinance. The unwritten or common law of another State, or of a territory, or of a foreign country, may be proved, as a fact, by oral evidence. The books of reports of cases, adjudged in the courts thereof, must also be admitted, as presumptive evidence of the unwritten or common law thereof.

Co. Proc., § 426, as am'd in 1869. See, also, L. 1848, ch. 312 (4 Edm. 643).

§ 943. Copies of records of United States courts.

A copy of the record, or any other proceeding, of a court of the United States, is evidence, when certified by the clerk or officer, in whose custody it is required by law to be.

L. 1845, ch. 303, § 1 (4 Edm. 641), am'd.

§ 944. [Am'd, 1879, 1890, 1907.] Copies of documents on file in departments of U. S. presumptive evidence.

A copy of a record or other paper, remaining in a department of the government of the United States, is evidence, when certified by the head, or acting chief officer, for the time being, of that department; or when certified by the officer in whose charge it is, pursuant to a statute of the United States, or otherwise in accordance with a statute of the United States, relating to certifying the same. A certificate of the director or other officer in charge of the census of the United States, attested by the secretary of the interior, stating the population of any part of the United States, or giving the result of said census otherwise shall be received as prima facie evidence of such facts. The record of the observations of the weather, taken under the direction of the signal service of the United States, when certified by the officer in charge thereof, at the place where they were taken and are kept, is prima facie evidence of the matters of fact stated therein. The records of the observation of the weather taken at the

arsenal in Central park under the direction of the meteorological and astronomical observatory of the city of New York, when duly certified by the official in charge thereof, or his deputy, shall be presumptive evidence of the facts set forth therein, and shall be received in evidence on the trial of any action in all the courts of this state.

L. 1846, ch. 240, § 1 (4 Edm. 641), am'd and L. 1870, ch. 290; L. 1899, ch. 10; L. 1907, ch. 286. In effect May 20, 1907.

§ 945. Record of bill of sale, etc., of vessels.

The record of a bill of sale, mortgage, hypothecation, or conveyance of a vessel, belonging to a port or place, within the United States, recorded in the office of the collector of customs, where the vessel is registered or enrolled, which was acknowledged or proved, before it was recorded, in like manner as a deed to be recorded within the State; or a transcript of such a record, duly certified by the collector; is evidence, with the like effect as the original.

L. 1862, ch. 251 (4 Edm. 646), as am'd by L. 1865, ch. 512.

§ 946. Conveyance of land without the State.

A conveyance of real property, situated without the State, acknowledged or proved, and certified, in like manner as a deed to be recorded within the county wherein it is offered in evidence, is evidence, without further proof thereof, as if it related to real property situated within the State. A conveyance of real property, situated within another state, or a territory of the United States, which has been duly authenticated, according to the laws of that state or territory, so as to be read in evidence in the courts thereof, is evidence in like manner.

1 R. S. 761, § 27 (1 Edm. 712), am'd.

§ 947. Exemplification of record of conveyance of land without the State.

An exemplification of the record of a conveyance of real property situated without the State, and within the United States, which has been recorded in the state or territory, where the real property is situated, pursuant to the laws thereof, when certified under the hand and seal of the officer, having the custody of the record, is, if the original cannot be produced, presumptive evidence of the conveyance, and of the due execution thereof.

Analogous to L. 1864, ch. 311 (6 Edm. 254).

§ 948. Transcript of docket, etc., of justice of adjoining state.

A transcript from the docket-book of a justice of the peace, within an adjoining state, of a judgment rendered by him; a transcript of his minutes of the proceedings in the cause, previous to the judgment; or of an execution issued thereon; or of the return of an execution; when subscribed by the justice, and authenticated as prescribed in the next section, is presumptive evidence of his jurisdiction in the cause, and of the matters shown by the transcript.

From L. 1836, ch. 439, § 1 (4 Edm. 639).

§ 949. Id.: how authenticated.

Such a transcript must be authenticated by a certificate of the justice, annexed thereto, to the effect, that it is in all respects correct, and that he had jurisdiction of the cause; and also by a certificate of the clerk or prothonotary of the county, in which the justice resided at the time of rendering the judgment, under his hand and seal of the court of common pleas, or other county

court of the county, to the effect that the person, subscribing the certificate attached to the transcript, was, at the date of the judgment, a justice of the peace of that county; and that the signature thereto is in his own handwriting.
Id., § 2.

§ 950. Other proof.

The judgment and other proceedings, and the justice's authority to render the judgment, may also be proved, by the production of the docket, or of a copy of the judgment or other proceedings; and the oral testimony of the justice, to the truth and correctness thereof, and to his authority to render the judgment.

L. 1836, ch. 439, § 3.

§ 951. Proof may be rebutted.

The last three sections do not prevent the introduction of evidence, to controvert any of the proof, in relation to the validity of a judgment therein specified.

Id., § 4.

§ 952. Copies of records of courts of foreign countries; how authenticated.

A copy of a record, or other judicial proceeding, of a court of a foreign country, is evidence, when authenticated as follows:

1. By the attestation of the clerk of the court, with the seal of the court affixed, or of the officer in whose custody the record is legally kept, under the seal of his office.

2. By a certificate of the chief-judge or presiding magistrate of the court, to the effect, that the person, so attesting the record, is the clerk of the court; or that he is the officer, in whose custody the record is required by law to be kept; and that his signature to the attestation is genuine.

3. By the certificate, under the great or principal seal of the government, under whose authority the court is held, of the secretary of State, or other officer having the custody of that seal, to the effect, that the court is duly constituted, specifying generally the nature of its jurisdiction; and that the signature of the chief-judge or presiding magistrate, to the certificate specified in the last subdivision, is genuine.

From 2 R. S. 396, § 26 (2 Edm. 413), am'd.

§ 953. Other proof.

A copy of a record, or other judicial proceeding, of a court of a foreign country, attested by the seal of the court, in which it remains, must also be admitted in evidence, upon due proof of the following facts:

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of the original.

2. That the original was, when the copy was made, in the custody of the clerk of the court, or other officer legally having charge of it.

3. That the attestation is genuine.

Id., § 27.

§ 954. [Am'd, 1877.] This article does not declare effect of record, etc.

Nothing in this article is to be construed, as declaring the effect of a record or other judicial proceeding of a foreign country, authenticated, so as to be evidence.

Id., § 28, last clause.

§ 955. [Inserted, 1892; am'd, 1904.] Public records in New York county.

All maps, surveys and official records, shall have been on record or on file in the office of either the register of the city and county of New York, or the surrogate of said city, or any of the courts of record of said city, or the clerk of the city and county of New York, or any county within the city of New York, or any of the departments of said city as enumerated in section thirty-four of the New York city consolidation act, or in the office of the registers, surrogates, commissioners of public works or kindred department, or park department, for a period of twenty years or upwards prior to such trial, shall be presumptive evidence of their contents, and shall be receivable in evidence as such upon any trial in any of the courts of this state in any controversy pending therein, between any parties.

L. 1892, ch. 522; L. 1904, ch. 444. In effect Sept. 1, 1904.

§ 956. [Am'd, 1877, 1912.] Documents from foreign countries; how authenticated.

A copy of a patent, record or other document remaining of record or on file in a public office of a foreign country, certified according to the form in use in that country, is evidence when authenticated, as follows:

1. By the certificate under the hand and official seal of a commissioner appointed by the governor to take the proof or acknowledgment of deeds in that country, to the effect that the patent, record or document is of record or on file in the public office, and that the copy thereof is correct and certified in due form; and

2. By a certificate under the hand and official seal of the secretary of State, annexed to that of the commissioner, to the same effect as prescribed by law for the authentication of the certificate of such a commissioner, upon a conveyance to be recorded within the State. The certificate of the commissioner, thus authenticated, is presumptive evidence that the copy of the patent, record or document is certified according to the form in use in the foreign country; or

3. By a certificate under the hand and official seal of a consular officer of the United States to the effect that the patent, record or document is of record or on file in the public office and certified according to the form in use in the foreign country, and a copy of a patent, record or other document so authenticated is presumptive evidence that the same is certified according to the form in use in the foreign country.

L. 1875, ch. 136, portions of §§ 1, 2, 8 and 9. Am'd by L. 1912, ch. 97, in effect Apr. 3, 1912.

TITLE V.**Miscellaneous provisions.**

Sec. 957. Form of certificate to copies, etc.

958. Certificate must be sealed.

959. Qualification of last section.

960. Evidence, in actions for recovery of, injury to, etc., unoccupied lands and timber thereon.

961. Surrogates to search files, and to certify, etc.

961a. Determining age of child.

961b. Proof of written instruments where there are subscribing witnesses.

961c. Proof of payments by a municipal corporation or officer thereof.

961d. Proof of instrument by submitting disputed and genuine handwriting.

961e. Proof of lost execution or writ under which sheriff's sale of real property was made.

961f. Evidence of weather conditions.

962. Saving clause.

§ 957. Form of certificate to copies, etc.

Where a transcript, exemplification, or certified copy of a record or other paper, is declared by law to be evidence, and special provision is not made for the form of the certificate, in the particular case, the person, authorized to certify, must state, in his certificate, that it has been compared by him with the original, and that it is a correct transcript therefrom, and of the whole of the original.

2 R. S. 403, § 59 (2 Edm. 420), am'd.

§ 958. Certificate must be sealed.

If the officer, or the court, body, or board, in whose custody an original paper, specified in the last section, is required to be, by the laws of the State, or of another state, or of the United States, or of a territory thereof, or of a foreign country, has, pursuant to those laws, an official seal, the certificate must be attested by that seal. If the certificate is made by the clerk of a county, within the State, it must be attested by the seal of the county.

Id., remainder of § 59, am'd.

§ 959. [Am'd, 1877.] Qualification of last section.

The last section does not require the seal of a court to be affixed to a certified copy of an order, or of a paper filed therein, or entry made, where the copy is used in the same court, or before an officer thereof; or, in the supreme court, where it is used in a circuit court, or a court of oyer and terminer.

Id., § 60, with the addition of the words "or a court of oyer and terminer."

§ 960. [Added, 1808; am'd, 1906.] Evidence, in actions for recovery of, injury to, etc., unoccupied lands and timber thereon.

In all actions to recover the possession of, or otherwise to determine the title to, or, for trespass upon or injury to unoccupied lands, timber, trees or underwood thereon, except an action in which any county or any state or county officer, board or com-

mission is a party defendant, the plaintiff may show an unbroken chain of title or conveyance of the land to himself for thirty years next preceding the commencement of the action, or if an action for trespass, next preceding the commission of the trespass or injury, and such proof shall be presumptive evidence of ownership at the times respectively, of the commencement of such action or commission of such trespass or injury, but such presumption may be rebutted by the defendant by showing ownership of said lands at the times respectively, of the commencement of said action or the commission of said trespass or injury, in some person other than the plaintiff.

L. 1898, ch. 32; L. 1906, ch. 509. In effect Sept. 1, 1906.

§ 961. [Am'd, 1909.] Surrogates to search files, and to certify, etc. 1915
and L. 1915
ch. 207

A surrogate must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office; and either make one or more transcripts therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, cannot be found.

L. 1847, ch. 470, § 40 (4 Edm. 588), am'd. See ante, § 921. Am'd by L. 1909, chs. 65 and 210, § 81. Also partly repealed by L. 1909, chs. 16, 35, 88 and 51. See Consolidated Laws, tit. 1, County Law, § 101, Judiciary Law, § 256, Penal Law, § 1874, Public Officers Law, § 66. See note 60 of notes of Board of Statutory Consolidation at end of code.

§ 961a. [Added, 1909.] Determining age of child.

Whenever in any proceeding or trial it becomes necessary to determine the age of a child, such child may be produced and exhibited to enable the magistrate, court or jury to determine its age by a personal inspection; and such court or magistrate may direct an examination by one or more physicians, whose opinion shall also be competent evidence upon the question of such age.

Added by L. 1909, ch. 65. Derivation — L. 1882, ch. 340, § 1. See note 8 of notes of Board of Statutory Consolidation at end of code.

§ 961b. [Added, 1909.] Proof of written instruments where there are subscribing witnesses.

Except in the case of written instruments to the validity of which a subscribing witness, or subscribing witnesses, is, or are necessary, whenever, upon the trial of any action, or upon the hearing of any judicial proceeding, a written instrument is offered in evidence, to which there is a subscribing witness, it shall not be necessary to call such subscribing witness, but such instrument may be proved in the same manner as it might be proved if there were no subscribing witness thereto.

Added by L. 1909, ch. 65. Derivation — L. 1883, ch. 195, § 1. See note 9 of notes of Board of Statutory Consolidation at end of code.

§ 961c. [Added, 1909.] Proof of payments by a municipal corporation or officer thereof.

In any action or proceeding now pending or hereafter to be brought in any of the courts of this state, the payment of any sum of money by a municipal corporation, or an officer thereof, may be proved by a receipt purporting upon its face to be given

therefor, and to entitle such receipt to be read in evidence, no further or other proof shall be necessary than that it is produced from the files of the office of the chief financial officer of such municipal corporation, or from the files of the office of the person or department charged with the duty of making the payment. Every such receipt so read in evidence shall be presumptive proof of the fact of the payment to the person by or in whose behalf it purports to be signed of the sum of money and for the purpose therein expressed. But no such receipt shall be entitled to be read in evidence by virtue of the provisions of this section, unless it was given at least six years before the commencement of the action or proceeding in which it shall be offered as evidence. And the date or time appearing upon its face shall be presumptive proof that it was given at such date or time. Nothing in this section contained shall be held to prevent any party to such an action or proceeding from proving affirmatively that the payment so appearing to have been made has not in fact been made.

Added by L. 1909, ch. 65. Derivation — L. 1884, ch. 376, §§ 1, 2. See note 10 of notes of Board of Statutory Consolidation at end of code.

§ 961d. [Added, 1909.] Proof of instrument by submitting disputed and genuine handwriting.

Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person, claimed on the trial to have made or executed the disputed instrument, or writing shall be permitted and submitted to the court and jury in like manner.

Added by L. 1909, ch. 65. Derivation — L. 1880, ch. 36, § 1, as am'd by L. 1888, ch. 555, § 1. See note 11 of notes of Board of Statutory Consolidation at end of code.

§ 961e. [Added, 1909.] Proof of lost execution or writ under which sheriff's sale of real property was made.

Whenever, upon the trial of an action it shall appear that at least twenty years theretofore real property has been sold by a sheriff for enforcement of the valid lien thereon of a duly docketed judgment, and that a certificate of the sale has been duly made by the sheriff and filed, and that a conveyance in completion of the purchase has been executed and recorded, but that the execution or writ by virtue of which the sale has so been made can not be found in the office of the clerk with whom the same should have been filed, then and in such case the recital of or reference to such execution or writ contained in the said certificate, or in the said conveyance, or in the record thereof shall be prima facie evidence of the said execution or writ and of the issue of the same as against any party whose claim of title is not shown to have been accompanied or supported by peaceable possession of the premises in controversy for at least three years immediately preceding the commencement of the action.

Added by L. 1909, ch. 65. Derivation — L. 1800, ch. 158, § 1. See note 12 of notes of Board of Statutory Consolidation at end of code.

§ 961f. [Added, 1909.] Evidence of weather conditions.

Any record of the observations in regard to the conditions of the weather, or in regard to the amount and conditions of the precipitation, taken under the direction of the New York state

weather bureau, or any copy thereof, when certified in the form of and pursuant to law by the officer in charge thereof at the place where such record is duly filed, that the same is a true copy of such record, may be read in evidence in any court of this state, and shall be prima facie evidence of the facts and circumstances therein stated.

Added by L. 1909, ch. 65. Derivation — L. 1897, ch. 622, § 1. See note 13 of notes of Board of Statutory Consolidation at end of code.

§ 962. Saving clause.

Nothing in title fourth of this chapter prevents the proof of a fact, act, record, proceeding, document, or other paper or writing, according to the rules of the common law, or by any other competent proof.

2 R. S. 397, part of § 28 (2 Edm. 413), and L. 1846, ch. 240, § 2 (4 Edm. 642).

CHAPTER X.

Trials ; Including Jurors and Juries.

TITLE I.—*Trials Generally ; Including Exceptions and Motion for a New Trial.*

TITLE II.—*Trials without a Jury.*

TITLE III.—*Trial Jurors, Except in New-York and Kings Counties ; Mode of Selecting Them, and of Procuring Their Attendance.*

TITLE IV.—*Trial Jurors in New-York and Kings Counties ; Mode of Selecting Them, and of Procuring Their Attendance.*

TITLE V.—*Trial by Jury.*

TITLE VI.—*Miscellaneous Provisions ; Including Those Relating to Embracery, and Other Acts of Misconduct.*

TITLE I.

Trials generally ; including exceptions and motion for a new trial.

Article 1. *Issues, and the mode of trial thereof.*

2. *The place of trial.*

3. *Exceptions, case, and motion for a new trial.*

ARTICLE FIRST.

Issues, and the mode of trial thereof.

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979. *Id. ; when a jury does not attend.*

980. *Either party may bring issue to trial.*

981. *What papers to be furnished on trial, and by whom.*

§ 963. Issues defined ; different kinds of issues.

The issues, treated of in this chapter, are those only which are presented by the pleadings. An issue arises where a fact, or a conclusion of law, is maintained by one party, and controverted by the other. Issues are of two kinds:

1. *Of law ; and*

2. *Of fact.*

Co. Proc., § 248, am'd

§ 904. When issues of law arise; when issues of fact arise.

An issue of law arises only upon a demurrer. An issue of fact arises, in either of the following cases:

1. Upon a denial, contained in the answer, of a material allegation of the complaint; or upon an allegation, contained in the answer, that the defendant has not sufficient knowledge or information to form a belief, with respect to a material allegation of the complaint.

2. Upon a similar denial or allegation, contained in the reply, with respect to a material allegation of the answer.

3. Upon a material allegation of new matter, contained in the answer, not requiring a reply; unless an issue of law is joined thereupon.

4. Upon a material allegation of new matter, contained in the reply; unless an issue of law is joined thereupon.

Substitute for Co. Proc., §§ 240 and 250.

§ 905. [Am'd, 1879.] Issues to be judicially examined by a trial.

An issue, either of law or of fact, must be tried as prescribed in this chapter, unless it is disposed of as prescribed in chapter sixth of this act.

Substitute for Co. Proc., § 252. See §§ 537, 547.

§ 906. [Am'd, 1877.] Order of trial, where issues of law and of fact arise in the same action.

Where an issue of law and an issue of fact arise in one action, the issue of law must be first disposed of, except as otherwise prescribed in the next section.

Substitute for Co. Proc., § 251.

§ 907. [Am'd, 1877.] But court may direct the order, etc., of disposition of the issues.

A separate trial, between the plaintiff and one or more defendants, of some or all of the issues of fact, or one trial of some or all of the issues of law, or a change in the order of disposition of the issues, may be directed by the court, in its discretion. Such a direction may be given, in an order, made upon notice; or, except where an application for such an order has been denied, it may be given, by the judge holding the term, where those issues are regularly upon the calendar for trial, either with or without the entry of an order.

Includes part of Co. Proc., § 251, and part of § 258.

§ 908. [Am'd, 1877.] What issues of fact are triable by a jury.

In each of the following actions, an issue of fact must be tried by a jury unless a jury trial is waived, or a reference is directed:

1. An action in which the complaint demands judgment for a sum of money only.

2. An action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel.

Substitute for Co. Proc., § 253.

§ 909. What issues are triable by the court.

An issue of law, in any action, and an issue of fact, in an action not specified in the last section, or wherein provision for a trial

by a jury is not expressly made by law, must be tried by the court, unless a reference or a jury trial is directed.

Co. Proc., portions of §§ 253 and 254. See Rule 40.

§ 970. [Am'd, 1892.] Order for trial by jury, of specific questions of fact, when of right.

Where a party is entitled by the constitution, or by express provision of law, to a trial by jury, of one or more issues of fact, in an action not specified in section nine hundred and sixty-eight of this act, he may apply, upon notice, to the court for an order, directing all the questions arising upon those issues, to be distinctly and plainly stated for trial accordingly. Upon the hearing of the application, the court must cause the issues, to the trial of which by a jury the party is entitled, to be distinctly and plainly stated. The subsequent proceedings are the same, as where questions arising upon the issues, are stated for trial by a jury, in a case where neither party can, as of right, require such a trial; except that the finding of the jury upon such questions so stated, is conclusive in the action unless the verdict is set aside, or a new trial is granted.

L. 1892, ch. 188. See Rule 31.

§ 971. [Am'd, 1877.] Id.; when discretionary.

In an action, where a party is not entitled, as of right, to a trial by a jury, the court may, in its discretion, upon the application of either party, or without application, direct that one or more questions of fact, arising upon the issues, be tried by a jury, and may cause those questions to be distinctly and plainly stated for trial accordingly.

§ 972. [Am'd, 1877.] Trial of the remainder of the issues.

If the questions, directed to be tried by a jury, as prescribed in the last two sections, do not embrace all the issues of fact in the action, the remaining issues of fact must be tried by the court, or by a referee.

Substitute for part of Co. Proc., § 254.

§ 973. [Added, 1907.] Separate trial of one or more issues.

The court in its discretion may order one or more issues to be separately tried prior to any trial of the other issues in the case.

L. 1907, ch. 526. In effect Sept. 1, 1907.

§ 974. [Am'd, 1877.] Counterclaim to be deemed an action, within the foregoing sections.

Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact, arising thereupon, is the same, as if it arose in an action, brought by the defendant, against the plaintiff, for the cause of action stated in the counterclaim, and demanding the same judgment.

§ 975. Immaterial issues need not be tried.

An issue, the disposition of which is not necessary to enable the court to render the appropriate judgment, is not required to be tried.

§ 976. [Am'd, 1895, 1900, 1909.] What issues to be tried before one judge; regulation of trial in the supreme court.

An issue of law, or an issue of fact, triable by a jury or by the court, must be tried at a term held by one judge only. In the supreme court, an issue of fact triable by jury must be tried at a trial term thereof, and an issue of fact triable by the court may be tried at a trial term or a special term of the supreme court as prescribed in the general rules of practice. An issue of law may be brought on and tried at any term of court as a contested motion.

Am'd by L. 1895, ch. 946; L. 1900, ch. 569; L. 1909, ch. 488. In effect Sept. 1, 1909.

§ 977. [Am'd, 1877, 1882, 1896, 1898, 1899, 1903, 1904, 1907, 1909, 1911, 1912.] Notice of trial and note of issue; calendar to be prepared.

At any time after the joinder of issue, and at least fourteen days before the commencement of the term, either party may serve a notice of trial. The party serving the notice must file with the clerk a note of issue, stating the title of the action, the names of the attorneys, the time when the last pleading was served, the nature of the issue, whether of fact or of law; and, if an issue of fact, whether it is triable by jury, or by the court, without a jury, and the particular nature of the same and the object of the action. The note of issue must be filed at least twelve days before the commencement of the term. The clerk must thereupon enter the cause upon the calendar according to the date of issue. The clerk must prepare the calendar and have the necessary copies ready for distribution at least five days before the commencement of the term. In the counties of New York, Kings, Queens, Nassau, Richmond, Albany, Erie, Niagara, Monroe, Onondaga, Schenectady and Westchester, where a party has served a notice of trial, and filed a note of issue, for a term at which the case is not tried, it is not necessary for him to serve a new notice of trial, or file a new note of issue, for a succeeding term; and the action must remain on the calendar until it is disposed of.

Co. Proc., part of § 256, as am'd by L. 1876, ch. 431, § 9; L. 1890, ch. 565; L. 1898, ch. 70; L. 1899, ch. 18; L. 1903, ch. 51; L. 1904, ch. 474; L. 1907, ch. 211; Am'd by L. 1909, ch. 65; L. 1911, ch. 218; L. 1912, ch. 496. In effect Sept. 1, 1912. See also Consolidated Laws, tit. Judiciary Law, § 83. See note 51 of notes of Board of Statutory Consolidation at end of code.

§ 978. [Am'd, 1877.] Issues how arranged. Order of disposition at a jury term.

The issues on the calendar must be arranged by the clerk in the following order:

1. Issues of fact.
2. Issues of law.

Where a jury is in attendance, the issues must be disposed of in the same order; unless, for the convenience of parties, or the dispatch of business, the judge holding the term otherwise directs.

Substitute for Co. Proc., § 257; am'ts.

§ 979. Id.; when a jury does not attend.

Where a jury is not in attendance, issues of law have a preference over issues of fact; unless the judge holding the term otherwise directs.

See concluding sentence Co. Proc., § 255.

§ 980. [Am'd, 1877.] Either party may bring issue to trial.

Either party, who has served the notice, may bring the issue to trial; and, in the absence of the adverse party, unless the judge holding the term, for good cause, otherwise directs, may proceed with the cause, and take a dismissal of the complaint, or a verdict, decision, or judgment, as the case requires. An inquest, for want of an affidavit of merits, cannot be taken where the answer is verified.

Co. Proc., § 258, am'd; L. 1876, ch. 431, § 10. See Rule 23.

§ 981. What papers to be furnished on trial, and by whom.

Where the issue is brought to trial by the plaintiff, he must furnish the court with copies of the summons and pleadings, and of the offer, if any has been made. Where the issue is brought to trial by the defendant, and the plaintiff does not furnish those papers, they must be furnished by the defendant.

Co. Proc., § 259, am'd. See Rule 19.

ARTICLE SECOND.

The place of trial.

Sec. 982. Certain actions to be tried, where the subject thereof is situated.

982-a. Actions relating to real property situate without the state.

983. Other actions, where the cause thereof arose.

984. Other actions, according to the residence of the parties.

985. Place of trial, if proper county not designated.

986. Defendant may demand change; proceedings thereupon.

987. When court may change the place of trial.

988. Effect of changing the place of trial.

989. Effect of order changing place of trial.

990. Issues of law, where triable.

991. This article applicable only to the supreme court.

§ 982. **Certain actions to be tried, where the subject thereof is situated.**

Each of the following actions must be tried in the county, in which the subject of the action, or some part thereof, is situated: an action of ejectment; for the partition of real property; for dower; to foreclose a mortgage upon real property, or upon a chattel real; to compel the determination of a claim to real property; for waste; for a nuisance; or to procure a judgment, directing a conveyance of real property; and every other action to recover, or to procure a judgment, establishing, determining, defining, forfeiting, annulling, or otherwise affecting, an estate, right, title, lien, or other interest, in real property, or a chattel real. But where all the real property, to which the action relates, is situated without the State, the action must be tried, as prescribed in section 984 of this act.

Substitute for part of Co. Proc., § 128.

§ 982-a. [Added, 1913.] **Actions relating to real property situate without the state.**

An action may be maintained in the courts of this state to recover damages for injuries to real estate situate without the state, or for breach of contracts or of covenants relating thereto, whenever such an action could be maintained in relation to personal property without the state. The action must be tried in the county in which the parties or some one thereof resides, or if no party resides within the state, in any county.

Added by L. 1913, ch. 76. In effect Sept. 1, 1913.

§ 983. [Am'd, 1877.] **Other actions, where the cause thereof arose.**

An action, for either of the following causes, must be tried in the county, where the cause of action, or some part thereof, arose:

1. To recover a penalty or forfeiture, imposed by statute, except that, where the offence, for which it is imposed, was committed on a lake, river, or other stream of water, situated in two or more counties, the action may be tried in any county, bordering on the lake, river, or stream, and opposite to the place where the offence was committed. But in an action where the people of the State are a party to recover a penalty for trespass upon the lands of the Forest Preserve, the action may be tried in a county adjoining the county where the cause of action arose.

Last sentence in effect Sept. 1, 1900. L. 1890, ch. 179.

2. Against a public officer, or a person specially appointed to execute his duties, for an act done, in virtue of his office, or for an omission to perform a duty, incident to his office; or against a person, who, by the command or in the aid of a public officer, has done anything touching his duties.

3. To recover a chattel distrained, or damages for distraining a chattel.

§ 984. Other actions, according to the residence of the parties.

An action, not specified in the last two sections, must be tried in the county, in which one of the parties resided, at the commencement thereof. If neither of the parties then resided in the State, it may be tried in any county, which the plaintiff designates, for that purpose, in the title of the complaint.

Co. Proc., § 125.

§ 985. Place of trial, if proper county not designated.

If the county, designated in the complaint, as the place of trial, is not the proper county, the action may notwithstanding be tried therein; unless the place of trial is changed to the proper county, upon the demand of the defendant, followed by the consent of the plaintiff, or the order of the court.

Substitute for Co. Proc., part of § 126.

§ 986. Defendant may demand change; proceedings thereupon.

Where the defendant demands that the action be tried in the proper county, his attorney must serve upon the plaintiff's attorney, with the answer, or before service of the answer, a written demand accordingly. The demand must specify the county, where the defendant requires the action to be tried. If the plaintiff's attorney does not serve his written consent to the change, as proposed by the defendant, within five days after service of the demand, the defendant's attorney may, within ten days thereafter, serve notice of a motion to change the place of trial.

Id. See Rule 48.

§ 987. When court may change the place of trial.

The court may, by order, change the place of trial, in either of the following cases:

1. Where the county, designated for that purpose in the complaint, is not the proper county.

2. Where there is reason to believe, that an impartial trial cannot be had in the proper county.

3. Where the convenience of witnesses, and the ends of justice, will be promoted by the change.

Co. Proc., part of § 126.

§ 988. [Am'd, 1877.] Effect of changing the place of trial.

Where the place of trial is changed to another county, the subsequent proceedings shall be had in the county to which the change is made, the same as if it had been designated in the complaint, as the place of trial; except as otherwise directed by the court, or provided by the written consent of the parties, filed with the clerk. And the clerk of the county, from which it

is changed, must forthwith deliver to the clerk of the county, to which it is changed, all papers filed in the action, and certified copies of all minutes and entries relating thereto, which must be filed, entered, or recorded, as the case requires, in the office of the last named clerk.

Id., § 126, last sentence, am'd. See Rule 2.

§ 989. [Am'd, 1877.] Effect of order changing place of trial.

An order to change the place of trial takes effect, upon the entry thereof, in the office of the clerk of the county, from which the place of trial is changed. But for the purposes of the place of hearing a motion to set it aside, or an appeal therefrom, the place of trial is deemed unchanged.

§ 990. [Am'd, 1879, 1913.] Issues of law and certain issues of fact; where triable.

An issue of law, or an issue of fact triable by the court without a jury, arising in a county where no special terms distinct from trial terms are appointed to be held for the trial of such cases, may be tried at a special term in any county within the judicial district embracing the county wherein the action is triable; but after the trial, the decision and all other papers relating to the trial must be filed, and the judgment rendered must be entered, in the last named county.

Am'd by L. 1879, ch. 542; L. 1913, ch. 446. In effect Sept. 1, 1913.

§ 991. This article applicable only to the supreme court.
This article is applicable to an action in the supreme court only.

ARTICLE THIRD.***Exceptions, case, and motions for a new trial.***

- Sec. 991.** What rulings may be excepted to.
992. Decision of the court or referee.
993. When and how exceptions may be taken, after close of trial by court or referee.
994. Id., during the trial, or upon trial by jury.
995. Ruling excepted to; how reviewed.
996. Case, when necessary; how made and settled.
997. When appeal, etc., may be heard without a case.
998. Motion for new trial upon judge's minutes; appeal from order thereupon.
999. When and how exceptions, taken upon a jury trial, heard by the appellate division.
1000. Motion for new trial by the appellate division, when trial was by court or referee.
1001. When motion for new trial to be made at special term. Restrictions thereupon.
1002. Application of this article to trials of specific questions by jury; special provisions applicable thereto.
1003. Motion for new hearing, after trial of specific questions by a referee.
1004. Final judgment, etc., not stayed, by motion for a new trial. Motion may be heard afterwards.
1005. When exception not to prejudice motion for new trial.
1006. Notes of stenographer may be treated as minutes of the judge.

§ 992. What rulings may be excepted to.

An exception may be taken to the ruling of the court or of a referee, upon a question of law, arising upon the trial of an issue of fact. Except as prescribed in section 1180 of this act, an exception cannot be taken to a ruling, upon a question of fact. For the purposes of this article, a trial by a jury is regarded as continuing, until the verdict is rendered.

§ 993. [Added, 1903.] Decision of the court or referee.

Upon the trial of an issue of fact by a referee or by a court without a jury, a finding of fact without any evidence tending to sustain it, is a ruling upon a question of law within the meaning of the last section. The appellate division of the supreme court shall, on appeal from a judgment entered on the report of a referee, or the decision of a court on such trial, review all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party the judgment which the facts warrant.

L. 1903, ch. 85. See § 1022.

§ 994. When and how exceptions may be taken, after close of trial by court or referee.

Where an issue of fact is tried by a referee, or by the court, without a jury, an exception to a ruling, upon a question of law, made after the cause is finally submitted must be taken, by filing a notice of the exception in the clerk's office, and serving a copy thereof upon the attorney for the adverse party. The exception may be so taken, at any time before the expiration of ten days after service, upon the attorney for the exceptant, of a copy of the decision of the court, or report of the referee, and a written notice of the entry of judgment thereupon. If the notice of exception is filed before the entry of final judgment, it must be inserted in the judgment-roll; if afterwards, it must be annexed to the judgment-roll. In either case, it constitutes a part

of the papers, upon which an appeal from the judgment must be heard.

Parts of Co. Proc., §§ 268 and 272, modified and am'd. See § 998.

§ 995. Id.; during the trial, or upon trial by jury.

In any other case, an exception must be taken, at the time when the ruling is made, unless it is taken to the charge given to the jury; in which case, it must be taken before the jury have rendered their verdict. It must, at the time when it is taken, be reduced to writing by the exceptant, or entered in the minutes.

From 2 R. S. 422, § 73, and Id., § 74, as modified by Co. Proc., § 264, am'd.

§ 996. Ruling excepted to; how reviewed.

A ruling, to which an exception is taken, as prescribed in the last four sections, can be reviewed only upon an appeal from the judgment, rendered after the trial; except in a case, where it is expressly prescribed by law, that a motion for a new trial may be made thereupon.

§ 997. [Am'd, 1895.] Case, when necessary; how made and settled.

When a party intends to appeal from a judgment, rendered after the trial of an issue of fact, or to move for a new trial of such an issue, he must, except as otherwise prescribed by law, make a case, and procure the same to be settled and signed, by the judge, justice or the referee, by or before whom the action was tried, as prescribed in the general rules of practice; or, in a case of the death or disability of the judge, justice or referee, in such manner as the court directs. The case must contain so much of the evidence, and other proceedings upon the trial, as is material to the questions to be raised thereby, and also the exceptions taken by the party making the case: (and in a case where a special question is submitted to the jury, or the jury have assessed damages, such exceptions taken by any party to the action as shall be necessary to determine whether there should be a new trial in case the judgment should be reversed). If it afterwards becomes necessary to separate the exceptions, the separation may be made, and the exceptions may be stated, with so much of the evidence and other proceedings, as is material to the questions raised by them, in a case, prepared and settled, as directed in the general rules of practice; or in the absence of directions therein, by the court, upon motion. It is not necessary to state, in a case, that a finding upon the facts, or a ruling upon the law, was made, where the finding or ruling appears in a referee's report, or in the decision of the court, upon a trial by the court, without a jury.

Substituted for part of Co. Proc., §§ 264 and 268, and of § 272, with amendments; L. 1895, ch. 946.

§ 998. When appeal, etc., may be heard without a case.

It is not necessary to make a case, for the purpose of moving for a new trial, upon the minutes of the judge, who presided at a trial by a jury; or upon an allegation of irregularity, or surprise; or where a party intends to appeal from a judgment entered upon a referee's report, or a decision of the court upon a trial, without a jury, and to rely only upon exceptions, taken as prescribed in section 994 of this act.

§ 999. [Am'd, 1889.] Motion for new trial upon judge's minutes; appeal from order thereupon.

The judge, presiding at a trial by a jury, may, in his discretion, entertain a motion, made upon his minutes, at the same term, to set aside the verdict or a direction dismissing the complaint and grant a new trial upon exceptions; or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence, or contrary to law. If an appeal is taken from the order, made upon the motion, it must be heard upon a case prepared and settled in the usual manner.

Co. Proc., part of § 284, am'd. See § 1003, post.

§ 1000. [Am'd, 1895.] When and how exceptions, taken upon a jury trial, heard by the appellate division.

Upon the application of a party who has taken one or more exceptions, the judge, presiding at a trial by jury, may, in his discretion, at any time during the same term, direct an order to be entered, that the exceptions so taken be heard, in the first instance, by the appellate division of the supreme court; and that judgment be suspended, in the mean time. At any time before the hearing of the exceptions, the order may be revoked or modified, upon notice, in court or out of court, by the judge who made it; or it may be set aside for irregularity, by the court, at any term thereof. Unless it is so revoked or set aside, the exceptions must be heard upon a motion for a new trial, which must be decided by the appellate division. The motion is deemed to have been made, when the order was granted; and either party may notice it for hearing at a term of the appellate division, upon the exceptions.

L. 1895, ch. 946.

§ 1001. [Am'd, 1895.] Motion for new trial by the appellate division, when trial was by court or referee.

Where the decision or report, rendered upon the trial of an issue of fact by the court, without a jury, or by a referee, directs an interlocutory judgment to be entered; and further proceedings must be taken, before the court, or a judge thereof, or a referee, before a final judgment can be entered, a motion for a new trial, upon one or more exceptions, may be made at a term of the appellate division of the supreme court, after the entry of the interlocutory judgment, and before the commencement of the hearing directed therein. The time within which the party must except, for that purpose, to a ruling of law, made, upon such a trial, by the judge or the referee, after the close of the testimony, is ten days after service of a copy of the decision or report, and notice of the entry of the interlocutory judgment thereupon.

L. 1895, ch. 946.

§ 1002. When motion for new trial to be made at special term. Restrictions thereupon.

In a case, not specified in the last three sections, a motion for a new trial must, in the first instance, be heard and decided at the special term. But where it is founded upon an allegation of error, in a finding of fact, or ruling upon the law, made by the judge upon the trial, it cannot be made unless notice therefor be given before the expiration of the time within which an appeal can be taken from the judgment, and it cannot be heard

at a special term held by another judge; unless the judge, who presided at the trial, is dead, or his term of office has expired, or he is disqualified for any reason, or he specially directs the motion to be heard before another judge. And a trial by a referee cannot be reviewed, by a motion for a new trial, founded upon such an allegation, except in a case specified in the last section.

§ 1003. [Am'd, 1895.] Application of this article to trials of specific questions by jury; special provisions applicable thereto.

The provisions of this article, relating to the proceedings to review a trial by a jury, are applicable to the trial, by a jury, of one or more specific questions of fact, arising upon the issues, in an action triable by the court. But, except in a case specified in section 970 of this act, a new trial may be granted, as to some of the questions so tried, and refused as to the others; and an error, in the admission or exclusion of evidence, or in any other ruling or direction of the judge, upon the trial, may, in the discretion of the court which reviews it, be disregarded, if that court is of opinion, that substantial justice does not require that a new trial should be granted. Where the judge, who presided at the trial, neither entertains a motion for a new trial, nor directs exceptions, taken at the trial, to be heard at a term of the appellate division of the supreme court, a motion for a new trial can be made only at the term, where the motion for final judgment is made, or the remaining issues of fact are tried, as the case requires.

L. 1895, ch. 946. See ante, § 990.

§ 1004. Motion for new hearing, after trial of specific questions by a referee.

In an action triable by the court, where a reference has been made, to report upon one or more specific questions of fact, involved in the issue, a motion for a new hearing may be made at a special term, at any time before the hearing of a motion for final judgment, or the trial of the remaining issues of fact. The motion must be made upon affidavits, unless the court, or a judge thereof, directs a case to be prepared and settled.

§ 1005. Final judgment, etc., not stayed, by motion for a new trial. Motion may be heard afterwards.

The entry of final judgment, and the subsequent proceedings to collect or otherwise enforce it, are not stayed by an exception, the preparation or settlement of a case, or a motion for a new trial, unless an order for such a stay is procured and served, and the entry, collection, or other enforcement of a judgment does not prejudice a subsequent motion for a new trial. Where a new trial is granted, the court may direct and enforce restitution, as where a judgment is reversed upon appeal.

L. 1832, ch. 128, § 1 (4 Edm. 529), am'd.

§ 1006. When exception not to prejudice motion for new trial.

The taking of an exception, upon a trial by a jury, or the statement thereof in a case, as prescribed in this article, does not prejudice a motion for a new trial, on the ground that the verdict was contrary to evidence; but such a motion may be made,

before or after the hearing of the exception; or, in the discretion of the court before which the exception is heard, at the time of the hearing.

2 R. S. 422, § 76 (2 Edm. 440), am'd.

§ 1007. [Am'd 1883, 1884, 1909.] Notes of stenographer may be treated as minutes of the judge.

The notes of an official stenographer, or assistant-stenographer, taken at a trial, when written out at length, may be treated, in the discretion of the judge, as minutes of the judge upon the trial, for the purposes of this article.

See §§ 88-87, ante. Am'd by L. 1909, ch. 65. Also partly repeated by L. 1906, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 305. See note 52 of notes of Board of Statutory Consolidation at end of code.

TITLE II.**Trials without a jury.**

Sec. 1008. If trial by jury waived, action must be tried by the court.

1009. Trial by jury; how waived.

1010. Decision upon trial by the court, when to be filed; consequence of failure.

1011. Reference by consent; when and how made.

1012. Qualification of the last section.

1013. Compulsory reference for the trial of issues; in what cases it may be made.

1014. Proceedings where the reference is for trial of part of the issues.

1015. Compulsory reference upon questions incidentally arising.

1016. Referee to be sworn.

1017. Witnesses may be subpoenaed.

1018. General powers of a referee upon a trial.

1019. Referee's report; when to be made; consequence of failure.

1020. Double or other increased damages.

1021. Decision of court or report of referee, upon trial of demurrers.

1022. Id.; upon trial of the whole issue of fact.

1023. Parties may require court or referee to determine particular questions.

1024. Qualifications of a referee.

1025. Several referees may be appointed.

1026. Proceedings regulated where there are several referees.

§ 1008. [Am'd, 1877.] If trial by jury waived, action must be tried by the court.

In an action triable by a jury, if the parties waive the trial, by a jury, of the issue* of fact, the action must be tried by the court, without a jury; unless a reference is directed, in a case prescribed by law. (1) But such an action, other than to recover damages for breach of a contract, cannot be tried by the court, without a jury, unless the judge, presiding at the term where it is brought on for trial, assents to such a trial. (2) His refusal so to assent annuls a waiver, made as prescribed in subdivision second, third, or fourth of the next section.

(1) Corresponds to Co. Proc., §§ 253, 254. (2) From Co. Proc., § 266.

§ 1009. Trial by jury; how waived.

A party may waive his right to the trial of the issue of fact, by a jury, in any of the following modes:

1. By failing to appear at the trial.

2. By filing with the clerk a written waiver, signed by the attorney for the party.

3. By an oral consent in open court, entered in the minutes.

4. By moving the trial of the action, without a jury, or, if the adverse party so moves it, by failing to claim a trial by a jury, before the production of any evidence upon the trial.

Co. Proc., remainder of § 266, am'd.

§ 1010. Decision upon trial by the court, when to be filed; consequence of failure.

Upon a trial, by the court, of an issue of fact or of law, its decision, in writing, must be filed, in the clerk's office, within twenty days after the final adjournment of the term, where the issue was tried. If it is not so filed, either party may move, at a special term, for a new trial upon that ground. If the decision has not been filed, when the motion is heard, the court must make an order for a new trial, either absolutely, or unless it is

* Error in engrossing for "issues."

filed, within a time specified in the order. If an order for a new trial is made, or a contingent order for a new trial becomes absolute, the costs of the former trial abide the event.

Co. Proc., part of § 287, am'd.

§ 1011. [Am'd, 1879.] Reference by consent; when and how made.

Except in a case specified in the next section, the whole issue, or any of the issues in an action, either of fact or of law, must be referred, upon the consent of the parties, manifested by a written stipulation, signed by their attorneys, and filed with the clerk. Where the stipulation does not name the referee, he may be designated by the court, on motion of either party. Where the stipulation names the referee, the clerk must enter an order, of course, referring the issue or issues for trial, to that person only. If the referee named in a stipulation refuses to serve, or if a new trial of an action tried by a referee so named is granted, the court must appoint another referee, unless the stipulation expressly provides otherwise.

Id., § 270, and part of § 273, with amendment.

§ 1012. [Am'd, 1898.] Qualification of the last section.

But a reference shall not be made, of course, upon the consent of the parties, in an action to annul the marriage, or for a divorce or a separation; or an action against a corporation, to obtain a dissolution thereof, the appointment of a receiver of its property, or the distribution of its property, unless it is brought by the attorney-general; or an action wherein a defendant, to be affected by the result of the trial, is an infant. In a case specified in this section, where the parties consent to a reference, the court may, in its discretion, grant or refuse a reference; and, where a reference is granted, the court must designate the referee. If the referee, thus designated, refuses to serve, or if a new trial of an action tried by a referee, so designated, is granted, the court must, upon the application of either party, appoint another referee.

Id., § 273; L. 1898, ch. 317. In effect Sept. 1, 1898. See Rule 73.

§ 1013. Compulsory reference for the trial of issues; in what cases it may be made.

The court may, of its own motion, or upon the application of either party, without the consent of the other, direct a trial of the issues of fact, by a referee, where the trial will require the examination of a long account, on either side, and will not require the decision of difficult questions of law. In an action triable by the court, without a jury, a reference may be made, as prescribed in this section, to decide the whole issue, or any of the issues; or to report the referee's finding, upon one or more specific questions of fact, involved in the issue.

Id., part of § 271, am'd.
Applies to City Court of New York. L. 1898, Ch. 364, § 2

§ 1014. Proceedings where the reference is for trial of part of the issues.

Where a reference is made, as prescribed in the last section, to report upon a specific question of fact, involved in the issue, and the determination of one or more other issues is necessary, in order to enable the court to render judgment, they must be tried, either before or after the filing of the report, as the court directs, and either by a jury, or by the court, without a jury, as the case requires. Where they are tried by a jury, application for judgment must be made upon the verdict and the report.

Substitute for part of

§ 1015. Compulsory reference upon questions incidentally arising.

The court may likewise, of its own motion, or upon the application of either party, without the consent of the other, direct a reference to take an account, and report to the court thereon, either with or without the testimony, after interlocutory or final judgment, or where it is necessary to do so, for the information of the court; and also to determine and report upon a question of fact, arising in any stage of the action, upon a motion, or otherwise, except upon the pleadings.

Co. Proc., § 271, subd. 2 and 3. See § 1232, post.

§ 1016. Referee to be sworn.

A referee, appointed as prescribed in either of the foregoing sections of this title, must, before proceeding to hear the testimony, be sworn faithfully and fairly to try the issues, or to determine the questions referred to him, as the case requires, and to make a just and true report, according to the best of his understanding. The oath may be administered by an officer specified in section 842 of this act. But where all the parties, whose interest will be affected by the result, are of age, and present, in person or by attorney, they may expressly waive the referee's oath. The waiver may be made by written stipulation, or orally. If it is oral, it must be entered in the referee's minutes.

2 R. S. 384, § 44 (2 Edm. 390), am'd.

§ 1017. Witnesses may be subpoenaed.

A witness may be subpoenaed to attend before a referee, appointed as prescribed in either of the foregoing sections of this title, to testify, and, in a proper case, to bring with him a book, document, or other paper, as upon a trial by the court.

Id., § 45, am'd.

§ 1018. General powers of a referee upon a trial.

The trial, by a referee, of an issue of fact, or of an issue of law, must be brought on upon like notice, and conducted in like manner, and the papers to be furnished thereupon are the same, and are furnished in like manner, as where the trial is by the court, without a jury. The referee exercises, upon such a trial, the same powers as the court, to grant adjournments, to preserve order, and punish the violation thereof. Upon the trial of an issue of fact, the referee exercises also the same power as the court, to allow amendments to the summons, or to the pleadings; to compel the attendance of a witness by attachment; and to punish a witness for a contempt of court, for non-attendance, or refusal to be sworn, or to testify. Upon the trial of an issue of law, the referee exercises the same power as the court, to permit a party in fault to plead anew or amend; to direct the action to be divided into two or more actions; to award costs, and otherwise to dispose of any question, arising upon the decision of the issue referred to him. The powers, conferred by this section, are exercised in like manner, and upon like terms, as similar powers are exercised by the court, upon a trial.

First three sentences from the first three sentences of Co. Proc., § 272; the remainder is new. The last sentence but one refers to § 497, ante.

§ 1019. [Am'd, 1882.] Referee's report; when to be made; consequence of failure.

Upon the trial, by a referee, of an issue of fact, or an issue of law, or where a reference is made as prescribed in section one thousand and fifteen of this act, his written report must be either filed with the clerk, or delivered to the attorney for one of the parties, within sixty days from the time when the cause or matter is finally submitted; otherwise either party may before it is filed or delivered, serve a notice, upon the attorney for the adverse party, that he elects to end the reference. In such a case, the action must thenceforth proceed, as if the reference had not been directed; and the referee is not entitled to any fees.

Co. Proc., last sentence of § 273.

§ 1020. Double or other increased damages.

Where the* double, treble, or other increased damages are given by statute, the decision of the court, or the report of the referee, must specify the sum awarded as single damages, and direct judgment for the increased damages.

See § 1184, post.

§ 1021. [Am'd, 1895.] Decision of court or report of referee, upon trial of demurrer.

The decision of the court, or the report of a referee, upon the trial of a demurrer, or upon the trial of the issues of fact or law, where a nonsuit is granted, must direct the final or interlocutory judgment to be entered thereupon, and in any such case it shall not be necessary for the court or referee to make any finding of fact. Where it directs an interlocutory judgment, with leave to the party in fault to plead anew or amend, or permitting the action to be divided into two or more actions, and no other issue remains to be disposed of, it may also direct the final judgment to be entered if the party in fault fails to comply with any of the directions given or terms imposed.

Substituted for Co. Proc., part of § 267; L. 1895, ch. 946.

§ 1022. [Am'd, 1895, 1903.] Decision of court or report of referee upon trial of the whole issue of fact.

The decision of the court or the report of a referee upon the trial of the whole issues of fact must state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon, which decision so filed shall form part of the judgment roll. In an action where the costs are in the discretion of the court the decision or report must award or deny costs, and if it awards costs it must designate the party to whom the costs to be taxed are awarded.

L. 1895, ch. 946; L. 1903, ch. 83. See § 993.

§ 1023. [Added, 1904.] Parties may require court or referee to determine particular questions.

Before the cause is finally submitted to the court or the referee, or within such time afterwards, and before the decision or report is rendered, as the court or referee allows, the attorney for either party may submit, in writing, a statement of the facts, which he deems established by the evidence, and of the rulings

* This word inserted by error in engrossing.

upon questions of law, which he desires the court or the referee to make. The statement must be in the form of distinct propositions of law, or of fact, or both, separately stated; each of which must be numbered, and so prepared, with respect to its length, and the subject and phraseology thereof, that the court or referee may conveniently pass upon it. At or before the time, when the decision or report is rendered, the court or the referee must note, in the margin of the statement, the manner in which each proposition has been disposed of, and must either file, or return to the attorney, the statement thus noted; but an omission so to do does not affect the validity of the decision or report. An exception may be taken to a refusal of the court or referee to find any request thus submitted.

L. 1904, ch. 491. In effect Sept. 1, 1904.

§ 1024. [Am'd, 1905.] Qualifications of a referee.

A referee, appointed by the court, must be free from all just objection; and no person shall be so appointed, to whom all the parties object, except in an action to annul a marriage, or for a divorce, or a separation. A judge cannot be appointed a referee, in an action brought in a court, of which he is a judge, except by the written consent of the parties; and, in that case, he cannot receive any compensation as referee. No person shall be appointed, a commissioner of estimate and appraisal in condemnation or street opening proceedings or referee, in the first or second judicial districts, in an action or special proceeding, who holds the position of clerk, private secretary, secretary, or stenographer to any justice or judge of a court of record, or to any board of justices or judges of such a court in any department where such justice or judge is engaged in the discharge of the duties of his office.

Co. Proc., part of § 273; L. 1905, ch. 435. In effect Sept. 1, 1905.

§ 1025. Several referees may be appointed.

Where the court is authorized to appoint a referee, it may, in its discretion, appoint either one or three. And where a reference is made by consent of the parties, they may select any number of referees, not exceeding five.

Substitute for Co. Proc., part of § 273.

§ 1026. Proceedings regulated where there are several referees.

Where the reference is to more than one referee, all must meet together, and hear all the allegations and proofs of the parties; but a majority may appoint a time and place for the trial, decide any question which arises upon the trial, sign a report, or settle a case. Either of them may administer an oath to a witness; and a majority of those present, at a time and place appointed for the trial, may adjourn the trial to a future day.

2 R. S. 384, § 46 (2 Edm. 399).

TITLE III.

Trial Jurors, except in New-York and Kings counties; mode of selecting them, and of procuring their attendance.

Article 1. Qualifications and exemptions of trial jurors.

2. Mode of selecting, drawing, and procuring the attendance of trial jurors, in ordinary cases.

3. Mode of striking and procuring a special jury, and of procuring a foreign jury.

4. Penalties for non-attendance.

ARTICLE FIRST.

Qualifications and exemptions of trial jurors.

Sec. 1027. Qualifications of trial jurors.

1028. Additional provision respecting property qualification.

1029. Certain public officers disqualified.

1030. Persons entitled to claim exemption from service.

1031. Evidence of exemption in certain cases.

1032. When juror to be discharged from serving.

1033. When juror to be excused from serving.

1034. Application of this article, as respects New-York and Kings counties.

§§ 1027-1034. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 502, 503, 544, 546-548, 550, 590, 600, 680, 687.]

ARTICLE SECOND.

Mode of selecting, drawing, and procuring the attendance of trial jurors, in ordinary cases.

- Sec. 1035. Certain town officers to make lists of trial jurors.
 1036. Names of jurors to be taken from assessment-roll.
 1037. Duplicate jury lists to be made and filed.
 1038. County clerk to make and deposit ballots.
 1039. County clerk to destroy old ballots.
 1040. Jurors so returned to serve for three years.
 1041. Wards of certain cities to be considered towns. Rule in other cities.
 1042. When and how many jurors, for courts of record, to be drawn.
 1043. Notice of drawing.
 1044. Sheriff and county judge to attend drawing.
 1045. Sheriff or county judge, not appearing, to be again notified, etc.
 1046. Certain officers required to be present at drawing.
 1047. Mode of drawing jurors; minute of drawing; list to be delivered to sheriff.
 1048. Sheriff to notify jurors and make return.
 1049. Applicants to be furnished with copies of jury lists.
 1050. Names of jurors who have served, to be kept in separate box.
 1051. Jurors to be drawn from that box, when first box is exhausted.
 1052. A third jury box to be kept.
 1053. When old ballots therein to be destroyed and new ballots deposited.
 1054. Jurors, when to be drawn from third box.
 1055. Application of certain provisions to trial jurors.
 1056. Justice of supreme court, or county judge, may order drawing of additional jurors.
 1057. Proceedings upon such order.
 1058. For what courts, and by whom, additional jurors may be ordered.
 1059. How such additional jurors drawn and notified.
 1060. Power of county judge, as to attendance of jurors.
 1061. Powers of deputy county clerk, under this article.
 1062. This article not applicable to New York and Kings counties.

§§ 1035-1040. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 500, 501, 505, 506, 508-512.]

§ 1041. [Repealed by L. 1909, chs. 35 and 66. See Consolidated Laws, tit. Judiciary Law, § 507. See also Code of Criminal Procedure, § 229.]

§§ 1042-1054. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 26, 513-526, 528, 536, 543, 545.]

§ 1055. [Am'd, 1909.] Application of certain provisions to trial jurors.

The provisions of title five of this chapter apply to each person notified by the sheriff as provided by section five hundred and thirty-seven of the judiciary law.

Am'd by L. 1909, chs. 65 and 240, § 84. Also partly repealed by L. 1909, ch. 35. See Consolidated Laws tit. Judiciary Law, § 537. See note 53 of notes of Board of Statutory Consolidation at end of code.

§§ 1056-1062. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 513, 527-532, 535, 538, 539, 542, 543, 545, 565, 590, 680.]

ARTICLE THIRD.

Mode of striking and procuring a special jury, and of procuring a foreign jury.

- Sec. 1063. What courts may order a special jury to be struck.
 1064. Party obtaining order to give eight days' notice.
 1065. Mode of striking jury.
 1066. Jurors so drawn to be notified to attend.
 1067. Jury to be formed as in other cases.
 1068. Provision where clerk or commissioner of jurors is interested.
 1069. Party applying for special jury to pay expenses.
 1070. Copy of order for foreign jury to be delivered to sheriff.
 1071. Mode of obtaining a foreign jury.

§ 1063. [Am'd, 1895.] What courts may order a special jury to be struck.

Where it appears to the court, that a fair and impartial trial of an issue of fact, triable by a jury, joined in an action, pending in the supreme court, cannot be had without a struck jury, or that the importance or intricacy of the case requires such a jury, the court must make an order, upon notice, directing a special jury to be struck, for the trial of the issue. The order must specify the term, and it may specify a particular day in the term, when the jurors must attend.

2 R. S. 418, § 46 (2 Edm. 435), as am'd by L. 1857, ch. 530, further am'd; L. 1895, ch. 946.

§ 1064. [Am'd, 1895.] Party obtaining order to give eight days' notice.

Unless the order specifies, or directs the officer, who is to strike the jury, to fix a time for the parties to attend, the party obtaining it must give at least eight days' notice of the time when he will attend, before the clerk of the county in which the action is triable, or, if it is triable in the city and county of New-York, or the county of Kings, before the commissioner of jurors, for the purpose of having the jury struck.

L. 1895, ch. 946.

§ 1065. [Am'd, 1877.] Mode of striking jury.

At the time appointed, the clerk, or, in his absence, the deputy-clerk, or the commissioner, as the case requires, must attend at his office, with the original lists or books, filed or kept in his office, as required by law, containing the names of the persons who are then liable to serve as trial jurors; and, in the presence of the parties, or their attorneys or counsel, must strike a trial jury, as follows:

1. The clerk, deputy-clerk, or commissioner, must select from the lists or books, the names of forty-eight persons, whom he deems most indifferent between the parties, and best qualified to try the issue; and must make and certify a list of those names.

2. The party, on whose application the special jury was directed to be struck, or his attorney or counsel, may then first strike from the list one name; the adverse party or his attorney or counsel may then strike therefrom one name; and so alternately, until each party has stricken out twelve names.

3. If either party fails to attend, at the time and place of striking the jury, or neglects to strike out a name, the clerk, deputy-clerk, or commissioner, must strike for him.

4. The clerk, deputy-clerk, or commissioner, must thereupon make out a list of the names of the twenty-four persons not stricken out, and must certify that it is a correct list of the persons drawn to serve as jurors, pursuant to the order of the court. He must immediately deliver the list so certified, and a certified copy of the order, to the sheriff of the county. If the list, from any ward or town, cannot be found, the clerk must make a new list from the ballots then in use for jurors for that ward or town, and must use that list, upon striking the jury, in place of the original list.

2 R. S. 418, § 48, as am'd by L. 1876, ch. 69.

§ 1066. Jurors so drawn to be notified to attend.

The sheriff must notify the persons whose names are contained in the list; and must return the names of those notified, to the term, at which they are required to attend, as prescribed by law for notifying and returning ordinary trial jurors.

Id., § 49. See L. 1858, ch. 322, § 36, as modified by L. 1873, ch. 166, § 1.

§ 1067. [Am'd, 1895.] Jury to be formed as in other cases.

From the persons so notified and attending, a jury must be formed for the trial, and the issue must be tried, as prescribed in this chapter with respect to an ordinary jury trial. The court has the same power to excuse or discharge a juror, and to cause additional jurors to be drawn, or talesmen to attend as upon an ordinary jury trial. But the court may, in its discretion, set aside an additional juror so drawn, or a talesman, upon the objection of either party, without a formal challenge, but neither party shall have more than two peremptory challenges.

L. 1895, ch. 946.

§ 1068. [Am'd, 1884.] Provision where clerk or commissioner of jurors is interested.

If it appears to the court, to which an application for a special jury is made, that the clerk, or the commissioner of jurors, as the case may be, is interested in the action; or is related to either of the parties; or is not indifferent between them; the court must appoint two disinterested persons to strike the jury; and the court may, in its discretion, in any case appoint two such persons to strike such jury. The persons so appointed possess, for the purposes of the action, all the powers conferred, by this article, upon the clerk, or the commissioner of jurors.

Id., § 51; L. 1884, ch. 460.

§ 1069. Party applying for special jury to pay expenses.

The expense of striking a special jury must be paid by the party applying for it, and shall not be taxed in the costs of the action.

Id., § 52.

§ 1070. Copy of order for foreign jury to be delivered to sheriff.

Where an order for a trial by a foreign jury is made, a certified copy thereof must be delivered to the sheriff of the county, from which it is to be drawn; who must give notice thereof to the clerk of that county, and also, in the city and county of New-York, or the county of Kings, to the commissioner of jurors, at

least twenty days before the first day of the term, at which the foreign jury is required to attend.

2 E. S. 410, § 10 (2 Edm. 427).

§ 1071. Mode of obtaining a foreign jury.

The clerk, or, in the county of Kings, the commissioner, to whom the notice is given, must draw the names of twenty-four persons, in the same manner, and in presence of the same officers, as prescribed by law, with respect to ordinary trial jurors; except that notice of the drawing need not be published. A certified list of the names drawn must be delivered to the sheriff, who must notify each person drawn, and make a return, as in an ordinary case.

Id., § 11.

ARTICLE FOURTH.

Penalties for non-attendance.

- Sec. 1072. Fine to be imposed for non-attendance.
1073. Order to show cause, when juror was not personally notified.
1074. Id.; if default was at trial term.
1075. Duty of clerk and sheriff.
1076. Proceedings upon return of such order.
1077. When proceedings to cease.
1078. This article not applicable to New-York and Kings counties.

§§ 1072-1078. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 551-558, 590, 680.]

TITLE IV.

Trial jurors in New-York and Kings counties; mode of selecting them, and of procuring their attendance.

Article 1. Provisions relating to trial jurors in the city and county of New-York.

2. Provisions relating to trial jurors in the county of Kings.

ARTICLE FIRST.

Provisions relating to trial jurors in the city and county of New-York.

Sec. 1079. Qualifications of trial jurors.

1080. Who deemed a resident.

1081. Persons exempt from service.

1082. Evidence of right to exemption in certain cases.

1083. Military officers required to certify to commissioner persons performing full military duty.

1084. Jury year; length of jury service required and allowed.

1085. When court may temporarily excuse juror from attendance.

1086. In other cases, juror to be excused only on showing certain facts.

1087. Juror applying to court to be excused must produce notice, etc.

1088. Service in a court not of record; when an excuse.

1089. Clerk of court to certify to commissioner as to attendance, excuses, fines, etc., of jurors.

1090. Commissioner of jurors to select trial jurors; his general powers.

1091. Commissioner may appoint assistants, etc.; who may administer oaths.

1092. All public officers required to aid the commissioner.

1093. Expenses of commissioner's office; how paid.

1094. List of jurors to be prepared, etc.; commissioner to decide as to exemptions.

1095. Persons may be required to testify as to juror's liability to serve. Penalty for disobedience.

1096. Commissioner to return lists to county clerk; correction of lists.

1097. Old ballots to be destroyed and new ballots deposited; supplemental lists; new ballots therefor.

1098. Number of jurors to be drawn for each term of court of record.

1099. When jurors to be drawn; what officers to attend jury.

1100. Notice of drawing.

1101. Proceedings if officers do not appear.

1102. When jury to be drawn on adjourned day.

1103. Mode of drawing; minute; lists.

1104. Id.; where term consists of two or more parts.

1105. Commissioner may issue notice to jurors drawn.

1106. Sheriff to notify jurors and make return.

1107. Clerk of court to certify as to mode of service.

1108. Court may order new panel to be drawn during term.

1109. Court of record to fine juror for non-attendance; power to remit fine.

1110. Juror may also be arrested and compelled to serve.

1111. Jurors for district courts; how selected; punishment for non-attendance; clerk's duty; penalty for neglect.

1112. Sheriff's jury; how selected, etc.

1113. Remitting and enforcing jury fines.

1114-1116. [Repealed.]

1117. Uncollected fines, enforcement of.

1118. Commissioner to receive fines; accounts of.

1119. Corporation counsel to prosecute, etc.

1120. Penalty, for physician giving false certificate.

1121. Persons required to furnish information; penalty for refusal, etc.

1122. Punishment for bribery of officer, etc., by juror drawn.

1123. Id.; for officer accepting bribes, etc.

1124. Id.; for concealing offer to take bribe, etc.

1125. False swearing; when perjury.

§§ 1079-1113. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 549, 591-595, 597-599, 601-659. Section 1093 is omitted because superseded by L. 1901, ch. 602, § 1. Section 1111 is omitted because covered by Municipal Court Act (L. 1902, ch. 580), § 2(3).]

§ 1114. [Repealed, ch. 343, L. 1889.]

§ 1115. [Repealed, ch. 343, L. 1889.]

§ 1116. [Repealed, ch. 343, L. 1889.]

§§ 1117-1119. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 660-667.]

§ 1120. [Repealed by L. 1909, ch. 88. See Penal Law, § 1232.]

§ 1121. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 596.]

§§ 1122-1125. [Repealed by L. 1909, ch. 88. See Penal Law, §§ 1233, 1235.]

ARTICLE SECOND.

Provisions relating to trial jurors in the county of Kings.

- Sec. 1126. Qualifications of trial jurors.
 1127. Persons exempt from service.
 1128. Evidence of right to exemption in certain cases.
 1129. Length of jury service required. Notice to juror to attend.
 1130. When court to excuse juror from service.
 1131. Clerk of court to certify to commissioner, as to attendance, excuses, fines, etc., of jurors.
 1132. Commissioner of jurors to select trial jurors; his general powers.
 1133. Id.; to receive fees and fines for benefit of county.
 1134. Supervisors to provide for his expenses, etc.
 1135. Assessors to return persons liable, and commissioner to select jurors.
 1136. When commissioner to publish notice, and receive evidence of exemption.
 1137. Commissioner to prepare list, and file transcript.
 1138. Supplemental lists may be afterwards made.
 1139. Ballots to be prepared, and deposited in box.
 1140. What officers to attend drawing; how many jurors to be drawn.
 1141. Proceedings preliminary to drawing.
 1142. Drawing; how conducted.
 1143. Certificate to be made, and boxes sealed up.
 1144. Subsequent drawings; how conducted.
 1145. Proceedings when first box exhausted.
 1146. Commissioner to transmit panel to sheriff to notify jurors.
 1147. Days for which the jurors are to be notified. Excusing jurors, and changing days of their attendance.
 1148. Sheriff to make return of jurors notified.
 1149. Court may at any time order a new panel. How drawn.
 1150. Jurors in certain special proceedings.
 1151. Compensation to judges, etc., for services under this article.
 1152. Court of record to fine juror for non-attendance.
 1153. Juror may also be arrested, and compelled to serve.
 1154. Commissioner to notify jurors fined to appear; board for remission and enforcement of fines.
 1155. Commissioner to collect fines, and to make return of unpaid fines; precept thereupon.
 1156. Fines, not collected under precept, to be docketed and enforced as judgments.
 1157. When lien discharged.
 1158. Commissioner, etc., corruptly omitting name, is guilty of felony.
 1159. Commissioner's other wilful neglect, a misdemeanor.
 1160. Giving false information, or suppressing notice, a misdemeanor.
 1161. Penalty for physician giving false certificate.
 1162. Commissioner to report and pay over money.

§§ 1126-1157. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 26, 681-683, 686-736. Section 1134 is omitted because superseded by L. 1902, ch. 564, § 6.]

§§ 1158-1161. [Repealed by L. 1909, ch. 88. See Penal Law, §§ 1232, 1234, 1236.]

§ 1162. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 684, 685.]

TITLE V.**Trial by jury.**

Article 1. Formation of the jury.

2. The verdict.

ARTICLE FIRST.*Formation of the jury.*

Sec. 1163. Clerk to prepare ballots of jurors for trial.

1164. Clerk to draw ballots.

1165. Mode of drawing ballots.

1166. Persons drawn, etc., to form the jury.

1167. Ballots drawn, when to be deposited in a second box.

1168. Id.; when to be returned to the first box.

1169. Ballots of absentees, etc., to be returned to first box.

1170. New jury may be drawn while first is empanelled.

1171. When talesmen to be procured, or jurors drawn from third box.

1172. When talesmen to be procured.

1173. If sheriff is a party, court may appoint a person to act for him.

1174. Duty of sheriff and of talesmen.

1175. Jury competent, although containing only part or none of original panel.

1176. Peremptory challenges in a civil action.

1177. No challenge allowed because officer drawing is a party, etc.

1178. No challenge allowed because officer notifying is a party, etc.

1179. Challenges in penal actions.

1180. Challenges how tried. Exceptions to and review of the determination of the court, in reference thereto.

§ 1163. Clerk to prepare ballots of jurors for trial.

At the opening of a term of a court of record at which issues of fact are to be tried by jury, the clerk must cause ballots, uniform, as nearly as may be, in appearance, to be prepared, by writing the name of each person, returned to the term as a trial juror, with his proper additions, on a separate piece of paper. He must roll up or fold each ballot, in the same manner, as nearly as may be, so as to resemble the others, and so that the name is not visible. The ballots must be deposited in a sufficient box, from which they must be drawn, as prescribed in this article.

2 R. S. 420, § 59 (2 Edm. 488).

§ 1164. Clerk to draw ballots.

When an issue of fact, to be tried by a jury, is brought to trial, the clerk, under the direction of the court, must openly draw, out of the box, as many of the ballots, one after another, as are sufficient to form a jury.

Id., § 60.

§ 1165. Mode of drawing ballots.

Before the first ballot is drawn, the box must be closed and well shaken, so as thoroughly to mix the ballots; and the clerk must draw each ballot, without seeing the name written on any of them, through an aperture, made in the lid of the box, large enough only to admit his hand conveniently.

Id., § 60.

§ 1166. [Am'd, 1883.] Persons drawn, etc., to form the jury.

The first twelve persons who appear, as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, must be sworn, and constitute the jury to try the issue. Persons shall be disqualified from sitting as jurors if related by consanguinity or affinity to a party to the issue in the same cases in which judges are disqualified. The party related to the juror must raise the objection before the case is opened; but any other party to the issue may raise the objection within six months from the date of verdict.

2 R. S. 420, § 61; L. 1883, ch. 234.

§ 1167. Ballots drawn, when to be deposited in a second box.

The ballots, containing the names of the jurors so sworn, must be then deposited in another box, and there kept, apart from the other ballots, until that jury is discharged.

Id., § 62.

§ 1168. Id.; when to be returned to the first box.

After that jury is discharged, the ballots containing their names must be again rolled up or folded, as prescribed in section 1163 of this act, and returned to the box from which they were first taken; and the same course must be pursued, as often as an issue is brought to trial by a jury.

Id., § 63.

§ 1169. Ballots of absentees, etc., to be returned to first box.

The ballot, containing the name of a juror, who is absent, when his name is drawn or called, or is set aside, or excused from serving on that trial, must be again rolled up or folded, in the same manner as before, and returned to the box, containing the undrawn ballots, as soon as the jury is sworn.

Id., § 67.

§ 1170. New jury may be drawn while first is empanelled.

If an issue is brought to trial by a jury, while a jury is empanelled in another cause, at the same term, and not then discharged, the court may order a jury, for the trial of that issue, to be drawn, out of the box containing the ballots then undrawn; but, in any other case, the ballots, containing the names of all the trial jurors, returned at, and attending the term, must be placed together in the same box, before a jury is drawn therefrom.

Id., § 64.

§ 1171. [Am'd, 1879, 1909.] When talesmen to be procured, or jurors drawn from third box.

If a sufficient number of jurors, duly drawn and notified, do not attend, or cannot be obtained to form a trial jury, the court may, in any county except Westchester, direct the sheriff to require the attendance of such a number of talesmen, from the bystanders, or from the county at large, qualified to serve as trial jurors, as it deems sufficient for the purpose. In Westchester county, the court must direct the sheriff to draw a sufficient number of ballots from the first box, specified in section five hundred and eight of the judiciary law; if there is not a

sufficient number of ballots remaining therein, to draw the residue from the second box, specified in section five hundred and twenty-three of the judiciary law. In any other county, except New York and Kings, it may, in its discretion, instead of directing him to require talesmen to attend, direct him to draw a sufficient number of ballots from the third box, specified in section five hundred and twenty-four of the judiciary law. In either case, the sheriff must notify the persons thus drawn to attend forthwith, or upon a day fixed by the court. If, for any reason, a sufficient number of jurors to try the issue is not obtained, from the persons notified, under an order made as prescribed in this section, the court may make another order, or successive orders, until a sufficient number is obtained; and in making each order, the court may exercise the same discretion, as in making the first order.

2 R. S. 520, § 54, am'd. Am'd by L. 1900, ch. 65, § 3. See note 54 of notes of Board of Statutory Consolidation at end of code.

§ 1172. When talesmen to be procured.

In any county, except New-York, Kings, or Westchester, the court may also direct the sheriff to require the attendance of such a number of qualified talesmen, for the trial of an issue of fact, as it deems sufficient, where, by reason of one or more juries being empanelled, or for any other reason, no ballot remains undrawn; or where, in consequence of jurors being set aside, a juror cannot be obtained, for the trial of that issue, from the list of those returned.

Part of *Id.*, § 65.

§ 1173. If sheriff is a party, court may appoint a person to act for him.

If, in a case specified in the last two sections, the sheriff is a party to the issue, the court must appoint a disinterested person, to act in place of the sheriff. For that purpose, the person so appointed possesses all the powers, and is subject to all the duties and liabilities of the sheriff, with respect to the matters specified in those sections.

Part of same section, am'd.

§ 1174. [Am'd, 1909.] Duty of sheriff and of talesmen.

The sheriff, or person appointed by the court, must notify the requisite number of persons to attend, and make return thereof, as prescribed in section five hundred and thirty-six of the judiciary law; except that each person must be required to attend forthwith. Each person so notified must attend forthwith, and, unless excused by the court or set aside, must serve as a juror upon the trial. For a neglect or refusal so to do, he may be fined, in the same manner as a trial juror, regularly drawn and notified, as prescribed in the judiciary law; and he is subject to the same exceptions and challenges, as any other trial juror.

Id., § 55. Am'd by L. 1900, ch. 65, § 3. See note 55 of notes of Board of Statutory Consolidation at end of code.

§ 1175. [Am'd, 1877.] Jury competent, although containing only part or none of original panel.

It is not a valid objection to a jury, procured as prescribed in the last four sections, that it contains none of the jurors originally returned to the term, or is only partially composed of such jurors.

Remainder of *Id.*, § 65, extended.

§ 1176. [Am'd, 1894.] Peremptory challenges in a civil action.

Upon the trial of an issue of fact, joined in a civil action in a court of record, each party may peremptorily challenge not more than six and in a court not of record each party may peremptorily challenge not more than three of the persons drawn as jurors for the trial.

L. 1894, ch. 434.

§ 1177. No challenge allowed because officer drawing is a party, etc.

It is not a good cause of challenge, to the panel or array of trial jurors, in an action in a court of record, that the officer who drew them is a party to, or interested in the action, or counsel or attorney for, or related to, a party

2 R. S. 420, § 56 (2 Edm. 437).

§ 1178. No challenge allowed because officer notifying is a party, etc.

It is not a good cause of challenge to the panel or array of trial jurors, in an action in a court of record, that they were notified to attend by an officer, who is a party to, or interested in, the action, or related to a party; unless it is alleged in the challenge, and is established, that one or more of the jurors drawn were not notified, and that the omission was intentional.

Id., § 57.

§ 1179. [Am'd, 1903.] Challenges in penal actions.

In an action, in a court of record, or not of record, wherein a city, town or county is a party, it is not a good cause of challenge to a trial juror, or to an officer who notified the trial jurors, that the juror or the officer is a resident of, or liable to pay taxes, in the city, town or county, which is a party to such action.

Id., § 58. See also, 2 R. S. 551, § 2 (2 Edm. 571); L. 1903, ch. 294. In effect Sept. 1, 1903.

§ 1180. [Am'd, 1877, 1901, 1911.] Challenges how tried. Exceptions to and review of the determination of the court, in reference thereto.

An objection to the qualifications of a juror is available only upon a challenge. A challenge of a juror, or a challenge to the panel or array of jurors, must be tried and determined by the court only. Either party may except to the determination, and it may be reviewed, upon a question of fact, or a question of law, or both, as where an issue of fact presented by the pleadings is tried by the court; except that where one or more exceptions are taken to the rulings of the court, made after the jury is empanelled, an exception to the determination of a challenge must be heard at the same time; and the case must contain the matters necessary to present it, upon the facts, or the law, or both. The fact that a juror is in the employ of a party to the action; or, if a party to the action is a corporation, that he is an employee thereof or a shareholder or a stockholder therein; or in actions for damages for injuries to person or property, that he is a shareholder, stockholder, director, officer or employee, or in any manner interested, in any insurance company issuing policies for protection against liability for damages for injury to person or property, shall constitute a good ground for a challenge to the favor as to such juror.

L. 1873, ch. 427, § 1 (9 Edm. 600). am'd. See § 992; L. 1901, ch. 243; L. 1911, ch. 206, in effect Sept. 1, 1911.

ARTICLE SECOND.*The verdict.*

- Sec. 1181. Discharge of jury failing to agree.
 1182. Plaintiff cannot submit to nonsuit after jury retires.
 1183. In an action to recover money, jury to assess damages.
 1184. How double, treble, or increased damages, found and awarded.
 1185. When verdict to be taken, subject to the opinion of the court.
 1186. General and special verdict defined.
 1187. General or special verdict, when rendered; special finding with general verdict.
 1188. Special finding controls general verdict.
 1189. Entry of verdict; subsequent proceedings.

§ 1181. Discharge of jury failing to agree.

Where a jury is empanelled to try an issue, to make an inquiry, or to assess damages, in an action in a court of record, or not of record, or in a special proceeding before an officer, if the jurors cannot agree, after being kept together, for such a time as is deemed reasonable, by the court before which, or the officer before whom, they were empanelled the court or officer may discharge them, and issue a precept for a new jury, or order another jury to be drawn, as the case requires; and the same proceedings must be had before the new jury, as if it was the jury first empanelled.

2 R. S. 554, § 26 (2 Edm. 575).

§ 1182. Plaintiff cannot submit to nonsuit after jury retires.

It is not necessary, in an action in a court of record, to call the plaintiff, when the jurors are about to deliver their verdict; and the plaintiff, in such an action, cannot submit to a nonsuit, after the cause has been committed to the jury, to consider the verdict.

§ 1183. In action to recover money, jury to assess damages.

In an action to recover a sum of money only, if a verdict is found, either in favor of the plaintiff, or in favor of a defendant, who has set up a counterclaim for a sum of money, the jury must assess the amount of damages. The jury may also, under the direction of the court, assess the amount of the damages, where the court directs judgment for the plaintiff, on the pleadings.

Co. Proc., part of § 263. The remainder of that section is covered by §§ 503 and 504, ante.

§ 1184. How double, treble, or increased damages, found and awarded.

Where double, treble, or other increased damages are given by statute, single damages only are to be found by the jury; except in a case where the statute prescribes a different rule. The sum so found must be increased by the court, and judgment rendered accordingly.

Embodies the rule in 8 Johns. 648, and 25 Wend. 420.

§ 1185. [Am'd, 1879.] When verdict to be taken, subject to the opinion of the court.

Where, upon the trial of an issue by a jury, the case presents only questions of law, the judge may direct the jury to render a verdict, subject to the opinion of the court. Notwithstanding that such a verdict has been rendered, the judge holding the trial term may, at the same term, set aside the verdict, and direct judgment to be entered for either party, with like effect and like manner, as if such a direction had been given at the trial. An exception to such a direction may be taken as prescribed in section nine hundred and ninety-four of this act.

Co. Proc., part of § 265, am'd. See § 1234, post.

§ 1186. General and special verdict defined.

A general verdict is one, by which the jury pronounces, generally, upon all or any of the issues, in favor either of the plaintiff or of the defendant. A special verdict is one, by which the jury finds the facts only, leaving the court to determine, which party is entitled to judgment thereupon.

Id., § 260.

§ 1187. [Am'd, 1895, 1904.] General or special verdict, when rendered; special finding with general verdict.

In an action to recover a sum of money only, or real property, or a chattel, the jury may render a general or special verdict, in its discretion. In any other action, except where one or more specific questions of fact, stated under the direction of the court, are tried by a jury, the court may direct the jury to find a special verdict, upon all or any of the issues. Where the jury finds a general verdict, the court may instruct it to find also specially, upon one or more questions of fact, stated in writing. The special verdict or special finding must be in writing; it must be filed with the clerk, and entered in the minutes. When a motion is made to nonsuit the plaintiffs or for the direction of a verdict, the court may, pending the decision of such motion, submit any question of fact raised by the pleadings to the jury or require the jury to assess the damage. After the jury shall have rendered a special verdict upon such submission or shall have assessed the damage, the court may then pass upon the motion to nonsuit or direct such general verdict as either party may be entitled to. On an appeal from the judgment entered upon such nonsuit or general verdict, such special verdict, or general verdict, shall form a part of the record, and the appellate division or the court of appeals may direct such judgment thereon as either party may be entitled to.

Id., last paragraph of § 261; L. 1895, ch. 946; L. 1904, ch. 131. In effect March 28, 1904.

§ 1188. Special finding controls general verdict.

Where a special finding is inconsistent with a general verdict, the former controls the latter, and the court must render judgment accordingly.

Id., § 262.

§ 1189. [Am'd, 1877.] Entry of verdict; subsequent proceedings.

When the jury renders a verdict, or finds upon one or more specific questions of fact, stated under the direction of the court, the clerk must make an entry, in his minutes, specifying the time and place of the trial; the names of the jurors and witnesses; the

verdict, or the questions and findings thereupon, as the case requires; and the direction, if any, which the court gives, with respect to the subsequent proceedings. Upon the application of the party in whose favor a general verdict is rendered, the clerk must enter judgment, in conformity to the verdict, unless a different direction is given by the court, or it is otherwise specially prescribed by law.

Os. Proc., part of § 264. .

TITLE VI.

Miscellaneous provisions; including those relating to embracery, and other acts of.

Sec. 1190. Trials by jury to be as herein provided.

1191. Venire not necessary.

1192. Jurors not to be questioned for their verdict.

1193. Penalty where juror takes gift, etc.

1194. Embracery; penalty therefor.

1195. Penalty for juror's non-attendance in special proceeding.

1196. Sheriff, etc., to keep jury in special proceeding; penalty.

1197. Notice of imposition of fine.

1198. Special return of delinquency and fine to county court.

1199. Collection or remission of fine.

§ 1190. [Am'd, 1907, 1909.] Trials by jury to be as herein provided.

A trial by a jury, of an issue of fact, joined in a civil action, in a court of record, must be had, as prescribed in this chapter; except in a case where it is otherwise specially prescribed by law. The court may, upon the application of either party, exclude from the court-room the jurors sitting in an action during the argument of a motion for non-suit, dismissal of the complaint or direction of a verdict.

2 R. S. 419, § 53 (2 Edm. 437), remodelled. L. 1907, ch. 502. Am'd by L. 1909, ch. 65, § 3. Also partly repealed by L. 1909, ch. 14. See Consolidated Laws, tit. Civil Rights Law, § 12. See note 56 of notes of Board of Statutory Consolidation at end of code.

§ 1191. Venire not necessary.

A venire to procure jurors cannot be issued in a civil action, brought in a court of record, except as specially prescribed by law.

Id. 410, § 9 (2 Edm. 427).

§ 1192. [Repealed by L. 1909, ch. 14. See Consolidated Laws, tit. Civil Rights Law, § 14.]

§§ 1193-1194. [Repealed by L. 1909, ch. 88. See Penal Law, §§ 375, 377.]

§§ 1195-1199. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 559-564.]

CHAPTER XI.

Judgments.

TITLE I.—Judgment in an Action.

TITLE II.—Judgments Taken Without Process.

TITLE III.—Vacating or Setting Aside a Judgment, for Irregularity or Error in Fact.

TITLE I.

Judgment in an action.

Article 1. General provisions.

2. Mode of taking, entering, and enforcing a judgment.

3. Docketing a judgment; effect thereof, as a lien upon real property; suspending and discharging the lien; satisfaction and assignment of a judgment.

ARTICLE FIRST.

General provisions.

Sec. 1200. Definition of judgment.

1201. [Repealed.]

1202. When judgment may be entered.

1203. Application for judgment.

1204. Judgment may be for or against any of the parties.

1205. When a several judgment may be taken.

1206. Judgment for or against a married woman.

1207. When judgment for plaintiff not to exceed judgment demanded.

1208. Rate of damages.

1209. Effect of judgment dismissing the complaint.

1210. Judgment against a dead person.

1211. Judgment to bear interest.

§ 1200. [Am'd, 1877.] Definition of judgment.

A judgment is either interlocutory or the final determination of the rights of the parties in the action.

Co. Proc., § 245, am'd.

§ 1201. [Repealed, 1877.]

§ 1202. When judgment may be entered.

Judgment may be entered in term or vacation.

L. 1840, ch. 386, § 23 (4 Edm. 691).

§ 1203. [Am'd, 1900.] Application for judgment.

Judgment must be entered, in the first instance, pursuant to the direction of the court, at a term held by one judge; except where special provision is otherwise made by law. If notice of an application for judgment is not required, and an order for judgment is made by a judge out of court, the judgment may be entered with the same force and effect as if granted in court.

Substitute for Co. Proc., § 278. L. 1900, ch. 147. In effect Sept. 1, 1900.

§ 1204. Judgment may be for or against any of the parties.

Judgment may be given for or against one or more plaintiffs, and for or against one or more defendants. It may determine

the ultimate rights of the parties on the same side, as between themselves; and it may grant, to a defendant, any affirmative relief, to which he is entitled.

Co. Proc., first sentence of § 274. See §§ 454 and 456, ante.

§ 1205. When a several judgment may be taken.

Where the action is against two or more defendants, and a several judgment is proper, the court may, in its discretion, render judgment, or require the plaintiff to take judgment, against one or more of the defendants; and direct that the action be severed, and proceed against the others, as the only defendants therein.

Id., second sentence of § 274, am'd.

§ 1206. [Repealed by L. 1909, ch. 19. See Consolidated Laws, tit. Domestic Relations Law, § 51.]

§ 1207. When judgment for plaintiff not to exceed judgment demanded.

Where there is no answer, the judgment shall not be more favorable to the plaintiff, than that demanded in the complaint. Where there is an answer, the court may permit the plaintiff to take any judgment, consistent with the case made by the complaint, and embraced within the issue.

Co. Proc., § 275.

§ 1208. Rate of damages.

Where either party is entitled to recover damages, he may recover any rate of damages, which he might have heretofore recovered, for the same cause of action.

Id. § 276, am'd.

§ 1209. [Am'd, 1877.] Effect of judgment dismissing the complaint.

A final judgment, dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment-roll, that it is rendered upon the merits. (See §§ 1525, 1646.)

§ 1210. Judgment against a dead person.

Where a judgment for a sum of money, or directing the payment of money, is entered against a party, after his death, in a case where it may be so taken, by special provision of law, a memorandum of the party's death must be entered, with the judgment, in the judgment-book, indorsed on the judgment-roll, and noted on the margin of the docket of the judgment. Such a judgment does not become a lien upon the real property, or chattels real, of the decedent; but it establishes a debt, to be paid in the course of administration.

2 R. C. 359, § 7 (2 Edm. 372), with amendments.

§ 1211. Judgment to bear interest.

A judgment for a sum of money, rendered in a court of record, or not of record, or a judgment rendered in a court of record, directing the payment of money, bears interest from the time when it is entered. But where a judgment directs that money paid out shall be refunded or repaid, the direction includes interest from the time when the money was paid, unless the contrary is expressed.

From L. 1844, ch. 324, § 1 (4 Edm. 628), as am'd by L. 1869, ch. 807, § 1 (7 Edm. 477).

ARTICLE SECOND.

Mode of taking, entering, and enforcing a judgment.

- Sec. 1212.** Judgment by default in certain actions on contract; how taken.
1213. Amount of judgment in such cases; how determined.
1214. Application to court for judgment by default; when necessary.
1215. Proceedings on such an application.
1216. Application for judgment in case of service by publication, etc.
1217. Attachment and undertaking for restitution, required in certain actions.
1218. When judgment cannot be taken against an infant defendant.
1219. When a defendant in default is entitled to notice.
1220. When action may be severed, if issues of law and issues of fact presented.
1221. Judgment how taken, after trial of issues of law and issues of fact, in the same action.
1222. Final judgment, how taken after issue of law only.
1223. Proceedings upon application under the last two sections.
1224. Id.; upon interlocutory judgment, etc., affirmed at a term of the appellate division of the supreme court.
1225. Judgment after trial by jury of specific questions of fact.
1226. Id.; after reference to determine specific questions of fact.
1227. Id.; upon motion for a new trial, heard by the appellate division of the supreme court.
1228. Id.; upon trial by court or referee of the whole issue of fact.
1229. In matrimonial causes, judgment can be rendered only by the court.
1230. Final judgment upon decision or report awarding interlocutory judgment, etc.
1231. Id.; how final judgment entered and settled in certain cases.
1232. Interlocutory reference or inquiry; how reviewed.
1233. Motion for judgment upon a special verdict, etc.
1234. Id.; upon verdict subject to opinion of court.
1235. Interest on verdict, etc., to be included in recovery.
1236. Entry of judgment.
1237. Judgment-roll to be filed; of what it consists.
1238. Id.; by whom prepared.
1239. Time of filing judgment-roll to be noted.
1240. When a judgment may be enforced by execution.
1241. When a judgment may be enforced by punishment for disobeying it.
1242. Real property; how sold. Effect of conveyance.
1243. Security upon sale by referee.
1244. Conveyance to state name of party.

§ 1212. [Am'd, 1879.] Judgment by default in certain actions on contract; how taken.

In an action specified in section four hundred and twenty of this act, where the summons was personally served upon the defendant, and the copy of the complaint, or a notice stating the sum of money for which judgment will be taken, was served with the summons, or where the defendant has appeared, but has made default in pleading, the plaintiff may take judgment by default, as follows:

1. If the defendant has made default in appearing, the plaintiff must file proof of the service of the summons, and of a copy of the complaint or the notice; and also proof, by affidavit, that the defendant has not appeared. Whereupon the clerk must enter final judgment in his favor.

2. If the defendant had seasonably appeared, but has made default in pleading, the plaintiff must file proof of the service of the summons and of the appearance or of the appearance only; and also proof, by affidavit, of the default. Whereupon, the clerk must enter final judgment in his favor.

If the defendant has made default in appearing or pleading, and the case is not one where the clerk can enter final judgment,

as prescribed in either of the foregoing subdivisions of this section, the plaintiff must apply to the court for judgment, as prescribed in section 1214 of this act.

Substituted for Co. Proc., § 246, part of subd. 1.

§ 1213. Amount of judgment in such cases; how determined.

Where final judgment may be entered by the clerk, as prescribed in the last section, the amount thereof must be determined as follows:

1. If the complaint is verified, the judgment must be entered for the sum, for which the complaint demands judgment; or, at the plaintiff's option, for a smaller sum; and if a computation of interest is necessary, it may be made by the clerk.

2. If the complaint is not verified, the clerk must assess the amount due to the plaintiff, by computing the sum due upon an instrument for the payment of money only, the non-payment of which constitutes a cause of action, stated in the complaint; and by ascertaining, by the examination of the plaintiff, upon oath, or by other competent proof, the amount due to him for any other cause of action stated in the complaint. If an instrument, specified in this subdivision, has been lost, so that it cannot be produced to the clerk, he must take proof of its loss and of its contents. Either party may require the clerk to reduce to writing and file the assessment, and the oral proof, if any, taken thereupon.

Id.

§ 1214. [Am'd, 1877, 1900.] Application to court for judgment by default; when necessary.

Where the summons was personally served upon the defendant, within the State, and he has made default in appearing, or where the defendant has appeared, but has made default in pleading; and the case is not one where the clerk can enter final judgment, as prescribed in the last two sections, the plaintiff may apply to the court, or to a judge or justice thereof out of court, for judgment. Upon the application he must file, if the default was in appearing, proof of service of the summons; or, if the default was in pleading, proof of appearance, and also, if a copy of the complaint was demanded, proof of service thereof, upon the defendant's attorney; and in either case, proof by affidavit, of the default which entitles him to judgment. If one or more of the defendants have appeared, and one or more defendants have failed to appear, then the application for judgment must be made to the court, unless the defendants who have appeared consent to the making of such application to a judge or justice out of court.

Substituted for the first sentence of Co. Proc., § 246, subd. 2; L. 1900, ch. 147. In effect Sept. 1, 1900. See Rule 26.

§ 1215. [Am'd, 1877, 1901.] Proceedings on such an application.

The court, or a judge or justice thereof, must thereupon render the judgment to which the plaintiff is entitled. It, or they, may, without a jury, or with a jury if one is present in court, make a computation or assessment, or take an account, or proof of a fact, for the purpose of enabling it, or them, to render the judgment, or to carry it into effect; or it, or they, may in its, or their, discretion, direct a reference, or a writ of inquiry, for either purpose; except that where the action is brought to recover damages

for a personal injury or an injury to property, the damages must be ascertained by means of a writ of inquiry. Where a reference or writ of inquiry is directed, the court, or a judge or justice thereof, may direct that the report or inquisition be returned to the court, or a judge or justice thereof, for its, or their, further action; or it, or they, may in its, or their, discretion, except where special provision is otherwise made by law, omit that direction; in which case final judgment may be entered by the clerk, in accordance with the report of the referee, or for the damages ascertained by the inquisition, without any further application.

Co. Proc., § 246, second and third sentences of subd. 2, am'd. See § 1220; L. 1901, ch. 511. In effect April 24, 1901.

§ 1216. [Am'd, 1895, 1901.] Application for judgment in case of service by publication, etc.

Where the summons was served upon the defendant without the state, or otherwise than personally, if the defendant does not demand a copy of the complaint, or plead, as the case requires, within twenty days after the service is complete, the plaintiff may apply to the court, or a judge or justice thereof, for the judgment demanded in the complaint. Upon such an application, he must file proof that the service is complete, and proof, by affidavit, of the defendant's default. The court, or a judge or justice thereof, must require proof of the cause of action, set forth in the complaint to be made, either before such court, or such judge or justice, or before a referee appointed for that purpose; except that where the action is brought to recover damages for a personal injury, or an injury to property, the damages must be ascertained by means of a writ of inquiry as prescribed in the last section. If the defendant is an* non-resident, or a foreign corporation, the court, or a judge or justice to whom such application is made, must require the plaintiff, or his agent or attorney, to be examined on oath, respecting any payments to the plaintiff, or to any one for his use, on account of his demand, and must render the judgment to which the plaintiff is entitled. But before rendering judgment, the court, or a judge or justice thereof, to whom the application is made, may, in any case, in its, or their, discretion, require the plaintiff to file an undertaking, to abide the order of the court touching the restitution of any estate or effects which may be directed by the judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of the judgment, in case the defendant or his representative applies and is admitted to defend the action, and succeeds in his defense.

L. 1895, ch. 582; L. 1901, ch. 511. In effect April 24, 1901.

§ 1217. Attachment and undertaking for restitution, required in certain actions.

A judgment shall not be rendered for a sum of money only, upon an application made pursuant to the last section, except in an action specified in section 635 of this act. Where the defendant is a non-resident, or a foreign corporation, and has not appeared, the plaintiff, upon the application for judgment in such an action, must produce and file the following papers:

1. Proof, by affidavit, that a warrant of attachment, granted in the action, has been levied upon property of the defendant.

2. A description of the property, so attached, verified by affidavit; with a statement of the value thereof, according to the inventory.

3. The undertaking mentioned in section 1216, if one has been required.

From Rule 84, and Co. Proc., § 246, part of subd. 3, am'd.

§ 1218. [Am'd, 1879.] When judgment cannot be taken against an infant defendant.

A judgment by default shall not be taken against an infant defendant, until twenty days have expired, since the appointment of a guardian ad litem for him.

See Co. Proc., § 115, and ante, § 471. See § 1858, post.

§ 1219. When a defendant in default is entitled to notice.

A defendant, against whom judgment is taken, pursuant to the foregoing sections of this article, is entitled to notice, as follows:

1. [Am'd, 1879.] If he has appeared generally but has made default in pleading, he is entitled to at least five days' notice of the time and place of an assessment by the clerk, and to at least eight days' notice of the time and place of an application to the court for judgment.

2. In a case where an application for judgment must be made to the court, the defendant may serve upon the plaintiff's attorney, at any time before the application for judgment, a written demand of notice of the execution of any reference, or writ of inquiry, which may be granted upon the application. Such a demand is not an appearance in the action. It must be subscribed by the defendant, in person, or by an attorney or agent, who must add to his signature his office address, with the particulars, prescribed in section 417 of this act, concerning the office address of the plaintiff's attorney. Thereupon at least five days' notice of the time and place of the execution of the reference, or writ of inquiry, must be given to the defendant, by service thereof upon the person, whose name is subscribed to the demand, in the manner prescribed in this act, for service of a paper upon an attorney in an action.

See Co. Proc., § 246, subds. 1 and 2.

§ 1220. When action may be severed, if issues of law and issues of fact presented.

Where an issue of law and an issue of fact arise, with respect to different causes of action, set forth in the complaint, and final judgment can be taken, with respect to one or more of the causes of action, without prejudice to either party in maintaining the action, or a defence or counterclaim, with respect to the other causes of action, or in the recovery of final judgment upon the whole issue, the court may, in its discretion, and at any stage of the action, direct that the action be divided into two or more actions, as the case requires.

§ 1221. [Am'd, 1877.] Judgment how taken, after trial of issues of law and issues of fact, in the same action.

Where one or more issues of law, and one or more issues of fact, arise in the same action, and all the issues have been tried, final judgment upon the whole issue must be taken, as follows:

1. Where an application must be made to the court for judgment upon the issue last tried, the application must be for judgment, upon the whole issue; and judgment must be rendered accordingly.

2. Where the action is triable by a jury, and the issue last tried is tried at a term of the court, the application for judgment, upon the whole issue, may be entertained, in the discretion of the court, at that term and with or without notice; if not so entertained, it must be heard as a motion.

3. Where the issue last tried is tried before a referee, his report must award the proper judgment upon the whole issue, unless otherwise prescribed in the order of reference.

§ 1222. [Am'd, 1879.] Final judgment, how taken after issue of law only.

Final judgment upon an issue of law, where no issue of fact remains to be tried, and final judgment has not been directed as prescribed in section ten hundred and twenty-one of this act, may be entered upon application to the court or by the clerk in an action specified in section four hundred and twenty of this act.

Co. Proc., part of § 269, am'd.

§ 1223. [Am'd, 1877.] Proceedings upon application under the last two sections.

Upon an application, by either party, to the court, for final judgment, after the decision of an issue of law, as prescribed in the last two sections, the court has the powers specified in section 1215 of this act, upon an application for judgment by the plaintiff. Where final judgment may be awarded in a referee's report, as prescribed in section twelve hundred and twenty-one of this act, the referee may make a computation, or an assessment, or take an account, or proof of a fact, for the purpose of enabling him to award the proper judgment, or enabling the court to carry it into effect; and he may ascertain and fix the damages, as a jury may do, upon the execution of a writ of inquiry.

Id.

§ 1224. [Am'd, 1895.] Id.; upon interlocutory judgment, etc., affirmed at a term of the appellate division of the supreme court.

When an order or judgment is wholly or partly affirmed upon an appeal to the appellate division of the supreme court, and no issue of fact remains to be tried, the appellate division may, in its discretion, render final judgment, unless it permits the appellant to amend or plead over.

1. 1 '95, ch. 946.

§ 1225. Judgment after trial by jury of specific questions of fact.

In an action triable by the court, where one or more specific questions of fact, arising upon the issues, have been tried by a jury, judgment may be taken, upon the application of either party, as follows:

1. If all the issues of fact in the action are determined by the findings of the jury, or the remaining issues of fact have been determined by the decision of the court, or the report of a referee, an application for judgment, upon the whole issue, may be made as upon a motion.

2. If one or more issues of fact remain to be tried, judgment may be rendered, upon the whole issue, at the term of the court where, or by direction of the referee by whom, they are tried.

See §§ 970-972, ante.

§ 1226. Id.; after reference to determine specific questions of fact.

Where a reference has been made, to report upon one or more specific questions of fact, arising upon the issue, and the remain-

ing issues have been tried, judgment must be taken, upon the application of either party, as prescribed in section 1221 of this act.

Co. Proc., part of § 272, am'd. See §§ 973 and 1221, ante.

§ 1227. [Am'd, 1895.] Id.; upon motion for new trial, heard by the appellate division of the supreme court.

Where a motion for a new trial, made at the first instance at a term of the appellate division of the supreme court, is denied, judgment may be taken, as if the motion for a new trial had not been made, after the expiration of four days from the entry of the order, and the service, upon the attorney for the adverse party, of a copy thereof, and notice of the entry; but not before.

L. 1895, ch. 946.

§ 1228. [Am'd, 1879.] Id.; upon trial by court or referee of the whole issue of fact.

Where the whole issue is an issue of fact, which was tried by a referee, the report stands as a decision of the court. Except where it is otherwise expressly prescribed by law, judgment upon such a report, or upon the decision of the court, upon the trial of the whole issue of fact without a jury, may be entered by the clerk, as directed therein, upon filing the decision or report.

Co. Proc., parts of §§ 267 and 273, am'd.

§ 1229. In matrimonial causes, judgment can be rendered only by the court.

In an action to annul a marriage, or for a divorce or separation, judgment cannot be taken, of course, upon a referee's report, as prescribed in the last section, or where the reference was made, as prescribed in section 1215 of this act. Where a reference is made in such an action, the testimony, and the other proceedings upon the reference, must be certified to the court, by the referee, with his report; and judgment must be rendered by the court.

§ 1230. [Am'd, 1877.] Final judgment upon decision or report awarding interlocutory judgment, etc.

In a case, not provided for in the foregoing sections of this article, where the decision, upon a trial by the court, without a jury, or the report, upon the trial by a referee, directs an interlocutory judgment to be entered, and the party afterwards becomes entitled to a final judgment, an application for the latter may be made, as upon a motion. And where a judgment requires the appointment of a referee, to do any act thereunder, the referee must be appointed by the judgment, or by the court, upon motion, except as otherwise prescribed in the next section.

§ 1231. Id.; how final judgment entered and settled in certain cases.

In an action triable by the court, an interlocutory judgment, rendered upon a default in appearing or pleading, or pursuant to the direction contained in a decision or report, may state the substance of the final judgment, to which the party will be entitled. It may also direct, that the final judgment be settled by a judge, or a referee. In that case, final judgment shall not be entered, until a settlement thereof, subscribed by the judge or referee, is filed. Where an interlocutory judgment awards costs, they may be awarded generally, without specifying the amount thereof.

Where the final judgment is directed to be settled, and the costs have not been taxed when the settlement thereof is filed, a blank for the amount of the costs must be left in the settlement; and the costs must be taxed, and the blank filled up accordingly, by the clerk, when the final judgment is entered.

§ 1232. Interlocutory reference or inquisition; how reviewed.

Where a reference, or writ of inquiry, directed as prescribed in section 1015, or section 1215 of this act, has been executed, either party may apply for an order, directing a new hearing, or a new writ of inquiry, upon proof, by affidavit, that error was committed, to his prejudice, upon the hearing, or in the report, or upon the execution of the writ, or in the inquisition. In a proper case, the application may be granted, after judgment has been entered. In that case, the judgment may be set aside, either then or after the new hearing, or the execution of the new writ, as justice requires.

§ 1233. Motion for judgment upon a special verdict, etc.

A motion for judgment, upon a special verdict, may be made by either party; and must, in the first instance, be heard and decided, at a term held by one judge.

Co. Proc., part of § 265. See § 1189, ante.

§ 1234. [Am'd, 1895.] Id.; upon verdict subject to opinion of court.

A motion for judgment, upon a verdict subject to the opinion of the court, may be made by either party; and must be heard and decided at a term of the appellate division of the supreme court.

Id. See § 1185, ante. L. 1895, ch. 946.

§ 1235. Interest on verdict, etc., to be included in recovery.

Where final judgment is rendered for a sum of money, awarded by a verdict, report, or decision, interest upon the sum awarded, from the time when the verdict was rendered, or the report or decision was made, to the time of entering judgment, must be computed by the clerk, added to the sum awarded, and included in the amount of the judgment.

Id., § 810, am'd

§ 1236. [Am'd, 1897.] Entry of judgment.

Every interlocutory judgment or final judgment shall be signed by the clerk and filed in his office, and such signing and filing shall constitute the entry of the judgment. The clerk shall, in addition to the docket-books required to be kept by law, keep a book, styled the "judgment-book," in which he shall record all judgments entered in his office.

L. 1897, ch. 188. In effect April 6, 1897. See L. 1897, ch. 187.

§ 1237. [Am'd, 1877, 1879, 1913.] Judgment-roll to be filed; of what it consists.

The clerk, upon entering final judgment, must immediately file the judgment-roll, which must consist, except where special provision is otherwise made by law, of the following papers: the summons; the pleadings, or copies thereof; the final judgment, and

the interlocutory judgment, if any, or copies thereof; and each paper on file, or a copy thereof, and a copy of each order, which in any way involves the merits, or necessarily affects the judgment. If judgment is taken by default, the judgment-roll must also contain the papers required to be filed, upon so taking judgment, or upon making application therefor; together with any report, decision or writ of inquiry, and return thereto. If judgment is taken after a trial, the judgment-roll must contain the verdict, report, or decision; each offer, if any, made as prescribed in this act, and the exceptions or case then on file.

Upon an appeal to the court of appeals from a judgment or order of the appellate division of the supreme court, the opinion of the appellate division, if any, shall, for the purposes of the appeal, be deemed to be a part of the judgment-roll or appeal papers.

Co. Proc., § 281, subd. 1 and 2, am'd. Am'd by L. 1877, ch. 416; L. 1879, ch. 542; L. 1913, ch. 545. In effect Sept. 1, 1913. See § 1717.

§ 1238. Id.: by whom prepared.

The judgment-roll must be prepared, and furnished to the clerk, by the attorney, for the party, at whose instance the final judgment is entered; except that the clerk must attach thereto the necessary original papers, on file. But the clerk may, at his option, make up the entire judgment-roll.

Substitute for introductory part of Co. Proc., § 281.

§ 1239. Time of filing judgment-roll to be noted.

The clerk must make a minute, upon the back of each judgment-roll, filed in his office, of the time of filing it, specifying the year, month, day, hour, and minute. A proceeding to enforce or collect a final judgment, cannot be taken, until the judgment-roll is filed.

2 R. S. 360, § 11, am'd.

§ 1240. When a judgment may be enforced by execution.

In either of the following cases, a final judgment may be enforced by execution:

1. Where it is for a sum of money, in favor of either party; or directs the payment of a sum of money.

2. Where it is in favor of the plaintiff, in an action of ejectment, or for dower.

3. In an action to recover a chattel, where it awards a chattel to either party.

Substitute for Co. Proc., part of § 285. See § 1364, post.

§ 1241. When a judgment may be enforced by punishment for disobeying it.

In either of the following cases, a judgment may be enforced, by serving a certified copy thereof, upon the party against whom it is rendered, or the officer or person, who is required thereby, or by law, to obey it; and, if he refuses or wilfully neglects to obey it, by punishing him for a contempt of the court:

1. Where the judgment is final, and cannot be enforced by execution, as prescribed in the last section.

2. Where the judgment is final, and part of it cannot be enforced by execution, as prescribed in the last section; in which

case, the part or parts, which cannot be so enforced, may be enforced as prescribed in this section.

3. Where the judgment is interlocutory, and requires a party to do, or to refrain from doing, an act, except in a case specified in the next subdivision.

4. Where the judgment requires the payment of money into court, or to an officer of the court; except where the money is due upon a contract, express or implied, or as damages for non-performance of a contract. In a case specified in this subdivision, if the judgment is final, it may be enforced, as prescribed in this section, either simultaneously with, or before or after the issuing of an execution thereupon, as the court directs.

Substitute for Co. Proc., part of §285. See § 2555, post.

§ 1242. [Am'd, 1877, 1902, 1911.] Real property; how sold; effect of conveyance.

Except where special provision is otherwise made by law, real property adjudged to be sold, must be sold in the county and borough where it is situated, by the sheriff of the county or by a referee, appointed by the court for that purpose, who must execute a conveyance to the purchaser. If such real property is situated partly in one county or borough and partly in another and is so circumstanced that a sale of the whole will be most beneficial to the parties, the court rendering judgment may direct in which county and borough the whole of such real property shall be sold. The conveyance is effectual, to pass the right, title or interest of a party adjudged to be sold; but nothing contained in this section shall be deemed to repeal or modify the provisions of any law specially regulating the sale of real property under a judgment or decree of any court, in any particular county of the state.

Co. Proc., last sentence but one, of § 287; L. 1902, ch. 138; L. 1911, ch. 180, in effect Sept. 1, 1911.

§ 1243. [Am'd, 1877.] Security upon sale by referee.

Where a referee is appointed by the court, to sell real property, the court may provide for his giving such security, as the court deems just, for the proper application of the money received upon the sale; or for the payment thereof by the purchaser, directly to the person or persons entitled thereto, or their attorneys.

§ 1244. [Am'd, 1879.] Conveyance to state name of party.

A conveyance of property, sold by virtue of an execution, or sold pursuant to a judgment, which specifies the particular party or parties, whose right, title or interest is directed to be sold, must distinctly state, in the granting clause thereof, whose right, title, or interest was sold, and is conveyed, without naming, in that clause, any of the other parties to the action; otherwise, the purchaser is not bound to accept the conveyance, and the officer executing it is liable for the damages, which the purchaser sustains by the omission, whether he accepts or refuses to accept it.

ARTICLE THIRD.

Docketing a judgment; effect thereof, as a lien upon real property; suspending and discharging the lien; satisfaction and assignment of a judgment.

Sec. 1245. Certain clerks to keep docket books.

1245a. Current docket books.

1246. Id.; to docket judgments.

1247. Filing transcripts, and docketing judgments thereon.

1248. Penalty for clerk's neglect.

1249. Dockets to be public.

1250. Judgment not to be a lien until docketed.

1251. Real property bound for ten years by a judgment thus docketed.

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1270. Clerk to file and note assignment of judgment.

1271. [Repealed.]

1272. To what judgments and executions this article applies.

§ 1245. [Am'd, 1895, 1911, 1912.] **Certain clerks to keep docket books.**

Each county clerk, and the clerk of the city court of the city of New York, must keep one or more books, ruled in columns, con-

venient for making the entries prescribed in section twelve hundred and forty-six; in which he must docket, in its regular order and according to its priority, each judgment, which he is required by this article to docket. The expense of procuring new books when necessary is a county charge. The judgment dockets kept by the county clerk of New York county must hereafter be kept in two separate sets of books, one set to be designated and used for judgment debtors that are individuals, including all individual members of a copartnership or of a firm doing business under a firm name or style as stated in the title of the action, and the other set to be designated and used for judgment debtors that are corporations, a joint stock company, a copartnership or a firm name or style under which a person or persons are doing business; and each set of such judgment dockets must have a separate volume or volumes for each letter of the alphabet, and each judgment docket book shall have its letter, and the year or years of its entries plainly marked on its back and cover and on every page. A judgment docket for judgment debtors that are individuals shall contain the names of those judgment debtors whose last name begins with the letter marked on the back of the volume. Each volume shall also have a marginal page index showing each letter of the alphabet in order. And a page of such judgment docket for judgment debtors that are individuals shall contain the names of those judgment debtors whose first name begins with the letter or whose first initial is the letter marked on the marginal index for that page; except that there shall be at the back of each of such volumes blank pages not indexed which shall contain the names of those judgment debtors whose first names or initials are stated in the title of the action to be unknown or fictitious. And a judgment docket for those judgment debtors that are corporations, a joint stock company, a copartnership or a firm name or style under which a person or persons are doing business shall contain the names of those judgment debtors the first letter or initial of whose name as it appears, following the prefixed articles "A," "An," or "The," is the letter marked on the page and on the back of the book. And there must be prepared and kept two separate sets of volumes for judgment dockets, designated, lettered, indexed and marked as hereinbefore provided in which there shall be entered in the same manner as hereinbefore directed to be entered, in their regular order and according to their priority and as soon as it may be practicable to have it done, the names of judgment debtors against whom judgments have been docketed within ten years of the time of the making of the entry, in such volumes. And the county clerk of New York county shall prepare and keep a card index, supplemental to the judgment docket books hereinbefore provided for, wherein he shall enter and arrange in alphabetical order the names of all judgment debtors hereinbefore

directed to be docketed. And with every entry of a judgment in an action begun on or after September first, nineteen hundred and eleven, there shall be entered as a part of such entry the number of the action and the year in which it was begun.

Am'd by L. 1896, ch. 946; L. 1911, ch. 290; L. 1912, ch. 344, in effect Apr. 15, 1912.

§ 1245-a. [Added, 1911, and am'd, 1912.] Current docket books.

*am'd L. 41
ch. 367*

The county clerk of New York county must keep books to be known as current docket books. Each half page of space in each book shall be consecutively numbered in a series of consecutive numbers for each year and shall be devoted to one action. On a half page so numbered the clerk shall enter the title of the action having the same consecutive number for that year, with the names of the plaintiffs and defendants and attorneys in full, and in chronological order a brief description of each paper as it is filed, together with the date of filing thereof, also the verdict, report or decision, if any, rendered in the action as of the date of the rendering thereof, also all orders and judgments in the action. All interlocutory and provisional proceedings, and proceedings supplementary to execution, shall be entered on the same half page of the docket as the action out of which they arise, except in actions where the entries are so voluminous as to require one or more additional half pages of space; in which case the entries shall be continued under the same number upon other pages of that or a subsequent docket book, reference thereto being entered at the end of the first and all additional half pages, and the clerk upon entering the description of a paper filed in an action shall enter upon its front page and opposite the title caption the number of the action and the filing date and number of entry of the paper. There shall be kept an alphabetical index of all the actions entered in such current docket books during any year, which index shall consist of two sets of separate volumes, one set to be designated and used for indexing actions wherein the plaintiff or plaintiffs are individuals, including all individual members of a copartnership or of a firm doing business under a firm name or style as stated in the title of the action, and the other set to be designated and used for indexing actions wherein the plaintiff or plaintiffs are corporations, a joint stock company, a copartnership or a firm name or style under which a person or persons are doing business. Each of such sets of index books shall have a separate volume or volumes for each letter of the alphabet, and the volumes designated and used for indexing actions wherein the plaintiff or plaintiffs are individuals shall have a marginal page index showing each letter of the alphabet in order, and shall have the designation of its set of books, its letter and the year or years of its entries plainly marked on its back and cover and on every page. And all such actions shall

be indexed in such index volumes according to all the plaintiffs of each title, in the same manner as it is provided in section twelve hundred and forty-five that judgment debtors shall be docketed in the judgment docket books, and in every case the serial number of the action shall be entered opposite the name indexed. Within three days after a summons, writ or other original process is served in an action in the supreme court, New York county, the attorney or party causing the same to be served shall file said process with proof of service in the office of the clerk who has custody of the records of the court in which the action is brought. The said clerk shall, upon receipt thereof, stamp the same upon its front page with a certain number to be one of the series for that year, and enter in the current docket book, on the half page bearing the same number, the names of the parties as they appear on said process, and the name and address of the attorney who issued the same. And the attorney or party causing such summons, writ or original process to be served shall, upon demand, give to the party so served, or to the attorney of such party, the number so stamped by the clerk, stamped or indorsed upon a paper with the title of the action, and the name and address of the attorney or party who made or caused the service to be made. All papers in the action shall bear the same number and year as the summons, writ or other original process, which number shall constitute a part of the title of such action. All original papers in the action, with proof or admission of their service, not later than the day after their service, shall be filed with or mailed to the clerk who stamped the number, on the summons, writ or other original process. All papers to be hereafter filed with the clerk of New York county must be flat and filed flat. The word "action" as used in this section shall mean "action or special proceeding." Whenever a paper pertaining to any action begun prior to the passage of this act is filed in the office of the clerk who has custody of the records of the court in which the action is pending the clerk shall upon receipt of such paper stamp the same upon the front page with a certain number, to be one of a series of consecutive numbers for the year in which said action was brought, and shall enter in a current docket book prepared for that year the names of the parties to the action and the name and address of the attorney who filed the paper, in the same manner as if such paper were the original summons, writ or other process in such action; and the clerk shall as soon as practicable thereafter stamp or indorse that number upon every paper in that action theretofore filed in his office and shall enter such papers, as they are so numbered, in such docket book in the same manner as if such docketing had been begun with the first paper in such action. And all such entries in such docket books of actions begun prior to the passage of this act shall be

indexed in separate volumes for each letter of the alphabet, and for corporations, a joint stock company, a copartnership or a person or persons doing business under a firm name or style, as hereinbefore provided, in the same manner as actions begun after the passage of this act are hereinbefore directed to be indexed. Whenever an action is transferred to another court, or the place of trial changed, the clerk to whom the papers in such action are delivered shall enter in the current docket book in which he makes entries copies of all entries theretofore made in said action, and shall continue to make subsequent entries therein in the same manner as if the process had originally been filed with him. All papers numbered and docketed as herein directed shall be filed together; and on the entry of final judgment in any action all the papers in that action shall be arranged in the order of the dates on which they were filed and shall be fastened or bound together flat with the judgment-roll and so filed. The county clerk of New York county shall appoint, subject to the rules of the state civil service commission, such subordinates as may be necessary for the work required to be done in his office under the provisions of this act, and shall designate the positions and fix the compensation of such subordinates, subject to the approval of the board of estimate and apportionment of the city of New York; and the comptroller of the city of New York shall issue and sell certificates of indebtedness to an amount sufficient to provide for the payment of the salaries of such subordinates during the year nineteen hundred and twelve, which shall be a charge against the county of New York, and an amount sufficient to pay and discharge the certificates so issued shall be included in the budget made by said board of estimate and apportionment for the year nineteen hundred and thirteen.

Added L. 1911, ch. 290. Am'd by L. 1912, ch. 344, in effect Apr. 15, 1912.

§ 1246. Id.; to docket judgments.

Each clerk, specified in the last section, must, when he files a judgment-roll, upon a judgment, rendered in a court of which he is clerk, docket the judgment, by entering, in the proper docket-book, the following particulars, under the initial letter of the surname of the judgment debtor, in its alphabetical order:

1. The name, at length, of the judgment debtor; and also his residence, title, and trade or profession, if any of them are stated in the judgment.

2. The name of the party, in whose favor the judgment was rendered.

3. The sum, recovered or directed to be paid, in figures.

4. The day, hour, and minute, when the judgment-roll was filed.

5. The day, hour, and minute, when the judgment was docketed in his office.

6. The court in which the judgment was rendered, and, if it was rendered in the supreme court, the county where the judgment-roll is filed.

7. The name of the attorney for the party recovering the judgment.

If there are two or more judgment debtors, those entries must be repeated, under the initial letter of the surname of each.

2 R. S. 861, § 18 (2 Edm. 373), remodelled and am'd.

§ 1247. Filing transcripts, and docketing judgments thereon.

A clerk, with whom a judgment-roll is filed, upon a judgment docketed as prescribed in the last section, must furnish, to any person applying therefor, and paying the fees allowed by law, one or more transcripts of the docket of the judgment, attested by his signature. A county clerk to whom such a transcript is presented, must, upon payment of his fees therefor, immediately file it, and docket the judgment, as prescribed in the last section, in the appropriate docket-book, kept in his office.

L. 1840, ch. 486, § 26 (4 Edm. 692), am'd.

§ 1248. Penalty for clerk's neglect.

A clerk who omits, as soon as practicable, to docket a judgment required to be docketed, or to furnish a transcript of a judgment, so docketed in his office, as prescribed in the last two sections, forfeits, to the person aggrieved, two hundred and fifty dollars, in addition to the damages sustained by reason of the omission.

2 R. S. 862, § 20 (2 Edm. 374).

§ 1249. Dockets to be public.

A docket-book, kept by a clerk, must be kept open, during the business hours fixed by law, for search and examination by any person.

Id., § 19.

§ 1250. Judgment not to be a lien until docketed.

A judgment, required to be docketed, as prescribed in this article, neither affects real property or chattels real, nor is entitled to a preference, until the judgment-roll is filed, and the judgment docketed.

Id., § 12, am'd.

§ 1251. [Am'd, 1902, 1905.] Real property bound for ten years by a judgment thus docketed; judgments against persons sued by a fictitious name.

Except as otherwise specially prescribed by law, and except also as in this section below provided, a judgment, hereafter rendered, which is docketed in a county clerk's office, as prescribed in this article, binds, and is a charge upon, for ten years after filing the judgment roll, and no longer, the real property and chattels real, in that county, which the judgment debtor has at the time of so docketing it, or which he acquires at any time afterwards, and within the ten years. Provided however that no judgment shall be a charge upon or bind the real property of any person unless and until he be designated by his name in a docket of such judgment in the office of the clerk in the county where such property is. Upon such notice to a judgment debtor as the court may direct the supreme court may order that any

judgment heretofore or hereafter rendered therein against such debtor be amended so as to designate such debtor by his name and that the clerk of the county in which the judgment roll is filed redocket such judgment as so amended; and from the time of such redocket during the remainder of ten years from the filing of the judgment roll, such judgment shall bind and be a charge upon the real property and chattels real in that county which such judgment debtor may have at the time of such redocket or may thereafter within said ten years acquire, and a transcript of such new docket may be filed and docketed in the office of the clerk of any other county in the state in like manner and with like effect as a transcript of an original docket may be filed. Upon such notice to a judgment debtor as the court may direct any court other than the supreme court may order that, any judgment heretofore or hereafter rendered therein against such debtor and any docket thereof in such court be amended so as to designate such debtor by his name, and at any time after such amendment shall have been made a transcript of the docket of such judgment as so amended may be filed and docketed in the office of the clerk of any county in this state in like manner and with like effect as a transcript of an original docket may be filed.

This and next section are substitutes for 2 R. S. 359, §§ 3 and 4; L. 1840, ch. 348, § 25; and Co. Proc., part of § 282; L. 1902, ch. 318; L. 1905, ch. 432. In effect May 16, 1905.

§ 1252. Real property may be levied upon after ten years.

When ten years after filing the judgment-roll have expired, real property or a chattel real, which the judgment debtor, or real property which a person, deriving his right or title thereto, as the heir or devisee of the judgment debtor, then has, in any county, may be levied upon, by virtue of an execution against property, issued to the sheriff of that county, upon a judgment hereafter rendered, by filing, with the clerk of that county, a notice, subscribed by the sheriff, describing the judgment, the execution, and the property levied upon; and, if the interest levied upon is that of an heir or devisee, specifying that fact, and the name of the heir or devisee. The notice must be recorded and indexed by the clerk, as a notice of the pendency of an action. For that purpose, the judgment debtor, or his heir, or devisee, named in the notice, is regarded as a party to an action. The judgment binds, and becomes a charge upon, the right and title thus levied upon, of the judgment debtor, or of his heir or devisee, as the case may be, only from the time of recording and indexing the notice, and until the execution is set aside, or returned.

§ 1253. Land held under contract not bound by judgment.

The interest of a person, holding a contract for the purchase of real property, is not bound by the docketing of a judgment; and cannot be levied upon or sold, by virtue of an execution, issued upon a judgment.

1 R. S. 744, first paragraph of § 4 (1 Edm. 696). See §§ 645, 1370, 1874.

§ 1254. Preference of mortgages for purchase-money.

Where real property is sold and conveyed, and, at the same time, a mortgage thereupon is given by the purchaser, to secure the payment of the whole or a part of the purchase-money, the

lien of the mortgage, upon that real property, is superior to the lien of a previous judgment against the purchaser.

1 R. S. 749, § 5 (1 Edm. 700), am'd.

§ 1255. Certain time not to be included in the ten years.

The time, during which a judgment creditor is stayed, by an injunction or other order, or by the operation of an appeal, or by express provision of law, from enforcing a judgment, is not a part of the ten years, to which the lien of a judgment is limited by this article. But this section does not extend the time of the lien, as against a purchaser, creditor, or mortgagee in good faith.

Co. Proc., second sentence of § 282, am'd.

§ 1256. Court may order lien of judgment to be suspended upon appeal.

Where an appeal from a judgment has been perfected, and an undertaking has been given, sufficient to entitle the appellant to a stay of the execution of the judgment, without an order for that purpose, the court, in which the judgment was recovered, may, in its discretion and upon such terms as justice requires, make an order, upon notice to the attorney for the respondent, and to the sureties in the undertaking, exempting from the lien of the judgment, as against judgment creditors, and purchasers and mortgagees in good faith, the real property or chattels real, upon which the judgment is a lien, or a portion thereof, specifically described in the order. If all the property, subject to the lien, is so exempted, the order must direct the clerk, in whose office the judgment-roll is filed, to make an entry, on the docket of the judgment, in each place where it appears in the docket-book, substantially as follows: "Lien suspended upon appeal. See order entered"; adding the proper date. If a portion only is exempted, the order must direct the clerk to make, in like manner, an entry, substantially as follows: "Lien partially suspended upon appeal. See order entered"; adding the proper date. The clerk must, when he files the motion papers, and enters the order, make the entry or entries in the docket-book, as required by the order.

Substitute for Co. Proc., part of § 282.

§ 1257. From what time order suspends the lien.

Where an order is made, as prescribed in the last section, by the supreme court or by a county court, it operates as a suspension of the lien upon property situated in the county, where the judgment-roll is filed, from the time when the order is entered, and the proper entry made in the docket-book. If the property exempted is situated in another county, or if the order was made by a court, other than the supreme court or a county court; the order operates as a suspension, from the time, when the proper entry is made in the docket-book, kept by the clerk of that county, as prescribed in the next section.

Id.

§ 1258. How lien suspended in any other county.

The clerk, with whom the order is entered, must, upon payment of his fees therefor, furnish to the party who obtained the order, one or more transcripts, attested by his signature, of the docket of the judgment, including the entry made upon the docket. A county clerk, in whose office the judgment is docketed, must, upon payment of his fees therefor, immediately file such a transcript; and make an entry upon the docket of the judgment,

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in each place where it appears in his docket-book, sub as follows: "Lien suspended", or, "Lien partially suspended according to the entry upon the original docket, and a transcript filed"; adding the proper date.

Id.

§ 1259. When and how lien restored.

At any time after a judgment, which has ceased to be as prescribed in the last three sections, is affirmed, or if therefrom is dismissed, the lien thereof may be restored as follows:

1. The clerk, in whose office the judgment of affirmance the order dismissing the appeal, is entered, must, at the request of the judgment creditor, docket the judgment as it was originally docketed, but in the order of priority on the new docket; and he must write, upon the new docket, the words "Lien restored by redocket"; adding the date of redocketing.

2. A transcript of the new docket must be furnished to the county clerk, in whose office an entry of the suspension of the lien has been made, as prescribed in the last two sections. Thereupon the judgment must be docketed by him in the order of the priority of the new docket. The clerk who docketed the judgment, must make an entry upon the new docket substantially as follows: "Lien restored by redocket. Transcript filed"; adding the date of redocketing in his county.

The lien of the judgment is thereupon restored, for the full period thereof, as if the order had not been made; and it has the same effect only, as against judgment creditors, purchasees and mortgagees in good faith, as if the judgment had been first docketed.

§ 1260. [Am'd, 1899, 1911, 1913.] Docket of judgment how cancelled.

The docket of a judgment must be cancelled and docketed by the clerk in whose office the judgment-roll is filed, or by the clerk of any county where a transcript of said judgment has been docketed, upon filing with him a satisfaction-piece describing the judgment, and executed as follows:

1. Except as otherwise prescribed in the next subdivision, the satisfaction-piece must be executed by the party in whose favor the judgment was rendered, or his executor or administrator, if it is made within two years after the entry of judgment, or after the entry of final judgment or order of affirmance, or by the attorney of record of the party. But where the attorney has been revoked, a satisfaction by him is not conclusive, against the person entitled to enforce the judgment, respect to a person, who had actual notice of the revocation before a payment on the judgment was made, or a property bound thereby was effected.

2. If an assignment of the judgment, executed by the party in whose favor it was rendered, or his executor or administrator, has been filed in the clerk's office the satisfaction-piece must be executed by the person, who appears, from the assignment, to be the last of the subsequent assignments, if any, showing a continuous chain of title, to be the owner of the judgment; or by his executor or administrator.

3. If the satisfaction-piece is executed by an attorney in behalf of a person authorized to execute it, other than the attorney of record, an instrument, containing a power of attorney, must be filed with the satisfaction-piece, showing the knowledge the satisfaction, must be filed with the sat

piece, unless it has been recorded, in the proper book for recording deeds, in that or another county; in which case, the satisfaction-piece must refer to the record, and the clerk may, for his own indemnity, require evidence of a record remaining in another office.

The execution of each satisfaction-piece or power of attorney must be acknowledged, before the clerk, or his deputy, and certified by him thereupon; or it must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county where it is filed.

4. In the absence of a satisfaction piece under any of the foregoing provisions of this section the docket of a judgment must be canceled, satisfied and discharged by the clerk in whose office the judgment-roll is filed at any time if the judgment debtor, or his legal representatives, or any other person shall deposit with such clerk a sum of money equal to the amount of the judgment, or if the docket shows a partial satisfaction thereof, the unpaid residue thereof, with interest to the time of such deposit and in addition thereto a sum equal to one per centum of said judgment or unpaid residue. There shall be delivered to such clerk with such a deposit a certificate of the sheriff of the same county dated on the day of such deposit that no execution upon the judgment is in his hands. Upon any such payment and delivery of such certificate the clerk shall enter upon the judgment docket the words "satisfied and discharged by deposit." All the provisions of section twelve hundred and sixty-seven of this act, so far as they affect, shall be applicable to this subdivision of this section, except that the clerk of a county with whom a judgment has been docketed, but with whom the judgment-roll has not been filed, before filing the transcript and canceling and discharging the docket of a judgment satisfied of record pursuant to this subdivision of this section, shall also require to be delivered to him in addition to the certificate provided for in section twelve hundred and sixty-seven of this act, a certificate of the sheriff of the same county showing that no execution is in his hands or that an execution is in his hands and that he has received payment of all fees to which he would by law be entitled if he had collected by virtue of an execution the amount of said judgment or unpaid residue thereof with interest. It shall be the duty of such sheriff to accept such fees without payment to him of the amount of the judgment or any part thereof, upon there being delivered to him a certificate of the clerk with whom the judgment-roll is filed, showing that the judgment has been satisfied of record; and it shall be the duty of any sheriff to give any and all certificates required under this subdivision of this section, upon compliance with the provisions hereof and he shall be entitled to receive fifty cents for each certificate. All deposits of money hereunder shall be considered as paid into court and shall be subject to the provisions of the code of civil procedure relative to the payment of money into court, and the surrender of such money by an order of the court. The additional one per centum to be deposited as aforesaid shall be in payment of all fees of the financial officer of the city or county with whom any money is deposited hereunder. But no provision of this subdivision shall affect the right of the judgment creditor to appeal from the judg-

ment, or make any motion with respect thereto, nor shall any proceedings on appeal be affected by this subdivision.

2 R. S. 362, §§ 22, 23 and 24 (2 Edm. 375), and L. 1834, ch. 202, §§ 1, 2 and 3 (4 Edm. 622). Am'd by L. 1890, ch. 95; L. 1911, ch. 590; L. 1913, ch. 30. In effect Sept. 1, 1913.

§ 1261. Satisfaction-piece to be given on payment of judgment.

The person, entitled to enforce a judgment, must execute, and acknowledge before the proper officer, a satisfaction-piece thereof, at the request of the judgment debtor, or of a person interested in the property bound by the judgment, upon presentation of a satisfaction-piece, and payment of the sum due upon the judgment, and the fees allowed by law for taking the acknowledgment of a deed.

Id., § 25 (2 Edm. 375), am'd.

§ 1262. [Am'd, 1905.] Assignor must acknowledge assignment.

A person who has heretofore executed, or hereafter executes, a written assignment of a judgment, owned by him, without acknowledging the execution thereof, before an officer authorized to take the acknowledgment of a deed, must so acknowledge it, at the request of his assignee, or of a subsequent assignee thereof, or of the judgment debtor, upon presentation of the assignment, and payment of the officer's fees.

L. 1895, ch. 946.

§ 1263. Assignee who is a receiver, etc., may file notice.

A resident of the State, or a person having an office within the State, for the regular transaction of business, in person, who becomes the owner of a judgment, by virtue of a general assignment for the benefit of creditors, or of an appointment as a receiver, or trustee or assignee of an insolvent debtor or bankrupt, may file with the clerk, in whose office the judgment-roll is filed, a notice of the assignment, or of his appointment, and of his ownership of the judgment. The notice must be subscribed by him, adding to his signature his place of residence, and also, if he resides without the State, his office address. A notice so filed has the same force and effect, for the purposes of this article, as if it was an assignment of the judgment.

§ 1264. Entry in docket, upon return of execution satisfied.

Where an execution is returned, wholly or partly satisfied, the clerk must make an entry of the satisfaction, or partial satisfaction, in the docket of the judgment, upon which it was issued. Thereupon the judgment is deemed satisfied, to the extent of the amount returned as collected, unless the return is vacated by the court.

2 R. S. 362, § 26 (2 Edm. 375).

§ 1265. Id.; where execution returned unsatisfied.

Where an execution is returned wholly unsatisfied, the clerk must immediately make, in the docket of the judgment, upon which it was issued, an entry of the fact, stating the time when the execution was returned.

§ 1266. Sheriff to give copy of satisfied execution; clerk to enter satisfaction.

A sheriff, upon being paid the full amount due upon an execution in his hands, must immediately indorse thereupon a return of satisfaction thereof. He must also deliver, to the person making the payment, upon the latter's request, and payment of the fees allowed by law therefor, a certified copy of the execution, and of the return of satisfaction thereupon; which may be filed with the clerk of the same county, who must thereupon cancel and discharge the docket of the judgment, as if the judgment-roll was filed in his office, and the execution was returned to him, as satisfied. But this section does not exonerate the sheriff, from his duty to return the execution, to the clerk with whom the judgment-roll is filed.

L. 1860, ch. 6, § 1 (4 Edm. 635), am'd. See § 1366.

§ 1267. Docket; when to be discharged and cancelled.

The clerk of a county, with whom a judgment has been docketed, must cancel and discharge the docket thereof, upon the filing, with him, of a certificate of the clerk, with whom the judgment-roll is filed, showing that the judgment has been reversed, vacated, or satisfied of record; or the certificate of the clerk of the county, with whom a copy of an execution, and of a return of satisfaction thereupon, have been filed, as prescribed in the last section, showing that they have been so filed, and the docket cancelled and discharged accordingly.

L. 1860, ch. 6, § 2, and L. 1844, ch. 104, § 5 (4 Edm. 627), consolidated.

§ 1268. [Repealed by L. 1900, ch. 17. See Consolidated Laws, tit. Debtor and Creditor Law, § 150.]

§ 1269. Power of courts respecting docket.

A court of record has the same power and jurisdiction, concerning the docket of its judgments, kept by a county clerk, which it has concerning the docket, kept by its own clerk. It may direct that such a docket be amended; or that its judgment, there docketed, be docketed nunc pro tunc.

L. 1844, ch. 104, § 7 (4 Edm. 628), am'd.

§ 1270. Clerk to file and note assignment of judgment.

Upon the presentation, to the clerk of a court of record, of an assignment of a judgment, entered in his office, executed by a person entitled to satisfy the judgment, as prescribed in section 1260 of this act, and otherwise executed as prescribed in that section, with respect to a satisfaction-piece, and upon payment of the fees, allowed by law, for filing a transcript, and docketing a judgment thereupon, the clerk must forthwith file the assignment in his office, and make, upon the docket of the judgment, an entry of the fact, and of the day of filing; or, if he keeps a separate book for the entry of assignments of judgments, an entry, referring to the page of the book, where the filing of the assignment is noted.

§ 1271. [Repealed, 1879.]**§ 1272. To what judgments and executions this article applies.**

This article applies only to a judgment, wholly or partly for a sum of money, or directing the payment of a sum of money; and to an execution issued upon such a judgment.

TITLE II.

Judgments taken without process.

Article 1. Confession of judgment.

2. Submission of a controversy, upon facts admitted.

ARTICLE FIRST.

Confession of judgment.

Sec. 1273. Judgment may be confessed.

1274. Statement; form thereof.

1275. Statement to be filed, and judgment entered.

1276. Judgment-roll; docketing and enforcing the judgment.

1277. Execution, where the judgment is not all due.

1278. Confession by one of several joint debtors.

§ 1273. [Am'd, 1877, 1897, 1909.] Judgment may be confessed.

A judgment by confession may be entered, without action, either for money due or to become due, or to secure a person against contingent liability in behalf of the defendant, or both, as prescribed in this article.

Co. Proc., § 382; L. 1897, ch. 38, Am'd by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 19. See Consolidated Laws, tit. Domestic Relations Law, § 51. See note 57 of notes of Board of Statutory Consolidation at end of code.

§ 1274. Statement; form thereof.

A written statement must be made, and signed by the defendant, to the following effect:

1. It must state the sum, for which judgment may be entered, and authorize the entry of judgment therefor.

2. If the judgment to be confessed is for money due or to become due, it must state concisely the facts, out of which the debt arose; and must show, that the sum confessed therefor is justly due, or to become due.

3. If the judgment to be confessed is for the purpose of securing the plaintiff, against a contingent liability, it must state concisely the facts, constituting the liability; and must show, that the sum confessed therefor does not exceed the amount of the liability.

The statement must be verified by the oath of the defendant, to the effect, that the matters of fact therein set forth are true.

Id., § 383, am'd.

§ 1275. [Am'd, 1895.] Statement to be filed, and judgment entered. L. 639

At any time within three years after the statement is verified, it may be filed with a county clerk, or, where the sum, for which judgment is confessed, does not exceed two thousand dollars, exclusive of interest from the time of making the statement, with the clerk of the city court of the city of New-York. Thereupon the clerk must enter, in like manner as a judgment is entered in an action, a judgment for the sum confessed, with costs, which he must tax, to the amount of fifteen dollars, besides disbursements taxable in an action. If the statement is filed with a county clerk, the judgment must be entered in

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the supreme court; if it is filed with the clerk of another court, specified in this section, the judgment must be entered in the court of which he is clerk. But a judgment shall not be entered upon such a statement, after the defendant's death.

Co. Proc., § 384, first sentence am'd; L. 1895, ch. 946.

§ 1276. [Am'd, 1879.] Judgment-roll; docketing and enforcing the judgment.

The clerk, immediately after entering the judgment, must attach together and file the statement, as verified, and a copy of the judgment; which constitute the judgment-roll. The judgment may be docketed, and enforced against property, in the same manner, and with the same effect, as a judgment in an action, rendered in the same court; and each provision of law, relating to a judgment in an action, and the proceedings subsequent thereto, apply to a judgment thus taken.

Id., § 384, second and third sentences am'd.

§ 1277. Execution where the judgment is not all due.

Where the debt, for which the judgment is rendered, is not all due, execution may be issued, upon the judgment, for the collection of the sum which has become due. The execution must be in the form prescribed by law, for an execution upon a judgment for the full amount recovered; but the person, whose name is subscribed to it, must indorse thereupon a direction to the sheriff, to collect only the sum due, stating the amount thereof, with interest thereon, and the costs of the judgment. Notwithstanding the issuing and collection of such an execution, the judgment shall remain, as security for the sum or sums to become due, after the execution is issued. When a further sum becomes due, an execution may, in like manner, be issued for the collection thereof; and successive executions may be issued, as further sums become due.

Id., remainder of § 384.

§ 1278. Confession by one of several joint debtors.

One or more joint debtors may confess a judgment for a joint debt, due or to become due. Where all the joint debtors do not unite in the confession, the judgment must be entered and enforced against those only who confessed it; and it is not a bar to an action against all the joint debtors, upon the same demand.

ARTICLE SECOND.

Submission of a controversy, upon facts admitted.

Sec. 1279. Controversy, how submitted without process.

1280. Papers to be filed; controversy thereupon becomes an action.

1281. Subsequent proceedings regulated.

§ 1279. Controversy, how submitted without process.

The parties to a question in difference, which might be the subject of an action, being of full age, may agree upon a case, containing a statement of the facts, upon which the controversy depends; and may present a written submission thereof to a court of record, which would have jurisdiction of an action, brought for the same cause. The case must be accompanied with the affidavit of one of the parties, to the effect, that the controversy is real; and that the submission is made in good faith, for the purpose of determining the rights of the parties. The submission must be acknowledged or proved, and certified, in like manner as a deed, to be recorded in the county where it is filed.

Co. Proc., part of § 372, am'd.

§ 1280. Papers to be filed; controversy thereupon becomes an action.

The case, submission, and affidavit, must be filed in the office of the clerk of the court to which the submission is made.⁽¹⁾ If the submission is made to the supreme court, they must be filed in the office of the county clerk, if any, specified in the submission; if no county clerk is so specified, they may be filed in the office of any county clerk. The filing is a presentation of the submission; and thenceforth the controversy becomes an action; and each provision of law, relating to a proceeding in an action, applies to the subsequent proceedings therein except as otherwise prescribed in the next action.

⁽¹⁾ New. Remainder is substituted for Co. Proc., § 374, and part of §§ 372 and 373.

§ 1281. [Am'd, 1895, 1899.] Subsequent proceedings regulated.

An order of arrest, a temporary injunction, or a warrant of attachment, cannot be granted in such an action: the costs thereof are always in the discretion of the court, but costs cannot be taxed, for any proceedings before notice of trial; the action must be tried by the court, upon the case alone; and the case, submission, affidavit, and a certified copy of the judgment, and of any order or paper necessarily affecting the judgment, constitute the judgment roll. If the action is in the supreme court it must be tried and judgment rendered by the appellate division thereof, and if in the city court of the city of New York, it must be tried and judgment rendered at the general term thereof. If the statement of facts contained in the case, is not sufficient to enable the court to render judgment, an order must be made

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dismissing the submission, without costs to either party; unless the court permits the parties, or, in a proper case their representatives, to file an additional statement, which it may do, in its discretion, without prejudice to the original statement.

L. 1886, ch. 946; L. 1899, ch. 526. In effect May 5, 1899.

TITLE III.

Vacating or setting aside a judgment, for irregularity or error in fact.

Sec. 1282. Motion to set aside judgment for irregularity; when it may be heard.

1283. Motion to set aside judgment for error in fact; when it may be made by party.

1284. Id.; after a party's death.

1285. Id.; by a person not a party.

1286. Id.; when several parties are entitled to move.

1287. To whom notice of the motion must be given.

1288. Id.; when real property recovered by the judgment has been conveyed.

1289. How notice given under this title.

1290. Within what time motion to be made.

1291. Exceptions in cases of disability.

1292. Restitution; when directed.

§ 1282. Motion to set aside judgment for irregularity; when it may be heard.

A motion to set aside a final judgment, for irregularity, shall not be heard, after the expiration of one year since the filing of the judgment-roll; unless notice thereof is given for a day within the year, and either the hearing is adjourned, by one or more orders, until after the expiration of the year; or the term, for which it is thus noticed, is not held. In the latter event, the motion may be re-noticed for, and heard at, the next term at which it can be made, held not less than ten days after the day, when the first term was appointed to be held.

2 R. S. 359, § 2 (2 Edm. 371), remodelled. See § 724.

§ 1283. Motion to set aside judgment for error in fact; when it may be made by party.

A motion to set aside a final judgment, rendered in a court of record, for error in fact, not arising upon the trial, may be made by the party against whom it is rendered; or, if an execution has not been issued thereon, and the judgment has not been wholly or partly satisfied or enforced, by the party in whose favor it is rendered. (See § 1290.)

2 R. S. 591, parts of §§ 2 and 3 (2 Edm. 613), consolidated and am'd.

§ 1284. Id.; after a party's death.

A like motion may be made, after the death of a party entitled to make it, as prescribed in the last section, by the following persons:

1. Where the judgment awards a sum of money, or a chattel, or an interest in real property, which is declared by law to be assets, the motion may be made by his executor or administrator.

2. Where the judgment awards real property, or the possession thereof, or where the title to or an estate or interest in real property is determined or affected thereby, the motion may be made by the heir of the decedent, to whom the real property descended, or might have descended, or by the person to whom he devised it.

3. Where the judgment is rendered against or in favor of two or more persons, the motion may be made, jointly, by the survivor, and the person who would have been entitled to make

it, if the judgment had been rendered in favor of or against the decedent only.

2 R. S. 501, § 2, subd. 2 and 3, and § 6, consolidated.

§ 1285. Id.; by a person not a party.

A motion may be made, either before or after the death of the defendant, by a person, who is not a party, to set aside, for error in fact, not arising upon the trial, a judgment, rendered in an action against a tenant for life, or for years, awarding real property, or the possession of real property, in which the person making the motion has an estate, or interest, in reversion or remainder.

Id., § 2, subd. 4, remodelled.

§ 1286. Id.; when several parties are entitled to move.

Where two or more persons are entitled to move to set aside a judgment, as prescribed in the last three sections, one or more of them may move separately; but, in that case, notice of the motion must be given to those who do not join therein, in like manner as if they were adverse parties.

Substitute for 2 R. S. 502, §§ 7-17.

§ 1287. To whom notice of the motion must be given.

Notice of a motion to set aside a final judgment, for error in fact, not arising upon the trial, must be given to the adverse party, or, in case of his death, to each person who might have moved, as against the moving party, to set aside the judgment for the same cause, as prescribed in this title.(1) Where the motion is made by the party against whom the judgment is rendered, or by his heir, devisee, executor, or administrator, service of the notice, upon the attorney of record for the party, in whose favor the judgment is rendered, has the like effect, as if it was served upon the party.(2)

(1) Id., the substance of § 19, except the last clause of subd. 3 thereof.
(2) New.

§ 1288. Id.; when real property recovered by the judgment has been conveyed.

Where the judgment awards real property, or the possession thereof, or where the title to, or an estate or interest in, real property is determined or affected thereby, and the real property, or estate or interest therein, has been conveyed, by the adverse party, more than eight days before the hearing of the motion, notice of the motion must also be given to each actual occupant of the property, claiming under the conveyance.

2 R. S. 502, remainder of § 19.

§ 1289. How notice given under this title.

Notice must be given, in a case specified in this title, by personal service of a written notice, or of an order to show cause why the motion should not be granted; or, if a person entitled to notice cannot, with due diligence, be found within the State, in any manner which the court, or a judge thereof, directs in an order to show cause, or which the court directs in a subsequent order.

§ 1290. Within what time motion to be made.

A motion to set aside a final judgment, for error in fact, not arising upon the trial, shall not be heard, except as specified

in the next section, after the expiration of two years since the filing of the judgment-roll, unless notice thereof is given, for a day within the two years; and either the hearing is adjourned, by one or more orders, until after the expiration of the two years; or the term, for which it is thus noticed, is not held. In the latter event, the motion may be re-noticed for, and heard at, the next term at which it can be made, held not less than ten days after the day, when the first term was appointed to be held.

§ 1291. Exceptions in cases of disability.

If the person, against whom the judgment is rendered, is, at the time of filing the judgment-roll, either

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution, upon conviction of a criminal offence, for a term less than for life;

The time of such a disability is not a part of the time, limited by the last section; except that the time, within which the motion may be heard, cannot be extended more than five years by such a disability, nor, in any case, more than one year after the disability ceases.

From 2 R. S. 594, §§ 22 and 24.

§ 1292. Restitution, when directed.

Where a judgment is set aside for any cause, upon motion, the court may direct and enforce restitution, in like manner, with like effect, and subject to the same conditions, as where a judgment is reversed upon appeal.

See § 1323, post.

CHAPTER XII.

Appeals.

TITLE I.—General Provisions, Relating to the Appeals Provided for in this Chapter.

TITLE II.—Appeal to the Court of Appeals.

TITLE III.—Appeal to the Supreme Court from an Inferior Court.

TITLE IV.—Appeal to the Appellate Division of the Supreme Court.

TITLE V.—Appeal From a Determination in a Special Proceeding.

TITLE I.

General provisions, relating to the appeals provided for in this chapter.

- See 1293. Writs of error abolished.
 1294. When party may appeal.
 1295. Parties to appeal; how designated. Title of cause.
 1296. When a person entitled to become a party may appeal.
 1297. Appeal when adverse party has died.
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 1319. Mode of enforcing affirmed or modified judgment.
 1320. Id.; as to order.
 1321. Mode of cancelling docket of reversed or modified judgment.
 1322. Id.; when reversal, etc., was by court of appeals.
 1323. Restitution; when awarded.
 1323a. Remarks or comments of judge, duly excepted to, shall be subject to review.

§ 1293. Writs of error abolished.

The writ of error in a civil action or special proceeding has been abolished.

Substituted for Co. Proc., § 333, and the first sentence of § 457.

§ 1294. When party may appeal.

A party aggrieved may appeal, in a case prescribed in this chapter, except where the judgment or order, of which he complains, was rendered or made upon his default.

Co. Proc., § 325, am'd by adding the final clause. See § 2568.

§ 1295. Parties to appeal; how designated. Title of cause.

The party or person appealing is designated as the appellant, and the adverse party as the respondent. After an appeal is taken to another court, the name of the appellate court must be substituted, for that of the court below, in the title of the action or special proceeding, and in any case, the name of the county, if it is mentioned, may be omitted; otherwise the title shall not be changed, in consequence of the appeal.

Co. Proc., § 326, am'd.

§ 1296. When a person entitled to become a party may appeal.

A person aggrieved, who is not a party, but is entitled by law to be substituted, in place of a party; or who has acquired, since the making of the order, or the rendering of the judgment appealed from, an interest, which would have entitled him to be so substituted, if it had been previously acquired, may also appeal, as prescribed in this chapter, for an appeal by a party. But the appeal cannot be heard, until he has been substituted in place of the party; and if he unreasonably neglects to procure an order of substitution, the appeal may be dismissed, upon motion of the respondent. (See § 2569.)

§ 1297. Appeal when adverse party has died.

Where the adverse party has died, since the making of the order, or the rendering of the judgment appealed from, or where the judgment appealed from was rendered, after his death, in a case prescribed by law, an appeal may be taken, as if he was living; but it cannot be heard, until the heir, devisee, executor, or administrator, as the case requires, has been substituted as the respondent. In such a case, an undertaking required to perfect the appeal, or to stay the execution of the judgment or order appealed from, must recite the fact of the adverse party's death; and the undertaking enures, after substitution, to the benefit of the person substituted.

§ 1298. [Am'd, 1877.] Proceedings, when party dies pending appeal.

Where either party to an appeal dies, before the appeal is heard, or has heretofore died, and the appeal has not been heard, if an order, substituting another person in his place, is not made, within three months after his death, or, where he has heretofore died, within three months after this section takes effect, the court, in which the appeal is pending, may, in its discretion, make an order, requiring all persons interested in the decedent's estate, to show cause before it, why the judgment or order appealed from should not be reversed or affirmed, or the appeal dismissed, as the case requires. The order must specify a day, when cause is to be shown, which must be not less than six months after making the order; and it must designate the mode of giving notice to the persons interested. Upon the return day of the order, or at a subsequent day, appointed by the court, if the proper person has not been substituted, the court, upon proof, by affidavit, that notice has been given, as required by the order, may reverse or affirm the judgment or

order appealed from, or dismiss the appeal, or make such further order in the premises, as the case requires.

Substitute for Co. Proc., part of § 121.

§ 1299. Order of substitution.

Where the appeal is from one court to another, an application for an order of substitution, as prescribed by the last three sections, must be made to the appellate court. Where personal service of notice of application for an order has been made, within the State, upon the proper representative of the decedent, an order of substitution may be made, upon the application of the surviving party.

§ 1300. [Am'd, 1909.] Appeal, how taken.

An appeal must be taken, by serving, upon the attorney for the adverse party, as prescribed in article third of title sixth of chapter eighth of this act, and upon the clerk, with whom the judgment or order appealed from is entered, by filing it* in his office, a written notice, to the effect, that the appellant appeals from the judgment or order, or from a specified part thereof. Upon an appeal to the court of appeals from an order of the appellate division, made upon an appeal from the surrogates' court, the notice of appeal shall be filed with the clerk of the surrogates' court.

Co. Proc., § 527, first sentence. Am'd by L. 1909, ch. 416. In effect Sept. 1, 1909. See § 2574.

§ 1301. When notice of appeal to specify interlocutory judgment, etc.

Where the appeal is from a final judgment, or from a final order in a special proceeding, and the appellant intends to bring up, for review thereupon, an interlocutory judgment, or an intermediate order, he must, in the notice of appeal, distinctly specify the interlocutory judgment, or intermediate order, to be reviewed.

See §§ 1316 and 1317, post.

§ 1302. Proceedings, if attorney or party not found.

If the attorney for the adverse party is dead; or if he has been removed, and notice of the removal has been served upon the appellant's attorney, and another attorney has not been substituted in his place; or if, for any reason, service of a notice of appeal, upon the proper attorney for the adverse party, cannot, with due diligence, be made within the State, the notice of appeal may be served upon the respondent, in the manner prescribed by law for serving it upon an attorney. If personal service upon the respondent cannot, with due diligence, be so made within the State, the notice of appeal may be served upon him, and notice of the subsequent proceedings may be given to him, as directed by a judge of the court, in or to which the appeal is taken.

§ 1303. Defects in proceedings may be supplied.

Where the appellant, seasonably and in good faith, serves the notice of appeal, either upon the clerk or upon the adverse party, or his attorney, but omits, through mistake, inadvertence, or excusable neglect, to serve it upon the other, or to do any other act, necessary to perfect the appeal, or to stay the execution of the judgment or order appealed from; the court, in or to which the appeal is taken, upon proof, by affidavit, of the facts, may, in its discretion, permit the omission to be supplied, or an amendment to be made, upon such terms as justice requires.

Co. Proc., part of § 327, am'd.

* So in original.
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§ 1304. Order appealed from must be entered. Proceedings to compel entry.

An appeal cannot be taken from an order made by a judge, out of court, until it is entered in the office of the proper clerk. Where such an order has not been so entered, or the papers, upon which it was founded, have not been filed in the same clerk's office, the judge who made it, or, if he is absent, or unable or disqualified to act, a judge of the court, in or to which an appeal therefrom may be taken, must, upon the application of a party or other person, entitled to take such an appeal, make an order, requiring the omission to be supplied, within a specified time after service of a copy of the order made by him. Upon proof, by affidavit, that a copy of the latter order has been served, and that the omission has not been supplied, the same judge may make, upon notice, an order revoking and annulling the original order. The provisions of the last section but one apply to the service of an order, or a notice, as prescribed in this section.

Substitute for portions of Co. Proc., § 350.

§ 1305. Security may be waived.

An undertaking, which the appellant is required, by this chapter, to give, or any other act which he is so required to do, for the security of the respondent, may be waived by the written consent of the respondent.

Co. Proc., § 334, last sentence, am'd.

§ 1306. Deposit, in lieu of undertaking.

Where the appellant is required, by this chapter, to give an undertaking, he may, in lieu thereof, deposit with the clerk, with whom the judgment or order appealed from is entered, a sum of money, equal to the amount for which the undertaking is required to be given. The deposit has the same effect, as filing the undertaking; and notice that it has been made, has the same effect, as notice of the filing and service of a copy of the undertaking. The court, wherein the appeal is pending, may direct the mode, in which the money shall be kept and disposed of, during the pendency, or after the determination of the appeal.

Id., part of § 335, am'd.

§ 1307. [Am'd, 1910.] Undertaking must be filed.

An undertaking, given as prescribed in this chapter, must be filed with the clerk, with whom the judgment or order appealed from is entered, except that upon an appeal to the court of appeals the undertaking must be filed with the clerk of the court wherein the original judgment or order was entered.

Id., § 343, first sentence. See Rule 4. Am'd, L. 1910, ch. 582. In effect Sept. 1, 1910.

§ 1308. [Am'd, 1895.] New undertaking to be given, when sureties are insolvent, etc.

The court, in which the appeal is pending, upon satisfactory proof, by affidavit, that since the execution of an undertaking, given as prescribed in this chapter, one or more of the sureties therein have become insolvent; or that his or their circumstances have become so precarious, that there is reason to apprehend, that the undertaking is not sufficient for the security of the respondent; may make an order, requiring the appellant to file a new undertaking, and to serve a copy thereof, as required with

respect to the original undertaking. If the appellant fails so to do, within twenty days after the service of a copy of the order, or such further time as the court allows, the appeal must be dismissed, or the order or judgment, from which the appeal is taken, must be executed, as if the original undertaking had not been given.

Co. Proc., part of § 335, am'd; L. 1895, ch. 946.

§ 1309. [Am'd, 1894.] Action upon undertaking; when not to be brought.

An action shall not be maintained, upon an undertaking, given upon an appeal, taken as prescribed in title third, fourth or fifth of this chapter, until ten days have expired, since the service, upon the attorney for the appellant, and upon the sureties on such undertaking, of a written notice of the entry of a judgment or order, affirming the judgment or order appealed from, or dismissing the appeal. Such service may be made by mailing such notice in a postpaid wrapper addressed to said surety or sureties, at the last known post-office address of such surety or sureties. Where an appeal to the court of appeals, from that judgment or order, is perfected, and security is given thereupon, to stay the execution of the judgment or order appealed from, an action shall not be maintained upon the undertaking, given upon the preceding appeal, until after the final determination of the appeal to the court of appeals.

L. 1894, ch. 108.

§ 1310. [Am'd, 1895, 1898.] When appeal stays proceedings; effect thereof.

Where an appeal to the general term of any court or to the appellate division of the supreme court or to the court of appeals or otherwise has been heretofore or shall hereafter be perfected, as prescribed in this chapter, and the other acts, if any, required to be done, to stay the execution of the judgment or order appealed from, have been done, the appeal stays all proceedings to enforce the judgment or order appealed from; except that the court or judge, from whose determination the appeal is taken, may proceed in any matter included in the action or special proceeding, and not affected by the judgment or order appealed from or not embraced within the appeal; or may cause perishable property to be sold, pursuant to the judgment or order appealed from. The proceeds of such a sale must be paid, to abide the result of the appeal, into the court from or in which the appeal is taken, or, if it was taken as prescribed in title fifth of this chapter, into the supreme court. When an appeal from a judgment for rent has been perfected and execution stayed as herein provided, the appeal stays all summary proceedings, pending or otherwise, to recover the possession of real property or dispossess tenants therefrom, based on the failure to pay the rent included in the judgment appealed from. In a case, specified in subdivision two of section one hundred and ninety-one, of this act, a party aggrieved, upon presenting to the court proof by affidavit that he intends to apply to the appellate division, rendering such decision, for leave to appeal to the court of appeals, and in case such appellate division shall refuse such leave, then that such party intends to apply to a judge of the court of appeals to be allowed to appeal to said court of appeals, and proof that an undertaking,

given as prescribed in this chapter, has been filed with the clerk with whom the judgment appealed from is entered, shall be entitled to an order staying all proceedings to enforce such judgment, until the granting or refusal of such leave to appeal by such appellate division or a judge of the court of appeals. The party desiring to make such application must do so at the same term or at the term of said appellate division next succeeding that at which judgment of affirmance was rendered and notice of entry thereof served upon the party aggrieved, and in case said appellate division refuses such application, then such party shall have thirty days, from and after service of a copy of the order of said appellate division denying such application, with notice of entry, in which to apply to a judge of the court of appeals, to be allowed to so appeal. (See §§ 2087, 2101, 2584.)

L. 1895, ch. 946; L. 1898, ch. 292. In effect April 15, 1898.

§ 1311. [Am'd, 1895, 1899.] Levy upon personal property, when superseded by appeal.

Where an appeal, taken from a final judgment, to the court of appeals, has been perfected, and the security, required to stay the execution of the judgment, has been given; or where the security, given upon an appeal, taken from a final judgment of the supreme court, a county court or the city court of the city of New York, or the municipal court of the city of New York, is equal to that required to perfect an appeal to the court of appeals, and to stay the execution of the judgment; the court, in which the judgment appealed from was rendered, may, in its discretion, and upon such terms as justice requires, make an order, upon notice to the respondent, and the sureties in the undertaking, discharging a levy upon personal property, made by virtue of an execution, issued upon the judgment appealed from. But this section does not authorize the discharge of a levy, made by virtue of a warrant of attachment.

L. 1895, ch. 946; L. 1899, ch. 215. In effect Sept. 1, 1899.

§ 1312. Court may limit amount of security in certain cases.

Where an appeal is taken, as prescribed in title second or fourth of this chapter, the court, in or from which the appeal is taken; or, where an appeal is taken as prescribed in title third or fifth of this chapter, the court, to which the appeal is taken; may, in its discretion, make an order, upon notice to the respondent, dispensing with or limiting the security, required to stay the execution of the judgment or order appealed from, as follows:

1. Where the appellant is an executor, administrator, trustee, or other person acting in another's right, the security may be dispensed with or limited, in the discretion of the court.

2. The aggregate sum, in which one or more undertakings are required to be given, may be limited to not less than fifty thousand dollars, where it would otherwise exceed that sum.

Substitute for part of Co. Proc., § 339.

§ 1313. No security necessary, on appeal by the people, etc.

Upon an appeal, taken by the people of the State, or by a State officer, or board of State officers, or a board of supervisors of a county, the service of the notice of appeal perfects the appeal, and stays the execution of the judgment or order appealed from, without an undertaking, or other security.

Substance of L. 1853, ch. 37, § 2, as am'd by L. 1861, ch. 288 (4 Edm. 200).

§ 1314. [Am'd, 1877.] Id.; on appeal by a domestic municipal corporation.

Upon an appeal, taken by a domestic municipal corporation, the service of the notice of appeal perfects the appeal, and stays the execution of the judgment or order appealed from, without an undertaking, or other security; except that, where an appeal is taken, as prescribed in title second, third or fourth of this chapter, the court, in or from which the appeal is taken, may, in its discretion, require security to be given. In that case, the form, nature, and extent of the security, not exceeding that which is required in a like case, from a natural person, and the time and manner in which it must be given, must be prescribed by the order of the court; and the mayor, comptroller, or counsel to the corporation, may execute, in behalf of the corporation, an undertaking, so required to be given.

L. 1859, ch. 262, § 1 (4 Edm. 682). See § 1990, post.

§ 1315. Papers to be transmitted to appellate court.

Where an appeal is taken from a final judgment, as prescribed in title second or third of this chapter, the appellant must, within twenty days after it is perfected, cause a copy of the judgment-roll, and of a case or notice of exceptions, if any, filed after the entry of judgment, and a certified copy of the judgment given thereon and of the notice of appeal, to be transmitted to the appellate court, by the clerk, upon whom the notice of appeal was served. Where an appeal from an order, or a part of an order, is taken as prescribed in title second, third, and fifth of this chapter, the appellant must, within the same time, cause a certified copy of the notice of appeal, of the order, and of the papers upon which the order was founded, to be transmitted to the appellate court, by the same clerk. If the appellant fails so to do, the respondent may cause those papers to be so transmitted; and he is entitled to tax the expense thereof, as a disbursement, where he recovers costs. The clerk of the appellate court must file the papers so transmitted; and, except where it is otherwise specially prescribed by law, the appeal must be heard upon them.

Co. Proc., § 328, am'd. See § 1339.

§ 1316. Interlocutory judgment, or intermediate order, may be reviewed.

An appeal, taken from a final judgment, brings up for review an interlocutory judgment, or an intermediate order, which is specified in the notice of appeal, and necessarily affects the final judgment; and which has not already been reviewed, upon a separate appeal therefrom, by the court or the term of the court, to which the appeal from the final judgment is taken. The right to review an interlocutory judgment, or an intermediate order, as prescribed in this section, is not affected by the expiration of the time, within which a separate appeal therefrom might have been taken.

Predicated on Co. Proc., § 329. See §§ 1336, 1350.

§ 1317. [Am'd, 1803, 1812.] Judgment or order on appeal.

Upon an appeal from a judgment or an order, the appellate division of the supreme court, or appellate term, to which the appeal is taken, may reverse or affirm, wholly or partly, or may

modify, the judgment or order appealed from, and each interlocutory judgment or intermediate order, which it is authorized to review, as specified in the notice of appeal, and as to any or all of the parties. It shall thereupon render judgment of affirmance, judgment of reversal and final judgment upon the right of any or all of the parties, or judgment of modification thereon, according to law, except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing. When a trial has been before a jury, the judgment of the appellate court must be rendered either upon special findings of the jury or the general verdict, or upon a motion to dismiss the complaint or to direct a verdict. A judgment, affirming wholly or partly a judgment, from which an appeal has been taken, shall not, expressly and in terms, award to the respondent, a sum of money, or other relief, which was awarded to him by the judgment so affirmed. After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties.

See Co. Proc., § 330. See § 1337. Am'd by L. 1895, ch. 946; L. 1912, ch. 380, in effect Sept. 1, 1912.

§ 1318. When no appeal lies from judgment of reversal. Where a judgment, from which an appeal is taken, is reversed upon the appeal, and a new trial is granted, an appeal cannot be taken from the judgment of reversal; but upon an appeal from the order granting a new trial, taken, as prescribed by law, the judgment of reversal must also be reviewed.

§ 1319. Mode of enforcing affirmed or modified judgment.

Where a judgment, from which an appeal has been taken, from one court to another, is wholly or partly affirmed, or is modified, upon the appeal, it must be enforced, by the court in which it was rendered, to the extent permitted by the determination of the appellate court, as if the appeal therefrom had not been taken.

§ 1320. Id.; as to order.

Where a final order, from which an appeal has been taken, from one court to another, as prescribed in title fifth of this chapter, is wholly or partly affirmed, or is modified, upon the appeal, the appellate court may enforce its order, or may direct the proceedings to be remitted, for that purpose, to the court below, or to the judge who made the order appealed from.

§ 1321. Mode of cancelling docket of reversed or modified judgment.

Where a final judgment for a sum of money, or directing the payment of a sum of money, has been reversed, or has been affirmed as to part only of the sum, upon an appeal, taken as prescribed in title third or fourth of this chapter; and an appeal to the court of appeals is not taken and perfected, and the security required to stay execution is not given, within ten days after the entry of the judgment upon the appeal, in the clerk's office where the judgment appealed from is entered, the clerk must make a minute of the reversal of the judgment, or of the amount to which it has been reduced, upon his docket-book, in each place, where the judgment is docketed. A transcript of the docket, as thus corrected, must be furnished by him, and may be filed in any county clerk's office, where the original judgment is docketed, as prescribed by law, with respect to the original docket; and there-

upon the county clerk must correct his docket accordingly. The lien of a judgment, the docket of which is not corrected as prescribed in this section, remains unaffected by the reversal or modification thereof, until the decision of the court of appeals, upon an appeal from the judgment reversing or modifying the same, or the expiration of the time to take such an appeal.

§ 1322. Id.; when reversal, etc., was by court of appeals.

Where a final judgment for a sum of money, or directing the payment of a sum of money, has been reversed, or affirmed as to part only of the sum, upon an appeal to the court of appeals, the docket may be corrected, as prescribed in the last section, at any time after the remittitur has been filed in the court below.

§ 1323. [Am'd, 1877, 1880, 1899.] Restitution; when awarded.

When a final judgment or order is reversed or modified, upon appeal, the appellate court, or the general term of the same court, as the case may be, may make or compel restitution of property, or of a right, lost by means of the erroneous judgment or order; but not so as to affect the title of a purchaser in good faith and for value. When property has been sold, the court may compel the value, or the purchase price, to be restored, or deposited to abide the event of the action, as justice requires. When the appeal is from a judgment in favor of the owner of real estate, in an action to set aside a conveyance thereof, or in an action to compel the specific performance of a contract for the sale thereof, such owner shall have the same right to sell or dispose of the same as though no appeal had been taken; unless the appellant shall file with the clerk of the court a written undertaking, in a sum fixed by the court, or a judge thereof, upon a notice to the respondent of at least ten days, and to be approved by such court or judge, to the effect that the appellant will, in case the judgment appealed from shall be affirmed, pay to such owner such damages as he may suffer by reason of such appeal, not exceeding the amount of the penalty in such undertaking. Such undertaking may be filed at any time during the appeal, but any sale of such real estate or contract to sell the same in good faith and for a valuable consideration, after said judgment and before the filing of such undertaking, shall be as valid as if such undertaking had not been filed. In case such undertaking shall not be filed, the respondent shall be entitled, at any time during such appeal, to an order discharging of record any notice of pendency of action filed in the action, and, in an action to compel the specific performance of a contract for the sale of real estate, also canceling and discharging of record said contract, in case the same has been recorded.

Substitute for Co. Proc., part of § 330. L. 1899, ch. 650. In effect Sept. 1, 1899.

§ 1323a. [Added, 1909.] Remarks or comments of judge, duly excepted to, shall be subject of review.

In case of an appeal, every remark or comment of the presiding judge during the trial, duly excepted to, shall be the subject of review, but the case and exceptions on appeal shall be settled by the trial justice as now provided by law.

Added by L. 1909, ch. 65. Derivation — Code Civ. Proc., § 83, pt. For remainder of section see Judiciary Law, §§ 14, 24, 295-297, 301. See note 14 of notes of Board of Statutory Consolidation at end of code.

TITLE II.

Appeal to the court of appeals.

- Sec. 1324.** What appeals may be taken.
- 1325.** Limitation of time to appeal.
- 1326.** Security to perfect appeal.
- 1327.** Security to stay execution on judgment, etc., for money.
- 1328.** Id.; on judgment, etc., for delivery of property.
- 1329.** Id.; on judgment for a chattel.
- 1330.** Id.; on judgment, etc., directing conveyance.
- 1331.** Id.; on judgment, etc., for possession of real property.
- 1332.** Construction of the last five sections.
- 1333.** The last six sections qualified.
- 1334.** Undertakings may be in one instrument; form, and service thereof.
- 1335.** Exceptions to sureties; justification.
- 1336.** Appeal from final judgment rendered after affirmation of interlocutory judgment, or denial of motion for new trial.
- 1337.** What questions are brought up for review.
- 1338.** When questions of fact to be reviewed.
- 1339.** When a case to be prepared, etc., for the appeal.

§ 1324. What appeals may be taken.

An appeal may be taken to the court of appeals, in a case where that court has jurisdiction, as prescribed in sections 190 and 191 of this act.

Co. Proc., § 333, first sentence.

§ 1325. [Am'd, 1895, 1909.] Limitation of time to appeal.

An appeal to the court of appeals, must be taken within sixty days after service, upon the attorney for the appellant, of a copy of the judgment or order appealed from, and a written notice of the entry thereof.

Substitute for Co. Proc., § 331. Am'd by L. 1895, ch. 940; L. 1909, ch. 418. In effect Sept. 1. 1909.

§ 1326. Security to perfect appeal.

To render a notice of appeal, to the court of appeals, effectual, for any purpose, except in a case where it is specially prescribed by law, that security is not necessary, to perfect the appeal, the appellant must give a written undertaking, to the effect, that he will pay all costs and damages, which may be awarded against him on the appeal, not exceeding five hundred dollars. The appeal is perfected, when such an undertaking is given and a copy thereof, with notice of the filing thereof, is served, as prescribed in this title.

Co. Proc., part of § 334, am'd.

§ 1327. Security to stay execution on judgment, etc., for money.

If the appeal is taken from a judgment for a sum of money, or from a judgment or order, directing the payment of a sum of money, it does not stay the execution of the judgment or order, until the appellant gives a written undertaking, to the effect, that if the judgment or order appealed from, or any part thereof, is affirmed, or the appeal is dismissed, he will pay the sum, recovered or directed to be paid, by the judgment or order, or the

part thereof, as to which it is affirmed. But where the judgment or order directs the payment of money in fixed instalments, the undertaking must be to the effect, that the appellant will pay each instalment, which becomes payable, pending the appeal, or the part thereof as to which the judgment or order is affirmed, not exceeding a sum specified in the undertaking, which must be fixed by a judge of the court below. The court below may, at any time afterwards, upon satisfactory proof, by affidavit, that the sum so fixed is insufficient in amount, make an order, requiring the appellant to give a further undertaking, to the same effect, in a sum and within a time, specified in the order. A failure to comply with such an order has the same effect, as if no undertaking had been given, as prescribed in this section.

Co. Proc., § 335, first sentence am'd.

§ 1328. Id.; on judgment, etc., for delivery of property.

If the appeal is taken from a judgment or order, directing the assignment or delivery of a document, or of personal property, it does not stay the execution of the judgment or order, until the thing directed to be assigned or delivered, is brought into the court below, or placed in the custody of an officer or receiver, designated by that court; or the appellant gives a written undertaking as prescribed in the next section.

Id., part of § 336, am'd.

§ 1329. Id.; on judgment for a chattel.

If the appeal is taken from a judgment for the recovery of a chattel, it does not stay the execution of the judgment, until the appellant gives a written undertaking, in a sum fixed by the court below, or a judge thereof, to the effect, that the appellant will obey the direction of the appellate court, upon the appeal.

Id.

§ 1330. Id.; on judgment, etc., directing conveyance.

If the appeal is taken from a judgment or order, directing the execution of a conveyance, or other instrument, it does not stay the execution of the judgment or order, until the instrument is executed, and deposited with the clerk, with whom the judgment or order is entered, to abide the direction of the appellate court.

Id., § 337, extended to an appeal from an order.

§ 1331. [Am'd, 1879, 1897.] Id.; on judgment, etc., for the possession of real property.

If the judgment or order directs the sale or the delivery of the possession of real property, or entitles the respondent to the immediate possession thereof, an appeal does not stay the execution of the judgment or order until the appellant gives a written undertaking to the effect that he will not, while in possession of the property, commit, or suffer to be committed, any waste thereon; and if the property is in his possession or under his control, the undertaking must also provide that if the judgment or order is affirmed or the appeal is dismissed, and there is a deficiency upon a sale, he will pay the value of the use and occupation of such property, or the part thereof as to which the judgment or order is affirmed, from the time of taking the appeal until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding a specified sum fixed by a judge of the court below. If

the judgment directs a sale of real property upon the foreclosure of a mortgage, and an appeal is taken by a party against whom payment of the deficiency is awarded by such judgment, the undertaking must also provide that if the judgment is affirmed or the appeal is dismissed, the appellant will pay any deficiency which may occur upon the sale, with interest and costs, and all expenses chargeable against the proceeds of the sale, not exceeding a sum fixed by a judge of the court below.

Co. Proc., § 338; L. 1897, ch. 119. In effect Sept. 1, 1897. See § 1616.

§ 1332. Construction of the last five sections.

Where the judgment or order, from which an appeal is taken to the court of appeals, affirms a judgment or order, to the effect specified in either of the last five sections, the undertaking must be the same, as if the judgment or order, from which the appeal is so taken, was to the same effect, as the judgment or order so affirmed.

§ 1333. The last six sections qualified.

The last six sections do not extend to a case, where it is specially prescribed by law, that an appeal may be taken, or the execution of a judgment or order appealed from may be stayed, without security, or where the security to be given, for either purpose, is specially regulated by law.

§ 1334. [Am'd, 1879.] Undertakings may be in one instrument; form and service thereof.

Where two or more undertakings are required to be given as prescribed in this title they may be contained in the same instrument, or in different instruments at the option of the appellant. Each undertaking given as prescribed in this title must be executed by at least two sureties, and must specify the residence of each surety therein. A copy thereof, with a notice showing where it is filed, must be served on the attorney for the adverse party with the notice of appeal or before the expiration of the time of appeal.

Co. Proc., § 341, am'd.

§ 1335. [Am'd, 1891.] Exceptions to sureties; justification.

It is not necessary that the undertaking should be approved; but the attorney for the respondent may, within ten days after the service of a copy of the undertaking with notice of the filing thereof, serve upon the attorney for the appellant, a written notice that he excepts to the sufficiency of the sureties. Within ten days thereafter, the sureties, or other sureties in a new undertaking to the same effect, must justify before the court below, or a judge thereof, or a referee appointed by the same, or a county judge. At least five days' notice of the justification must be given. A referee may be appointed upon the motion of either party, or upon the court's own motion to take the justification of such sureties and to report the evidence upon the same to the court or judge with his opinion. The court may further direct that either party shall pay the expenses of such reference. If the court or judge finds the sureties sufficient he must indorse his allowance of them upon the undertaking, or a copy thereof, and a notice of the allowance must be served upon the attorney for the exceptant. The effect of a failure so to justify and procure an allowance, is the same as if the undertaking had not been given. The court shall also have power, in case it shall be made

to appear to its satisfaction, upon motion, that the exception was taken unnecessarily or for purposes of vexation or delay, to set the same aside and approve the undertaking.

Co. Proc., § 341, am'd; L. 1891, ch. 389.

§ 1336. [Am'd, 1895.] Appeal from final judgment rendered after affirmance of interlocutory judgment, or denial of motion for new trial.

Where final judgment is rendered in the court below, after the affirmance, upon an appeal to the appellate division of the supreme court, of an interlocutory judgment; or after the refusal, by the appellate division, of a new trial, either upon an application, made, in the first instance, at a term thereof, or upon an appeal from an order of the special term, or of the judge before whom the issues, or questions of fact, were tried by a jury; the party aggrieved may appeal directly from the final judgment to the court of appeals, notwithstanding that it was rendered at a special term, or at a trial term, or pursuant to the directions, contained in a referee's report. But such an appeal brings up, for review, only the determination of the appellate division of the supreme court, affirming the interlocutory judgment, or refusing the new trial.

L. 1895, ch. 946. See § 1350, post.

§ 1337. [Am'd, 1895.] What questions are brought up for review.

An appeal to the court of appeals from a final judgment, or from an order, granting or refusing a new trial in an action, where the appellant stipulates that upon affirmance judgment absolute shall be rendered against him, brings up for review in that court only questions of law; but where the justices of the appellate division from which an appeal is taken are divided upon the question as to whether there is evidence supporting, or tending to support, a finding or verdict not directed by the court, a question for review is presented. In any action on an appeal to the court of appeals, the court may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to.

L. 1895, ch. 946. See § 191, subd. 4; § 1317.

§ 1338. [Am'd, 1895, 1912.] When reversal presumed not to be on a question of fact.

Upon an appeal to the court of appeals from a judgment, reversing a judgment entered upon the report of a referee, upon the verdict of a jury or a decision, or a determination in the trial court; or from an order granting a new trial, upon such a reversal; it must be conclusively presumed that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the particular question or questions of fact upon which the reversal was made or the new trial was granted are specified and referred to by number or other adequate designation in the body of the judgment or order appealed from.

Co. Proc., parts of §§ 268 and 272. Am'd by L. 1895, ch. 946; L. 1912, ch. 361, in effect Sept. 1, 1912.

§ 1339. [Am'd, 1895.] When a case to be prepared, etc., for the appeal.

Where an appeal to the court of appeals, from a judgment, rendered by the appellate division of the supreme court, upon a verdict, subject to the opinion of the court, has been perfected, a case, containing a concise statement of the facts, of the questions of law arising thereupon, and of the determination of those questions by the appellate division, must be prepared and settled, by or under the direction of the court below, and annexed to the judgment-roll. An exception is not necessary, to enable the court of appeals to review the determination of a question of law, arising upon the verdict. A certified copy of the case must be transmitted to the court of appeals, instead of the case upon which the judgment of the court below was rendered. The court below, or a judge thereof, may extend the time, limited by law, within which the papers must be transmitted to the court of appeals, for the purpose of enabling the appellant to procure the case to be prepared or settled.

Co. Proc., part of § 333 and part of § 265; L. 1895, ch. 946.

TITLE III.**Appeal to the supreme court from an inferior court.****Sec. 1840. Appeals from inferior courts.**

1341. Limitation of time; security.

1342. Appeal from order.

1343. Limitation of time and stay of proceedings.

1344. Appeal, where and how heard.

1345. Judgment or order, where entered.

§ 1340. [Am'd, 1895.] Appeals from inferior courts.

Except appeals from inferior and local courts heretofore heard in the court of common pleas for the city and county of New York, and the superior court of Buffalo, an appeal may be taken to the appellate division of the supreme court, from a final judgment, rendered by a county court, or by any other court of record possessing original jurisdiction, where an appeal therefrom to a court other than the supreme court is not expressly given by statute, and upon such appeal, an order granting or refusing a new trial for any of the causes mentioned in section nine hundred and ninety-nine of this act, made by any of said courts, and questions of fact, may be reviewed in the same manner and to the same extent as questions of fact may be reviewed, upon appeal to the appellate division of the supreme court from a final judgment and order, granting or refusing a new trial, rendered by the same court. Appeals from inferior and local courts heretofore heard in the court of common pleas for the city and county of New York and the superior court of Buffalo, may be taken to the supreme court,

Co. Proc., § 344, first sentence am'd. See 6 T. & C. 456. L. 1895, ch. 946.

§ 1341. Limitation of time; security.

An appeal, authorized by the last section, must be taken within thirty days after service, upon the attorney for the appellant, of the copy of the judgment, and written notice of the entry thereof. Security is not required to perfect the appeal, but to stay the execution of the judgment security must be given and the sureties may be excepted to, and must justify as upon an appeal to the court of appeals, from a judgment of the same amount, or to the same effect.

Id., § 345, and part of § 331, as am'd by L. 1876, ch. 341, § 12.

§ 1342. [Am'd, 1895, 1907.] Appeal from order.

An appeal may also be taken, as provided by section 1340, from an order affecting a substantial right made by the court or a judge, in an action brought in or taken by appeal to a court, specified in said section.

Id., part of § 344, am'd; L. 1895, ch. 946; L. 1907, ch. 579. In effect July 15, 1907.

§ 1343. [Am'd, 1877.] Limitation of time and stay of proceedings.

An appeal, authorized by the last section, must be taken, within sixty days after service upon the attorney for the appellant, of a copy of the order, and written notice of the entry thereof. (1) Security is not required to perfect it; but it does not stay the execution of the order from which it is taken. The appellate court, or a judge thereof, may direct such a stay,

upon such terms, as to security or otherwise, as justice requires. (2)

(1) Co. Proc., § 331, as am'd by L. 1876, ch. 431, § 13. (2) Id., § 350.

ind. 194 § 1344. [Am'd, 1895, 1902, 1904.] Appeal, where and how heard. *Ch. 344*

An appeal taken as prescribed in this title, must be heard by the appellate division of the supreme court, except that appeals from the judgment of any municipal court in either of the boroughs of Manhattan or the Bronx in the city of New York, or from a judgment or order of the city court in the city of New York, may be heard by the appellate division of the supreme court, or by such justice or justices of the supreme court as may be designated for that purpose by the justices of the appellate division sitting in the first judicial department. In case an appeal is heard by a justice or justices of the supreme court as hereinbefore provided, the justice or justices by whom such appeal was determined, or a justice of the appellate division in the first judicial department, may allow an appeal to be taken to such appellate division from such determination; and appeals from inferior courts heretofore heard by the superior court of Buffalo shall be heard by the appellate division of the supreme court in the fourth judicial department, or by such justice or justices of the supreme court as may be designated for that purpose by the justices of the appellate division of the fourth judicial department. The provisions of title fourth of this chapter, relating to the hearing of appeals, taken in the supreme court, and to the subsequent proceedings thereupon, apply to an appeal taken as prescribed in this title, except as specified in the next section.

L. 1895, ch. 946; L. 1902, ch. 515; L. 1904, ch. 502. In effect Sept. 1, 1904. See Municipal Ct. Act, § 310.

§ 1345. [Am'd, 1895.] Judgment or order, where entered. *am. L. 1906 ch. 84*

A judgment or order of the appellate division rendered upon an appeal authorized by this title must be entered in the office of the clerk of the appellate division in the department in which the court below is located. A certified copy thereof annexed to the papers transmitted from the court below must be transmitted by the clerk, upon payment of his fees, to the clerk of the county where the court from which the appeal was taken is situated, and shall constitute the judgment-roll and remain in his office. The filing of the judgment-roll or the entry of the order, as prescribed in this section, is a sufficient authority for any proceeding in the court below or before the judge or justice who made the order appealed from which the judgment or order of the appellate court directs or permits. But where the execution of the judgment or order of the appellate court is stayed by an appeal to the court of appeals, the proceedings in the court below or before the judge or justice, who made the order are stayed in like manner. A judgment or order of the supreme court, rendered upon an appeal from a judgment of any district court or of the city court of New York, or an appeal heretofore heard by the superior court of Buffalo, must be entered in the office of the clerk of the county wherein the court below is located, and, with the papers transmitted from the court below, forms the judgment-roll which must be filed in the same office. Where the appeal is from the city court of New York, the judgment or order of the supreme court must be entered in the office of the clerk of the said court.

TITLE IV.

Appeal to the appellate division of the supreme court.

Sec. 1346. Appeal from judgment.

1347. Appeal from order.

1348. *Id.*; when made out of court; powers of appellate division to grant orders.

1349. Appeal from interlocutory judgment.

1350. Appeal from final judgment, after affirmance of interlocutory judgment, or denial of new trial. Review in the court of appeals.

1351. Limitation of time; order to stay proceedings.

1352. Stay of proceedings without order.

1353. Upon what papers appeal to be heard.

1354. Entry of judgment or order; judgment-roll.

1355. Hearing, etc., in the supreme court.

Am'd 1/19/94 ch 356. **§ 1346. [Am'd, 1895.] Appeal from judgment.**

An appeal may be taken to the appellate division of the supreme court from a final judgment rendered in the supreme court or in any superior city court prior to the first day of January, one thousand eight hundred and ninety-six, and from a final judgment rendered in the supreme court after said day as follows:

1. Where the judgment was rendered upon a trial by a referee, or by the court without a jury, the appeal may be taken upon questions of law, or upon the facts, or upon both.

2. Where the judgment was rendered upon the verdict of a jury, the appeal may be taken upon questions of law.

Co. Proc., part of § 348, am'd. See L. 1870, ch. 408, § 8. L. 1895, ch. 946.

§ 1347. [Am'd, 1895.] Appeal from order.

An appeal may be taken, to the appellate division of the supreme court, from an order, made prior to the first day of January, one thousand eight hundred and ninety-six, in an action upon notice, at a special term or a trial term of a superior city court, or of the supreme court, or at a term of the circuit court, and from an order made at a special term or trial term of the supreme court, after said day, in either of the following cases:

1. Where the order grants, refuses, continues, or modifies a provisional remedy; or settles, or grants, or refuses an application to resettle a case on appeal or a bill of exceptions.

2. Where it grants or refuses a new trial; except that where specific questions of fact, arising upon the issues, in an action triable by the court, have been tried by a jury, pursuant to an order for that purpose, as prescribed in section 971 of this act, an appeal cannot be taken from an order, granting or refusing a new trial, upon the merits.

3. Where it involves some part of the merits.

4. Where it affects a substantial right.

5. Where, in effect, it determines the action, and prevents a judgment, from which an appeal might be taken.

6. Where it determines a statutory provision of the State to be unconstitutional; and the determination appears from the reasons given for the decision thereupon, or is necessarily implied in the decision.

An order, made upon a summary application, after judgment, is deemed to have been made, in the action, within the meaning of this section.

Id., § 349, am'd; L. 1895, ch. 946. See §§ 2087, 2370.

§ 1348. [Am'd, 1895.] Id.; when made out of court; powers of appellate division to grant orders.

An appeal may also be taken to the appellate division of the supreme court, from an order, made in an action, upon notice, by a judge or justice, out of court, in a case where an appeal might have been taken, as prescribed in the last section, if the order had been made, by the court. The appellate division shall have power to vacate or modify, without notice, or upon such notice as it shall deem proper, any order in an action or special proceeding made by a justice of the supreme court or by the court without notice to the adverse party; it may grant a stay of proceedings upon any judgment or order of the supreme court from which an appeal is pending, and may grant any order or provisional remedy which has been applied for without notice to the adverse party, and refused by the supreme court or a justice thereof.

L. 1895, ch. 946.

§ 1349. [Am'd, 1895.] Appeal from interlocutory judgment.

An appeal may also be taken to the appellate division of the supreme court, from an interlocutory judgment rendered at a special term or trial term of the supreme court, or entered upon the report of a referee.

Id.

§ 1350. [Am'd, 1895.] Appeal from final judgment, after affirmance of interlocutory judgment, or denial of new trial. Review in the court of appeals.

Where final judgment is taken, at a special term or trial term, or pursuant to the directions of a referee, after the affirmance, upon an appeal to the appellate division of the supreme court of an interlocutory judgment; or after the refusal, by the appellate division of a new trial, either upon an application, made, in the first instance, at a term of the appellate division, or upon an appeal from an order of the special term, or of the judge, before whom the issues, or questions of fact, were tried by a jury; an appeal to the appellate division from the final judgment brings up, for review, only the proceedings to take the final judgment, or upon which the final judgment was taken, including the hearing or trial of the other issues in the action, if any. If an appeal is taken, to the court of appeals, from the determination of the appellate division upon the appeal from the final judgment, the determination of the appellate division, affirming the interlocutory judgment or refusing the new trial, may, at the election of either party, be reviewed thereupon. If the respondent elects to bring it up for review, he may take a cross-appeal therefrom, notwithstanding the expiration of the time to take an original appeal therefrom.

Id. See §§ 1316, 1324.

§ 1351. [Am'd, 1895, 1903.] Limitation of time; order to stay proceedings.

An appeal, authorized by this title, must be taken, within thirty days after service, upon the attorney for the appellant, of a copy of the judgment or order appealed from, and a written notice

of the entry thereof. Security is not required to perfect the appeal; but, except where it is otherwise specially prescribed by law, the appeal does not stay the execution of the judgment or order appealed from; unless the court, in or from which the appeal is taken, or a judge thereof, makes an order, directing such a stay. Such an order may be made, and may, from time to time, be modified, upon such terms, as to security or otherwise, as justice requires. If security is given, either as a condition of granting the order, or as prescribed in the next section, the provisions of title second of this chapter apply thereto, as if the appellate division of the supreme court was specified in those provisions, in place of the appellate court, and a judge of the same court, in place of a judge of the court below. Execution of a judgment for the recovery of money only shall not be stayed without security for more than thirty days after the service upon the attorney for the appellant of a copy of the judgment and written notice of the entry thereof.

Col. Proc., portions of §§ 332, 348, and 350, reconstructed; L. 1895, ch. 946; L. 1903, ch. 238. In effect Sept. 1, 1903.

§ 1352. Stay of proceedings without order.

Upon an appeal from a final judgment, taken as prescribed in this title, the appellant may give the security, required to perfect an appeal to the court of appeals, from a judgment of the same amount, or to the same effect; and to stay the execution thereof. In that case, the execution of the judgment appealed from is stayed, as upon an appeal to the court of appeals, and subject to the same conditions.

Id., § 348.

§ 1353. [Am'd, 1895.] Upon what papers appeal to be heard.

An appeal from a final judgment, taken as prescribed in this title, must be heard upon a certified copy of the notice of appeal, of the judgment-roll, and of the case or notice of exceptions, if any, filed, as prescribed by law or the general rules of practice, after the entry of the judgment, and either before or after the appeal is taken. An appeal from an interlocutory judgment, or from an order taken as prescribed in this title, must be heard upon a certified copy of the notice of appeal, and of the papers used before the court, judge or justice, upon the hearing of the demurrer, application for judgment, or motion, as the case requires. Unless the appellate division shall in a special case otherwise direct, before an appeal shall be placed upon the calendar, the appellant shall file with the clerk of the appellate division the case and exceptions or the other papers, upon which the appeal shall be heard, printed as required by the rules of practice; in case the appeal is from a judgment the printed case and exceptions must be ordered filed by the justice or referee before whom the case was tried.

L. 1895, ch. 946.

§ 1354. [Am'd, 1879.] Entry of judgment or order; judgment-roll.

Where judgment of affirmance is rendered upon the appeal, the judgment-roll consists of a copy of the judgment, annexed to the papers, upon which the appeal was heard. Where subsequent proceedings are taken, at the special term or trial term, before the entry of final judgment, the judgment-roll must also contain the proper papers relating thereto.

§ 1355. [Am'd, 1895.] **Hearing, etc., in the supreme court.**

An appeal taken to the appellate division of the supreme court, as prescribed in this title, must be heard in the department, embracing the county, in which the judgment or order appealed from is entered; unless an order is made, as prescribed in section 231 of this act, directing that it be heard in another department, or unless appeals pending in one department are transferred for hearing and determination to another, pursuant to article six, section one, of the constitution. The order made upon the appeal must be entered in the office of the clerk of the appellate division, and a certified copy thereof with the original case or papers upon which the appeal was heard, filed as provided in section thirteen hundred and fifty-three must be transmitted by the clerk upon payment of his fees, to the clerk of the county where the judgment or order appealed from was entered, and upon such certified copy of the order and the case or papers upon which the appeal was heard, the county clerk shall enter the judgment in his office.

Substitute for Co. Proc., portions of §§ 347 and 348; L. 1895, ch. 946. See § 255.

TITLE V.

Appeal from a determination in a special proceeding.

Sec. 1356. Appeal from order made in the same court.

1357. *Id.*; when made by another court or judge.

1358. Preceding order may be reviewed.

1359. Limitation of time to appeal.

1360. Stay of proceedings; hearing of appeal; decision thereupon.

1361. This title qualified. Application of provisions relating to actions.

§ 1356. [Am'd, 1895, 1913.] Appeal from order made in the same court.

An appeal may be taken, to the appellate division of the supreme court, from an order, affecting a substantial right, made in a special proceeding, at a special term or a trial term of the supreme court; or made by a justice thereof in a special proceeding instituted before him, pursuant to a special statutory provision; or instituted before another judge, and transferred to, or continued before him. An appeal may also be taken to the appellate division of the supreme court from an order granting or denying an application for an alternative writ of mandamus, or an alternative writ of prohibition.

L. 1854, ch. 270, § 1, first clause (4 Edm. 681; 5 *Id.* 133). Am'd by L. 1895, ch. 946; L. 1913, ch. 572. In effect Sept. 1, 1913.

§ 1357. [Am'd, 1895.] *Id.*; when made by another court or judge.

An appeal may also be taken to the appellate division of the supreme court, from an order, affecting a substantial right, made by a court of record, possessing original jurisdiction, or a judge thereof, in a special proceeding instituted in that court, or before a judge thereof, pursuant to a special statutory provision; or instituted before another judge, and transferred to, or continued before, the judge who made the final order. But this section does not apply to a case, where an appeal from the order, to a court, other than the appellate division of the supreme court, is expressly given by statute.

Substituted for part of Co. Proc., § 344; L. 1895, ch. 946. See § 1342, ante.

§ 1358. [Am'd, 1877.] Preceding order may be reviewed.

An appeal, authorized by this title, brings up for review, any preceding order, made in the course of the special proceeding, involving the merits, and necessarily affecting the final order appealed from, which is specified in the notice of appeal.

See Co. Proc., § 320.

§ 1359. Limitation of time to appeal.

An appeal, authorized by this title, must be taken within thirty days after service of a copy of the final order, from which it is taken, with a written notice of the entry thereof, upon the appellant; or, if he appeared, upon the hearing, by an attorney at law or an attorney in fact, upon the person who so appeared for him.

From *Id.*, § 332. See L. 1854, ch. 270, § 2.

§ 1360. Stay of proceedings; hearing of appeal; decision thereupon.

The provisions of title fourth of this chapter, relating to perfecting an appeal from an order, taken as therein prescribed; to stay-

ing the execution of the order appealed from; to hearing the appeal; and to the entry and enforcement of the order made upon the appeal, apply, where an appeal is taken, as prescribed in this title, except as otherwise specially prescribed by law.

This section refers to §§ 1351, 1353, 1354, and 1355, ante. See, also, §§ 1313 and 1314, ante.

§ 1361. This title qualified. Application of provisions relating to actions.

This title does not confer the right to appeal from an order, in a case, where it is specially prescribed by law, that the order cannot be reviewed. The proceedings upon an appeal, taken as prescribed in this title, are governed by the provisions of this act, and of the general rules of practice, relating to an appeal in an action, except as otherwise specially prescribed by law.

CHAPTER XIII.

Executions.

TITLE I.—Forms of Execution; Time and Manner of Issuing an Execution; General Duties and Liabilities of Officers.

TITLE II.—Execution Against Property.

TITLE III.—Execution Against the Person.

TITLE I.

Forms of execution; time and manner of issuing an execution; general duties and liabilities of officers.

- Sec. 1362. To whom execution directed; provision where sheriff is a party.
- 1363. Time of receipt to be indorsed on execution.
- 1364. The different kinds of execution.
- 1365. To what counties executions may issue.
- 1366. General requisites of executions.
- 1367. Id.; when issued on filing the writ from justice's court, etc.
- 1368. Requisites of execution for the collection of money.
- 1369. Id.; against property.
- 1370. Id.; where a warrant of attachment has been levied by sheriff.
- 1371. Id.; against executor, etc.
- 1372. Id.; against the person.
- 1373. Id.; for delivery of property. How money, recovered by same judgment, may be collected.
- 1374. Separate executions, where separate sums awarded.
- 1375. Execution of course, within five years.
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- 1380. Execution against decedent's property.
- 1381. Leave, how obtained.
- 1382. Time of stay by order, etc., not reckoned under this title.
- 1383. Execution against surviving judgment debtors.
- 1384. Sale on execution, etc.; when and how conducted.
- 1385. Penalty for taking down or defacing notice of sale.
- 1386. Validity of sale, when not affected by sheriff's default, etc.
- 1387. Purchases on such sales, by certain officers, prohibited.
- 1388. When execution to be enforced by under-sheriff.

§ 1362. To whom execution directed; provision where sheriff is a party.

An execution must be directed to the sheriff, unless he is a party or interested; in which case it must be directed as prescribed in section 173 of this act. But the court may, in its discretion, order an execution, issued upon a judgment rendered against a sheriff, either alone or with another, to be directed to a person, designated in the order, instead of to the coroners, or a particular coroner; in which case it must be so directed. The person so designated must be of full age, a resident of the State, and not a party to the action, or interested therein. Where the execution is issued upon a judgment for a sum of money, or directing the payment of a sum of money, the order does not take effect, until the person so designated executes, and files in the clerk's office, a bond to the people, with at least two sureties, approved by a judge of the court, or a county judge, in a penal sum, fixed by the order, not less than twice the sum to be col-

lected by virtue of the execution; conditioned for the faithful performance of his duties under the execution. A certified copy of the order, and, where it requires a bond to be given, the clerk's certificate that a bond has been filed, as required by the order, must be attached to the execution. The person so designated is deemed an officer; and, with respect to that execution, he is subject to the obligations and liabilities, and has the power and authority of a coroner, and is entitled to fees accordingly.

Co. Proc., part of § 289, and 2 R. S. 364, §§ 11 and 12, am'd. See 3 T. & C. 608.

§ 1363. Time of receipt to be indorsed on execution.

The sheriff, to whom an execution is directed and delivered, must, upon the receipt thereof, indorse thereupon a memorandum of the day, hour, and minute, when he received it.

2 R. S. 364, § 10 (2 Edm. 377).

§ 1364. The different kinds of execution.

There are four kinds of execution, as follows:

1. Against property.
2. Against the person.
3. For the delivery of the possession of real property with or without damages for withholding the same.
4. For the delivery of the possession of a chattel, with or without damages for the taking or detention thereof.

An execution is the process of the court, from which it is issued.

Co. Proc., § 286, am'd. See § 1240.

§ 1365. To what counties executions may issue.

An execution against property can be issued only to a county, in the clerk's office of which the judgment is docketed. An execution against the person may be issued to any county. An execution for the delivery of the possession of real property, must be issued to the county, where the property, or a part thereof, is situated. An execution for the delivery of the possession of a chattel, may be issued to any county, where the chattel is found; or to the sheriff of the county where the judgment-roll is filed. Executions, upon the same judgment, may be issued at the same time, to two or more different counties.

Substitute for Co. Proc., part of § 287. See ante, § 597.

§ 1366. General requisites of executions.

An execution must intelligibly describe the judgment, stating the names of the parties in whose favor, and against whom, the time when, and the court in which, the judgment was rendered; and, if it was rendered in the supreme court, the county in which the judgment-roll is filed. It must require the sheriff to return it to the proper clerk, within sixty days after the receipt thereof. Except as otherwise prescribed in the next section, it must be made returnable to the clerk, with whom the judgment-roll is filed.

Co. Proc., part of § 289, consolidated with Id., § 290. See §§ 23, 24.

§ 1367. Id.; when issued on filing transcript from justice's court, etc.

Where an execution is issued out of a court, other than that in which the judgment was rendered, upon filing a transcript

of the judgment rendered in the latter court, it must also specify the clerk, with whom the transcript is filed, and the time of filing; and it must be made returnable to that clerk. If the judgment was rendered in a justice's court, it must specify the justice's name; and it must omit the specification, respecting the filing of the judgment-roll.

See post, § 3043.

§ 1368. Requisites of execution for the collection of money.

An execution, issued upon a judgment for a sum of money, or directing the payment of a sum of money, must specify, in the body thereof, the sum recovered, or directed to be paid, and the sum actually due when it is issued. It may specify a day, from which interest upon the sum due is to be computed; in which case, the sheriff must collect interest accordingly, until the sum is paid. If all the parties, against whom the judgment is rendered, are not judgment debtors, the execution must show who is the judgment debtor.

2 R. S. 364, § 9, as am'd by L. 1844, ch. 324; and Co. Proc., part of § 239.

§ 1369. Id.; against property.

An execution against property must, if the judgment-roll is not filed in the clerk's office of the county to which it is issued, specify the time when the judgment was docketed in that county. It must, except in a case where special provision is otherwise made by law, substantially require the sheriff to satisfy the judgment, out of the personal property of the judgment debtor; and, if sufficient personal property cannot be found, out of the real property, belonging to him, at the time when the judgment was docketed in the clerk's office of the county, or at any time thereafter.

Co. Proc., part of § 239, am'd.

§ 1370. Id.; where a warrant of attachment has been levied by sheriff.

Where a warrant of attachment, issued in the action, has been levied by the sheriff, the execution must substantially require the sheriff to satisfy the judgment, as follows:

1. Where the judgment debtor is a non-resident, or a foreign corporation, and the summons was served upon him or it, without the State, or otherwise than personally, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act, and the judgment debtor has not appeared in the action; out of the personal property attached, and, if that is insufficient, out of the real property attached.

2. In any other case, out of the personal property attached; and, if that is insufficient, out of the other personal property of the judgment debtor; if both are insufficient, out of the real property attached; and, if that is insufficient, out of the real property, belonging to him, at the time when the judgment was docketed in the clerk's office of the county, or at any time thereafter.

See §§ 649, 707 and 708, ante.

§ 1371. Id.; against executor, etc.

An execution against real or personal property, in the hands of an executor, administrator, heir, devisee, legatee, tenant of

real property, or trustee, must substantially require the sheriff to satisfy the judgment, out of that property.

Co. Proc., § 289, subd. 1.

§ 1372. Id.; against the person.

An execution against the person must substantially require the sheriff, to arrest the judgment debtor, and commit him to the jail of the county, until he pays the judgment, or is discharged according to law. Except where it may be issued, without the previous issuing and return of an execution against property, it must recite the issuing and return of such an execution, specifying the county to which it was issued.

Id., § 289, subd. 3, am'd. See § 1489.

§ 1373. Id.; for delivery of property. How money, recovered by same judgment, may be collected.

An execution for the delivery of the possession of real property, or a chattel, must particularly describe the property, and designate the party to whom the judgment awards the possession thereof; and it must substantially require the sheriff, to deliver the possession of the property, within his county, to the party entitled thereto. If a sum of money is awarded by the same judgment, it may be collected, by virtue of the same execution; or a separate execution may be issued for the collection thereof, omitting the direction to deliver possession of the property. If one execution is issued for both purposes, it must contain, with respect to the money to be collected, the same directions as an execution against property, or against the person, as the case requires.

Substitute for Co. Proc., § 289, subd. 4.

§ 1374. Separate executions, where separate sums awarded.

Where a judgment awards different sums of money, to or against different parties, a separate execution may be issued, to collect each sum so awarded; subject to the power of the court, to control the enforcement of the executions, upon motion, where the collection of one execution will, wholly or partly, satisfy another.

§ 1375. Execution of course, within five years.

Except as otherwise specially prescribed by law, the party recovering a final judgment, or his assignee, may have execution thereupon, of course, at any time within five years after the entry of the judgment.

Co. Proc., § 283, am'd. See §§ 1382, 1858.

§ 1376. [Am'd, 1885, 1887.] Execution after death of judgment creditor.

Where the party recovering a final judgment has died, execution may be issued at any time within five years after the entry of the judgment, by his personal representatives, or by the assignee of the judgment, if it has been assigned, and the execution must be indorsed with the name and residence of the person issuing the same. And where a party or one or more of several parties against whom a judgment for the recovery of possession of real property has been obtained has died, an order granting

leave to issue and execute such execution or writ of possession may be granted upon giving twenty days' notice to the occupants of the lands so recovered and to the grantees or devisees of said deceased, or if he died intestate, to the heirs at law of said deceased, said notices to be served in the same manner as a summons is directed to be served in an action in the supreme court.

L. 1887, ch. 682.

§ 1877. When execution may be issued after five years.

After the lapse of five years from the entry of a final judgment, execution can be issued thereupon, in one of the following cases only:

1. [Am'd, 1879.] Where an execution was issued thereupon, within five years after the entry of the judgment, and has been returned wholly or partly unsatisfied or unexecuted.

2. Where an order is made by the court, granting leave to issue the execution.

Co. Proc., part of § 284.

§ 1878. Id.; leave, how obtained.

Notice of an application for an order, granting leave to issue an execution, as prescribed in the last section, must be served personally upon the adverse party, if he is a resident of the State, and personal service can, with reasonable diligence, be made upon him therein; otherwise, notice must be given in such manner as the court directs. Where the judgment is for a sum of money, or directs the payment of a sum of money, leave shall not be granted, except on proof, by affidavit, to the satisfaction of the court, that the judgment remains wholly or partly unsatisfied.

Id., am'd.

§ 1879. No execution against decedent, except, etc.

An execution to collect a sum of money cannot be issued, against the property of a judgment debtor, who has died since the entry of the judgment except as prescribed in the next two sections.

*Am'd. 1916
ch. 625*
§ 1880. [Am'd, 1894.] Execution against decedent's property.

After the expiration of one year from the death of a party, against whom a final judgment for a sum of money, or directing the payment of a sum of money is rendered, the judgment may be enforced by execution against any property upon which it is a lien with like effect as if the judgment debtor was still living. But such an execution shall not be issued, unless an order granting leave to issue it is procured from the court from which the execution is to be issued, and a decree to the same effect is procured from a surrogate's court of this State, which has duly granted letters testamentary or letters of administration upon the estate of the deceased judgment debtor. Where the lien of the judgment was created as prescribed in section twelve hundred and fifty-one of this act, neither the order nor the decree can be made until the expiration of three years after letters testamentary or letters of administration have been duly granted upon the estate of the decedent, and for that purpose such a lien existing at the decedent's death continues for three years and six months thereafter, notwithstanding the previous expiration of ten years from

the filing of the judgment-roll. But where the decedent died intestate and letters of administration upon his estate have not been granted within three years after his death by the surrogate's court of the county in which the decedent resided at the time of his death, or if the decedent resided out of the State at the time of his death, and letters testamentary or letters of administration have not been granted within the same time by the surrogate's court of the county in which the property on which the judgment is a lien is situated, such court may grant the decree where it appears that the decedent did not leave any personal property within the State upon which to administer. In such case the lien of the judgment existing at the decedent's death continues for three years and six months as aforesaid. Provided, however, that such judgment lien, existing at the decedent's death, upon the decedent's real property, or some portion thereof, may be enforced and payment thereof obtained during the said three years after granting of letters testamentary, or letters of administration, by the proceeding provided and prescribed by title five of chapter eighteen of this act. But this section shall not apply to real estate which shall have been conveyed, or hereafter may be conveyed by the deceased judgment debtor during his lifetime, if such conveyance was made in fraud of his creditors or any of them, and any judgment creditor of said deceased, against whose judgment said conveyance shall have been, or may hereafter be, declared fraudulent by the judgment and decree of any court of competent jurisdiction, may enforce his said judgment against such real property, with like effect as if the judgment debtor was living, and it shall not be necessary to obtain the leave of any court or officer to issue such execution, and the same may be issued at any time to the sheriff of the county where such property is or may be situated. The person issuing such execution, however, shall annex thereto a description of the real estate against which the same is sought to be enforced, as aforesaid, and shall indorse on said execution the words "issued under section thirteen hundred and eighty of the code of civil procedure," whereupon said sheriff shall enforce said execution as therein directed, against the property so described, and not against any other property, either real or personal, and all provisions of law relating to the sale and conveyance of real estate on execution and the redemption thereof shall apply thereto.

L. 1894, ch. 734. See § 1825.

§ 1351. [Am'd, 1889.] Leave, how obtained.

Leave to issue an execution, as prescribed in the last section, must be procured as follows:

1. Notice of the application, to the court, from which the execution is to be issued, for an order, granting leave to issue the execution, must be given to the person or persons, whose interest in the property will be affected by a sale by virtue of the execution, and also to the executor or administrator of the judgment debtor. The general rules of practice may prescribe the manner in which the notice must be given; until provision is so made therein, it must be served, either personally, or in such manner as the court prescribes, in an order to show cause. Leave shall not be granted, except upon proof, by affidavit to the satisfaction of the court that the judgment remains wholly or partly unsatisfied.

2. For the purpose of procuring a decree from the surrogate's court, granting leave to issue the execution, the judgment creditor must present to that court, a written petition, duly verified, setting forth the facts, and praying for such a decree; and that the persons, specified in the first subdivision of this section, may be cited, to show cause why it should not be granted. Upon the presentation of such a petition, the surrogate must issue a citation accordingly, which said citation may be served in the same manner as is provided in the first subdivision of this section for the service or giving of a notice to the parties or persons therein mentioned, and, if the general rules of practice of the supreme court do not provide for a mode of giving such notice, such citation must be served in such manner as the surrogate by order may prescribe, or as is otherwise provided by law; and, upon his return thereof, he must make such a decree in the premises as justice requires.

L. 1880, ch. 82. See § 2725, subd. 2.

§ 1382. Time of stay by order, etc., not reckoned under this title.

The time during which the person, entitled to enforce a judgment, is stayed from enforcing it, by the provision of a statute, or by an injunction or other order, or in consequence of an appeal, is not a part of the time, limited by this title, for issuing an execution thereupon, or for making an application for leave to issue such an execution.

§ 1383. Execution against surviving judgment debtors.

The last six sections do not affect the right of a judgment creditor to enforce a judgment, against the property of one or more surviving judgment debtors, as if all the judgment debtors were living. In that case, an execution must be issued in the usual form; but the attorney for the judgment creditor must indorse thereupon, a notice to the sheriff, reciting the death of the deceased judgment debtor, and requiring the sheriff not to collect the execution, out of any property which belonged to him.

§ 1384. [Am'd, 1894.] Sale on execution, etc.; when and how conducted.

A sale of real or personal property, by virtue of an execution, or pursuant to the directions contained in a judgment or order, must be made at public auction, between the hour of nine o'clock in the morning and sunset. The sheriff to whom an execution is issued shall at any time before the sale of the personal property levied on by him, on the written request of any person who is a creditor of the person against whom the writ was issued under which the sheriff levied upon the property, exhibit to such creditor the personal property so levied upon under said writ and permit an inspection thereof by such creditor or his agent.

L. 1894, ch. 789.

§ 1385. Penalty for taking down or defacing notice of sale.

A person who, before the time fixed for the sale, in a notice of the sale of property, to be made by virtue of an execution, wilfully takes down or defaces such a notice put up by the sheriff, or by his authority, forfeits fifty dollars to the judgment creditor, and the same sum to the judgment debtor; unless the

notice was defaced or taken down, with the consent of the person seeking to enforce the forfeiture or the execution was previously satisfied.

§ 1386. Validity of sale, when not affected by sheriff's default, etc.

An omission by the sheriff to give notice, as required by law, or the taking down or defacing of a notice, when put up, does not effect* the validity of a sale, made by virtue of an execution, to a purchaser in good faith, without notice of the omission or offence.

2 R. S. 369, § 40.

§ 1387. Purchases on such sales, by certain officers, prohibited.

The sheriff, to whom an execution is directed, or the under-sheriff or deputy-sheriff, holding an execution, and conducting a sale of property by virtue thereof, shall not, directly or indirectly, purchase any of the property at the sale. A purchase made by him, or to his use, is void.

Id., § 41.

§ 1388. When execution to be enforced by under-sheriff.

Where the sheriff, to whom an execution is delivered, dies, is removed from office, or becomes otherwise disqualified to act, before the execution is returned, his under-sheriff must proceed upon the execution, as the sheriff might have done. If there is no under-sheriff, the court, from which the execution issued, may designate a person to proceed thereupon; who may complete the same, as an under-sheriff might have done. The person so designated must give such security as the court directs. He is deemed an officer; and is subject to the same obligations and liabilities, and has the same power and authority, in relation to the object of his appointment, as a sheriff, and is entitled to fees accordingly. But this section does not apply, in a case where special provision is otherwise made by law for the enforcement of an execution, after the death, removal from office, or other disqualification, of the sheriff, or under-sheriff.

2 R. S. 374, §§ 65 and 66 (2 Edm. 388).

* Error in engrossing for "affect."

TITLE II.

Execution against property.

- Article 1. Property exempt from levy and sale.
 2. Lien of an execution upon personal property; levy upon and sale of personal property. Rights of indemnitors of sheriff.
 3. Sale, redemption, and conveyance of real property; rights and liabilities of persons interested.
 4. Remedies for failure of title to real property sold, and to enforce contribution.

ARTICLE FIRST.

Property exempt from levy and sale.

- Sec. 1389. Certain special exemptions not affected by this article.
 1390. What personal property is exempt, when owned by a householder.
 1391. Additional personal property exempt in certain cases; levying execution against wages, etc., of judgment debtor.
 1392. Woman entitled to same exemption as a householder.
 1393. Military pay, rewards, etc., exempt from execution and other legal proceedings.
 1394. Right of action for taking, etc., exempt property.
 1395. Burying ground; when exempted.
 1396. How exempt burying ground designated.
 1397. Homestead; when exempted.
 1398. How exempt homestead designated.
 1399. Married woman's homestead; when exempted.
 1400. When exemption to continue after owner's death.
 1401. Exemption; when not affected by temporary suspension of residence.
 1402. If value of homestead exceeds \$1,000, lien attaches to surplus.
 1403. Id.; how proceeds to be marshalled when property is sold.
 1404. Exemption of real property; how cancelled.
 1404a. Exemption of exhibits at exhibitions.

§ 1389. Certain special exemptions not affected by this article.

The enumeration, in this article, of the property which is exempt from levy and sale by virtue of an execution, does not repeal any special provision of law, relating to such an exemption, which, by its terms, is applicable only to a particular class of persons, or corporations, or to a particular locality, or otherwise to a special case.

Designed to guard against a repeal, by implication, of provisions like L. 1847, ch. 133, § 10 (2 R. S., 5th ed., 630; 3 Edm. 748); L. 1851, ch. 122, § 19 (2 R. S., 5th ed., 784; 3 Edm. 782); L. 1866, ch. 273, § 6 (6 Edm. 715); L. 1867, ch. 516; and various similar statutes.

§ 1390. What personal property is exempt, when owned by a householder.*

The following personal property, when owned by a householder, is exempt from levy and sale by virtue of an execution; and each movable article thereof continues to be so exempt, while the family, or any of them, are removing from one residence to another:

1. All spinning wheels, weaving looms, and stoves, put up, or kept for use, in a dwelling house; and one sewing-machine, with its appurtenances.

2. The family bible, family pictures, and school-books, used by or in the family; and other books, not exceeding in value fifty dollars, kept and used as part of the family library.

* See L. 1878, ch. 33.

3. A seat or pew, occupied by the judgment debtor, or the family, in a place of public worship.

4. Ten sheep, with their fleeces, and the yarn or cloth manufactured therefrom; one cow; two swine; the necessary food for those animals; all necessary meat, fish, flour, groceries and vegetables, actually provided for family use; and necessary fuel, oil, and candles, for the use of the family for sixty days.

5. All wearing apparel, beds, bedsteads, and bedding, necessary for the judgment debtor and the family; all necessary cooking utensils; one table; six chairs; six knives; six forks; six spoons; six plates; six tea cups; six saucers; one sugar dish; one milk pot; one tea pot; one crane and its appendages; one pair of andirons; one coal scuttle; one shovel; one pair of tongs; one lamp, and one candlestick.

6. The tools and implements of a mechanic, necessary to the carrying on of his trade, not exceeding in value twenty-five dollars.

2 R. S. 367, § 22 (2 Edm. 380), as am'd by L. 1800, ch. 152; with additions.

§ 1391. [Am'd, 1879, 1901, 1903, 1905, 1908, 1911.] *Am'd*
Additional personal property exempt in certain cases; levying *1914*
execution against wages, etc., of judgment debtor. *Ch. 302*

In addition to the exemptions, allowed by the last section, necessary household furniture, working tools and team, professional instruments, furniture and library, not exceeding in value two hundred and fifty dollars, together with the necessary food for the team, for ninety days, are exempt from levy and sale by virtue of an execution, when owned by a person, being a householder, or having a family for which he provides, except where the execution is issued upon a judgment, recovered wholly upon one or more demands, either for work performed in the family as a domestic or for the purchase money, of one or more articles, exempt as prescribed in this or the last section. Where a judgment has been recovered and where an execution issued upon said judgment has been returned wholly or partly unsatisfied, and where any wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment debtor or shall thereafter become due and owing to him, to the amount of twelve dollars or more per week, the judgment creditor may apply to the court in which said judgment was recovered or the court having jurisdiction of the same without notice to the judgment debtor and upon satisfactory proof of such facts by affidavits or otherwise, the court, if a court not of record, a judge or justice thereof, must issue or if a court of record, a judge or justice, must grant an order directing that an execution issue against the wages, debt, earnings, salary, income from trust funds or profits of said judgment debtor, and on presentation of such execution by the officer to whom delivered for collection to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing, or may thereafter become due and owing to the judgment debtor, said execution shall become a lien and a continuing levy upon the wages, earnings, debts, salary, income from trust funds or profits due or to become due to said judgment debtor to the amount specified therein which shall not exceed ten per centum thereof, and said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid or

until modified as hereinafter provided, but only one execution against the wages, debts, earnings, salary, income from trust funds or profits of said judgment debtor shall be satisfied at one time and where more than one execution has been issued or shall be issued pursuant to the provisions of this section against the same judgment debtor, they shall be satisfied in the order of priority in which such executions are presented to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing. It shall be the duty of any person or corporation, municipal or otherwise, to whom said execution shall be presented, and who shall at such time be indebted to the judgment debtor named in such execution, or who shall become indebted to such judgment debtor in the future, and while said execution shall remain a lien upon said indebtedness to pay over to the officer presenting the same, such amount of such indebtedness as such execution shall prescribe until said execution shall be wholly satisfied and such payment shall be a bar to any action therefor by any such judgment debtor. If such person or corporation, municipal or otherwise, to whom said execution shall be presented shall fail, or refuse to pay over to said officer presenting said execution, the percentage of said indebtedness, he shall be liable to an action therefor by the judgment creditor named in such execution, and the amount so recovered by such judgment creditor shall be applied towards the payment of said execution. Either party may apply at any time to the court from which such execution shall issue, or to any judge or justice issuing the same, or to the county judge of the county, and in any county where there is no county judge, to any justice of the city court upon such notice to the other party as such court, judge, or justice shall direct for a modification of said execution, and upon such hearing the said court, judge or justice may make such modification of said execution as shall be deemed just, and such execution as so modified shall continue in full force and effect until fully paid and satisfied, or until further modified as herein provided. This section, so far as it relates to wages and salary, due and owing or to become due and owing to the judgment debtor, shall not apply to judgments recovered more than ten years prior to September first, nineteen hundred and eight, and any execution heretofore issued upon such judgments pursuant to an order heretofore granted under this section shall, when this act takes effect, cease to be a lien and continuing levy upon wages and salary thereafter to become due and owing to the judgment debtor.

L. 1842, ch. 157, § 1, as am'd by L. 1868, ch. 782 (4 Edm. 628; 6 id. 830); also L. 1858, ch. 107, § 1 (3 B. S., 5th ed., 646; 4 Edm. 635). See 3 T. & C. 596; L. 1901, ch. 116; L. 1903, ch. 401; L. 1905, ch. 175; L. 1908, ch. 148; L. 1911, chs. 489 and 332, in effect Sept. 1, 1911.

§ 1392. [Am'd, 1877.] Woman entitled to same exemption as a householder.

Where the judgment debtor is a woman, she is entitled to the same exemptions, from levy and sale by virtue of an execution, subject to the same exceptions, as prescribed in the last two sections, in the case of a householder.

§ 1393. [Am'd, 1895, 1897.] Military pay, rewards, etc., exempt from execution and other legal proceedings.

The pay and bounty of a non-commissioned officer, musician or private in the military or naval service of the United States or

the state of New York; a land warrant, pension or other reward heretofore or hereafter granted by the United States, or by a state, for military or naval services; a sword, horse, medal, emblem or device of any kind presented as a testimonial for services rendered in the military or naval service of the United States or a state; and the uniform, arms and equipments which were used by a person in that service, are also exempt from levy and sale, by virtue of an execution, and from seizure for non-payment of taxes, or in any other legal proceeding; except that real property purchased with the proceeds of a pension granted by the United States for military or naval services, and owned by the pensioner, or by his wife or widow, is subject to seizure and sale for the collection of taxes or assessments lawfully levied thereon.

L. 1897, ch. 348. In effect Sept. 1, 1896. (Probable error for 1897.)

§ 1394. Right of action for taking, etc., exempt property.

A right of action to recover damages, or damages awarded by a judgment, for taking or injuring personal property, exempt by law from levy and sale, by virtue of an execution, are exempt, for one year after the collection thereof, from levy and sale, by virtue of an execution, and from seizure in any other legal proceeding.

§ 1395. Burying ground; when exempted.

Land, set apart as a family or private burying ground, and heretofore designated, as prescribed by law, in order to exempt the same, or hereafter designated for that purpose, as prescribed in the next section, is exempt from sale, by virtue of an execution, upon the following conditions only:

1. A portion of it must have been actually used for that purpose.

2. It must not exceed in extent one-fourth of an acre.

3. It must not contain, at the time of its designation, or at any time afterwards, any building or structure, except one or more vaults, or other places of deposit for the dead, or mortuary monuments.

L. 1847, ch. 85, § 1, and part of § 2 (4 Edm. 629), am'd.

§ 1396. How exempt burying ground designated.

In order to designate land, to be exempted as prescribed in the last section, a notice, containing a full description of the land to be exempted, and stating that it has been set apart for a family or private burying ground, must be subscribed by the owner; acknowledged or proved, and certified, in like manner as a deed to be recorded in the county where the land is situated; and recorded in the office of the clerk or register of that county, in the proper book for recording deeds, at least three days before the sale of the land, by virtue of the execution.

L. 1847, ch. 85, the residue of § 2, am'd.

§ 1397. [Am'd, 1883.] Homestead; when exempted.

A lot of land, with one or more buildings thereon, not exceeding in value one thousand dollars, owned, and occupied as a residence, by a householder having a family, and heretofore designated as an exempt homestead, as prescribed by law, or hereafter designated for that purpose, as prescribed in the next section, is exempt from sale, by virtue of an execution, issued upon a judgment, recovered for a debt contracted after the

thirtieth day of April, eighteen hundred and fifty; unless the judgment was recovered wholly for a debt or debts, contracted before the designation of the property, (or) for the purchase-money thereof. But no property heretofore or hereafter designated as an exempt homestead, as prescribed by law, or by the next section, shall be exempt from taxation, or from sale for non-payment of taxes or assessments.

L. 1850, ch. 260 (4 Edm. 632), first sentence of § 1; L. 1883, ch. 156.

§ 1398. How exempt homestead designated.

In order to designate property, to be exempted as prescribed in the last section, a conveyance thereof, stating, in substance, that it is designed to be held as a homestead, exempt from sale by virtue of an execution, must be recorded, as prescribed by law; or a notice, containing a full description of the property, and stating that it is designed to be so held, must be subscribed by the owner, acknowledged or proved, and certified, in like manner as a deed to be recorded in the county where the property is situated; and must be recorded in the office of the clerk of that county, in a book kept for that purpose, and styled the "homestead exemption book."

L. 1850, ch. 260 (4 Edm. 632), part of § 2.

§ 1399. Married woman's homestead; when exempted.

A lot of land, with one or more buildings thereon, owned by a married woman, and occupied by her as a residence, may be designated as her exempt homestead, as prescribed in the last section; and the property so designated is exempt from sale, by virtue of an execution, under the same circumstances, and subject to the same exceptions, as the homestead of a householder, having a family.

See § 1392, ante.

§ 1400. When exemption to continue after owner's death.

The exemption, prescribed by the last three sections, continues, after the death of the person in whose favor the property was exempted, as follows:

1. If the decedent was a woman, it continues, for the benefit of her surviving children, until the majority of the youngest surviving child.
2. If the decedent was a man, it continues, for the benefit of his widow and surviving children, until the majority of the youngest surviving child, and until the death of the widow.

But the exemption ceases earlier, if the property ceases to be occupied, as a residence, by a person for whose benefit it may so continue, except as otherwise prescribed in the next section.

L. 1850, ch. 260 (4 Edm. 632), second sentence of § 1, am'd.

§ 1401. Exemption; when not affected by temporary suspension of residence.

The right to exemption, of a person entitled thereto, as prescribed in the last four sections, is not affected by a suspension

of the occupation of the exempt property, as a residence, for a period not exceeding one year, which occurs in consequence of injury to, or destruction of, the dwelling house upon the premises.

§ 1402. If value of homestead exceeds \$1,000, lien attaches to surplus.

The exemption of a homestead, otherwise valid under the provisions of this article, is not void, because the value of the property, designated as exempt, exceeds one thousand dollars. In that case, the lien of a judgment attaches to the surplus, as if the property had not been designated as an exempt homestead; but the property cannot be sold by virtue of an execution, issued upon a judgment, as against which it is exempt. After the return of such an execution, the owner of the judgment may maintain a judgment creditor's action, to procure a judgment, directing a sale of the property, and enforcing his lien upon the surplus.

§ 1403. Id.; how proceeds to be marshalled when property is sold.

Where the judgment, in a judgment creditor's action, brought as prescribed in the last section, or in any other action affecting the title to an exempt homestead, directs the sale of the property, the court must so marshal the proceeds of the sale, that the right and interest of each person in the proceeds, shall correspond, as nearly as may be, to his right and interest in the property sold. Money, not exceeding one thousand dollars, paid to a judgment debtor, as representing his interest in the proceeds, is exempt for one year after the payment, as the property sold was exempt; unless, before the expiration of the year, he causes real property to be designated as an exempt homestead, as prescribed in section 1398 of this act; in which case, the exemption ceases, with respect to so much of the money, as was not expended for the purchase of that property; and the exemption of the property so designated extends to every debt, against which the property sold was exempt. Where the exemption of property, sold as prescribed in this section, has been continued after the judgment debtor's death, or where he dies after the sale, and before payment to him of his proportion of the proceeds of the sale, the court may direct that portion of the proceeds, which represents his interest, to be invested, for the benefit of the person or persons, entitled to the benefit of the exemption; or to be otherwise disposed of, as justice requires.

§ 1404. [Am'd, 1894.] Exemption of real property; how canceled.

The owner of real property, exempt as prescribed in this article, may, at any time, subscribe a notice, and personally acknowledge the execution thereof, before an officer authorized by law to take the acknowledgment of a deed, to the effect that he cancels all exemptions from levy or sale by virtue of an execution affecting the property, or a particular part thereof, fully described in the

notice. The cancellation takes effect when such a notice is recorded, as prescribed in this article for recording a notice to effect the exemption so canceled. Any other release or waiver, hereafter executed, or an exemption of real property, allowed by this article, or of an exemption of a homestead, or a private or family burying-ground, allowed by the provisions of law heretofore in force, is void; provided, however, that nothing herein contained shall be so construed as to prevent the husband and wife from jointly conveying or mortgaging property so exempt.

L. 1894, ch. 202.

§ 1404a. [Added, 1909.] Exemptions of exhibits at exhibitions.

No process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon articles, goods, wares, merchandise or property of any description while the same is en route to or from, or while on exhibition or deposited by exhibitors at any international exhibition held under the auspices or supervision of the United States, within any city or county of the state, nor shall such property be subject to attachment, seizure, levy or sale, for any cause whatever, in the hands of the authorities of such exhibition or otherwise.

Added by L. 1909, ch. 65. Derivation — L. 1880, ch. 393, § 1. See note 15 of notes of Board of Statutory Consolidation at end of code.

ARTICLE SECOND.

*Levy of an execution upon personal property; levy upon and sale of personal property. Rights of indemnitors of sheriff.***Sec. 1405. Personal property bound by execution.**

1406. Order of preference among executions.

1407. Id.; when attachments also are issued.

1408. Id.; when issued from court not of record.

1409. Title of bona fide purchasers before levy, not affected.

1410. Execution may be levied upon current money.

1411. Levy upon certain evidences of debt.

1412. Interest of bailor in goods pledged may be sold.

1413. When partners may apply for release of property levied upon.

1414. Undertaking to be given.

1415. Provision, where a warrant of attachment has also been levied, etc.

1416. When the undertaking enures to other judgment creditors.

1417. How partner's interest sold; rights, etc., of purchaser.

1418. Claim of property by a third person, how tried.

1419. Proceedings, if claimant succeeds.

1420. Inquisition not to prejudice claimant's right.

1421. In action against officer, indemnitors may be substituted as defendants.

1422. Notice of application and proofs thereupon.

1423. Terms may be imposed.

1424. When indemnity related to part of property.

1425. Application when officer is joined with indemnitors.

1426. Effect of the order.

1427. Officer to whom indemnity is given, required to give notice of action.

1428. Sale of personal property; how made.

1429. Notices of sale to be posted.

§ 1405. Personal property bound by execution.

The goods and chattels of a judgment debtor, not exempt, by express provision of law, from levy and sale by virtue of an execution, and his other personal property, which is expressly declared by law, to be subject to levy by virtue of an execution, are, when situated within the jurisdiction of the officer, to whom an execution against property is delivered, bound by the execution, from the time of the delivery thereof to the proper officer, to be executed; but not before.

2 R. S. 365, § 13 (2 *ALM.* 379), am'd.**§ 1406. Order of preference among executions.**

Where two or more executions against property are issued, out of the same or different courts of record, against the same judgment debtor, the one first delivered, to an officer, to be executed, has preference, notwithstanding that a levy is first made, by virtue of an execution subsequently delivered; but if a levy upon and sale of personal property has been made, by virtue of the junior execution, before an actual levy, by virtue of the senior execution, the same property shall not be levied upon or sold, by virtue of the letter.*

Id., § 14, am'd.

§ 1407. Id.; when attachments also are issued.

Where there are one or more executions, and one or more warrants of attachment, against the property of the same person, the rule prescribed in the last section prevails, in determining the preferences of the executions or warrants of attachment; the de-

* Error in engrossing for "latter."

pendant in the warrants of attachment being, for that purpose, regarded as a judgment debtor.

2 R. S. 386, § 15, am'd.

§ 1408. Id.; when issued from court not of record.

But an execution, issued out of a court not of record, or a warrant of attachment, granted in an action pending in a court not of record, if actually levied, has preference over another execution, issued out of any court, of record or not of record, which has not been previously levied.

Id., § 15, am'd.

§ 1409. Title of bona fide purchasers before levy, not affected.

The title to personal property, acquired before the actual levy of an execution, by a purchaser in good faith, and without notice that the execution has been issued, is not affected by an execution delivered, before the purchase was made, to an officer, to be executed.

Id., § 17.

§ 1410. [Am'd, 1877.] Execution may be levied upon current money.

The officer, to whom an execution against property is delivered, must levy upon current money of the United States, belonging to the judgment debtor; and must pay it over, as so much money collected, without exposing it for sale; except that where it consists of gold coin, he must sell it, like other personal property; unless he is otherwise directed, by an order of a judge, or by the judgment in the particular cause.

Substituted for 2 R. S. 386, § 18.

§ 1411. [Am'd, 1877.] Levy upon certain evidences of debt.

The officer, to whom an execution against property is delivered, must levy upon and sell, a bill, or other evidence of debt, belonging to the judgment debtor, which was issued by a moneyed corporation to circulate as money, or a bond, or other instrument for the payment of money, belonging to the judgment debtor, which was executed and issued, by a government, state, county, public officer, or municipal or other corporation, and is in terms negotiable, or payable to the bearer or holder.

2 R. S. 386, § 19, am'd.

§ 1412. Interest of bailor in goods pledged may be sold.

The interest of the judgment debtor in personal property, subject to levy, lawfully pledged, for the payment of money, or the performance of a contract or agreement, may be sold, in the hands of the pledgee, by virtue of an execution against property. The purchaser at the sale acquires all the right and interest of the judgment debtor, and is entitled to the possession of the property, on complying with the terms and conditions upon which the judgment debtor could obtain possession thereof. This section does not apply to property, of which the judgment debtor is unconditionally entitled to the possession.

Id., § 20, am'd.

§ 1418. When partners may apply for release of property levied upon.

Where an officer has seized personal property of a partnership, before or after its dissolution, upon a levy upon the interest therein of a partner, made by virtue of an execution against his individual property, the other partners, or former partners, having an interest in the property, or any of them, may, at any time before the sale, apply to a judge of the court, or to the county judge or the county, where the seizure was made, upon an affidavit, showing the facts, for an order, directing the officer to release the property, and to deliver it to the applicant.

§ 1414. Undertaking to be given.

Upon such an application, the applicant must give an undertaking, with at least two sureties, approved by the judge, to the effect, that he will account to the purchaser, upon the sale to be made by virtue of the execution, of the interest of the judgment debtor in the property seized, in like manner as he would be bound to account to an assignee of such an interest; and that he will pay to the purchaser the balance, which may be found due upon the accounting, not exceeding a sum, specified in the undertaking, which must be not less than the value of the interest of the judgment debtor, in the property seized by the sheriff, as fixed by the judge. The provisions of sections 695 and 696 of this act apply to the proceedings, taken as prescribed in this and the last section.

See § 604, ante.

§ 1415. Provision, where a warrant of attachment has also been levied, etc.

Where a warrant of attachment has been levied upon the interest of a defendant, as a partner, in personal property of a partnership, and the attachment has been discharged as to that interest, as prescribed in sections 693 and 694 of this act, a levy, by virtue of an execution against his individual property, cannot be made upon his interest on the same property, unless the warrant of attachment has been vacated or annulled.

§ 1416. When the undertaking enures to other judgment creditors.

Where personal property of a partnership has been released, upon giving an undertaking, as prescribed in the last three sections, if the execution, by virtue of which the levy was made, is set aside, or is satisfied without a sale of the interest levied upon, the undertaking enures to the benefit of each judgment creditor of the same judgment debtor, then having an execution in the hands of the same officer, or of another officer, having authority to levy upon that interest, as if it had been given to obtain a release from a seizure, made by virtue of such an execution.

§ 1417. How partner's interest sold; rights, etc., of purchaser.

Where personal property of a partnership has been so released, the interest of the judgment debtor therein may be sold by the officer; and the purchaser, upon the sale, acquires all that interest as if he was an assignee thereof. If the purchase-money exceeds the amount of all the executions and warrants of attachment against the property of the same judgment debtor, of which the

officer has notice, and of the lawful fees and charges thereon, the officer must pay the surplus into court, for the benefit of the judgment debtor, or other person entitled thereto.

§ 1418. [Am'd, 1904.] Claim of property by a third person, how tried.

If personal property, levied upon as the property of the judgment debtor, is claimed by or in behalf of another person, as his property, an affidavit may be made and delivered to the sheriff, in behalf of such person, at any time while such property or the proceeds thereof are in the sheriff's possession, stating that he makes such a claim; specifying in whole or in part the property to which it relates, and in all cases stating the value of the property claimed and the damages, if any, over and above such value, which the claimant will suffer in case such levy is not released. In that case, the officer may, in his discretion, empanel a jury to try the validity of the claim.

See § 657, ante; also §§ 108-110, ante; L. 1904, ch. 541. In effect Sept. 1, 1904.

§ 1419. [Am'd, 1895, 1904.] Proceedings, if claimant succeeds.

If by their inquiry the jurors find that the property belongs to the claimant, they must also determine its value and the damages above such value as specified in the last section. Thereupon the officer may relinquish the levy, unless the judgment creditor gives him an undertaking with at least two sufficient sureties, to the effect that the sureties will indemnify him to an amount therein specified, not less than twice the value of the property and damages as determined by the jury, and two hundred and fifty dollars in addition thereto, against all damages, costs and expenses, in an action to be brought against him by any person, by the claimant, his assignee, or other representative, by reason of the levy upon, detention or sale of any of the property, by virtue of the execution. If the undertaking is given, the officer must detain the property as belonging to the judgment debtor. Where an undertaking is given to indemnify an officer, he must, within two days after the giving of the said undertaking, cause the same to be filed in the office of the clerk of the court out of which the execution was issued, and serve upon the claimant, his assignee or other representative, and the judgment creditor, or the attorney whose name is subscribed to the execution, a copy of the said undertaking, with a notice of the justification of the sureties thereon. The justification must take place before a judge of the court out of which the execution was issued, at a time to be specified in the notice, which must not be less than two nor more than five days after service of said notice. For the purpose of justification, each of the sureties upon the undertaking must attend before the judge, at the time and place mentioned in the notice, and be examined on oath, on the part of the claimant, his assignee or other representative, touching his sufficiency in such manner as the judge in his discretion thinks proper. The examination may be adjourned from day to day, until it is completed, but such adjournment must always be to the next judicial day. If required by the claimant, his assignee or other representative, the examination must be reduced to writing and subscribed by the sureties. If the judge finds

the sureties sufficient, he must annex the examination to the undertaking, endorse his allowance thereon, and cause the said undertaking, together with the examination of the sureties, to be filed with the clerk of the court. Thereupon the sheriff is released and discharged from all liability by reason of the levy upon, detention, and sale of the property seized. When any such undertaking shall have been approved and filed, as hereinbefore provided, the clerk of the court shall immediately upon the same being filed, index the same in the index book in his office, under which executions are indexed, under the title of the suit in which the execution is issued.

L. 1886, ch. 663. See § 658, ante; L. 1904, ch. 541. In effect Sept. 1, 1904.

§ 1420. Inquisition not to prejudice claimant's right.

If the property is found to belong to the defendant, the finding does not prejudice the right of the claimant, to bring an action to recover the property so levied upon, or damages by reason of the levy, detention, or sale.

See §§ 108 and 109, and 667-650, ante.

§ 1421. [Am'd, 1887, 1900.] In action against officer, indemnitors may be substituted as defendants.

Where an action to recover a chattel or chattels, hereafter levied upon by virtue of an execution, or several executions, or a warrant of attachment, or several warrants of attachment, or to recover damages by reason of a levy or levies upon detention, sale or sales of personal property, hereafter made, by virtue of an execution or several executions, or a warrant of attachment, or several warrants of attachment, is brought against an officer, or against a person who acted by his command or in his aid, if a bond or bonds or written undertaking or undertakings indemnifying the officer against the levy or levies, or other act or acts, has been given in behalf of the judgment creditor or the several judgment creditors, or the plaintiff in the warrant or the plaintiffs in the several warrants, either before or after the commencement of the action, the persons or person or the several persons who gave it to them, or the survivors, if one or more are dead, may apply to the court for an order to substitute the applicant or several applicants as defendants in the action, in place of the officer or of the person so acting by his command or in his aid; and the court may upon application of the officer, or in case of his death, upon the application of his legal representatives, grant an order substituting the indemnitors as defendants in the action, in place of the officer or of the person so acting by his command or in his aid.

L. 1887, ch. 452; L. 1900, ch. 115. In effect Sept. 1, 1900.

§ 1422. [Am'd, 1887.] Notice of application and proofs thereupon.

Where the application is made by the officer, notice of the application must be given to the indemnitors or their attorney, and also to the attorney for the plaintiff. If the pleadings do not sufficiently show that the case is one where the order may be granted, the facts with respect thereto must be shown by affidavit or other competent proof. Where the application is

made by the indemnitors, or one of them, the motion papers must contain a written consent to be made defendant in the action executed by each person who executed the instrument or instruments of indemnity, unless proof by affidavit is furnished that those who do not consent are dead. Each consent must be acknowledged or proved and certified in like manner as a deed to be recorded in the county, and notice of the application must be given to the attorney of each party to the action, and if the defendant has not appeared, notice must be given to him personally.

L. 1887, ch. 452.

§ 1423. [Am'd, 1887.] Terms may be imposed.

Upon granting the order the court may, in its discretion, require the indemnitors to furnish additional security to the plaintiff and to pay the reasonable expenses of the defendant, necessarily incurred before the order is granted, or it may impose such other terms for the security of either of the original parties as justice requires.

L. 1887, ch. 452.

§ 1424. [Am'd, 1887.] When indemnity related to part of property.

If the indemnity given related to a part only of the property, the court may, in a proper case, direct that the action be divided into two actions, that the indemnitors be substituted as defendants in one without affecting the other, and that the controversy in each action be limited to that part of the property in respect to which it is to be continued. Where such an order is made a similar application may be subsequently made in the action which proceeds against the original defendant.

L. 1887, ch. 452.

§ 1425. [Am'd, 1887.] Application when officer is joined with indemnitors.

If the officer, or person acting by his command, or in his aid, is joined as a defendant, with all the indemnitors, he may apply for an order to strike out his name as a defendant. If he is joined as a defendant with one or more, but not all of them, he may apply for an order substituting those who are not joined with him as defendants in his place. In either case, the application is made in the same manner, and is subject to the same provisions, as if made as prescribed in section 1421 of this act.

L. 1887, ch. 452.

§ 1426. Effect of the order.

An order, made as prescribed in the last five sections, does not affect the merits of the cause of action, or of the defense, except so far as it limits the controversy to particular property. But if the substituted or remaining defendants recover judgment, they are entitled to single costs only. If the action is discontinued, or the complaint dismissed, a new action may be brought, as if the former action had not been brought.

§ 1427. [Am'd, 1887.] Officer to whom indemnity is given, required to give notice of action.

Where an action is brought in a case where one or more persons are entitled to make an application for an order of substitution, or where one or more persons are liable to be substituted as defendants, as prescribed in section one thousand four hundred and twenty-one of this act, the officer to whom the instrument or instruments of indemnity was given cannot maintain an action thereupon against a person entitled to make, but who has not made, such an application, or who is liable to be but has not been substituted as a defendant, unless notice of the commencement of the action against the officer, or the person acting by his command or in his aid, is given before the trial thereof, or at least ten days before judgment by default is taken therein either to attorney or several attorneys whose name is or several names are subscribed to the execution or several executions or warrants of attachment or several warrants of attachment, or personally to the judgment creditor or creditors, or the plaintiff or several plaintiffs in the action in which the warrant of attachment was or several warrants of attachment were issued, or to one of the persons who executed the instrument or instruments of indemnity.

L. 1887, ch. 452.

§ 1428. Sale of personal property; how made.

Personal property must be offered for sale, in such lots and parcels, as are calculated to bring the highest price. Except where the officer is expressly authorized, by this article, to sell property not in his possession, personal property shall not be offered for sale, unless it is present, and within the view of those attending the sale.

2 R. S. 367, § 23 (2 Edm. 381), am'd.

§ 1429. [Am'd, 1907.] Notices of sale to be posted.

At least six days' previous notice of the time and place of a sale of personal property, by virtue of an execution, must be given, by posting conspicuously written or printed notices thereof, in at least three public places of the town or city, where the sale is made. Where perishable property has been levied upon by virtue of an execution the court may, upon the application of the officer making the levy, by order, direct the sale thereof at such a time and upon such a notice as it deems proper; and, thereupon, the property must be sold accordingly.

Id., § 21, am'd; L. 1907, ch. 244. In effect Sept. 1, 1907. See 3 T. & C. 210.

ARTICLE THIRD.

Sale, redemption, and conveyance of real property; rights and liabilities of persons interested.

- Sec. 1430. To what leasehold property this article applies.
 1431. Real property held in trust, when liable to execution.
 1432. Equity of redemption; when not to be sold.
 1433. Direction to be indorsed on execution.
 1434. Notice of sale of real property; how given.
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§ 1430. To what leasehold property this article applies.

The expression, "real property", as used in this and the succeeding article, includes leasehold property, where the lessee or his assignee is possessed, at the time of the sale, of at least five years unexpired term of the lease, and also of the building or buildings, if any, erected thereupon.

L. 1837, ch. 462, § 1; verbal amendments.

§ 1431. Real property held in trust, when liable to execution.

Real property, held by one person, in trust or for the use of another, is liable to levy and sale by virtue of an execution, issued

upon a judgment recovered against the person, to whose use it is so held, in a case where it is prescribed by law, that, by reason of the invalidity of the trust, an estate vests in the beneficiary; but special provision is not otherwise made by law, for the mode of subjecting it to his debts.

Substituted for 2 R. S. 308, § 23 (2 Edm. 381).

§ 1432. Equity of redemption; when not to be sold.

The judgment debtor's equity of redemption, in real property mortgaged, shall not be sold by virtue of an execution, issued upon a judgment recovered for the mortgage debt, or any part thereof.

Id., § 81.

§ 1433. Direction to be indorsed on execution.

Where an execution against property, is issued upon a judgment, specified in the last section, to the county where the mortgaged property is situated, the attorney, or other person who subscribes it, must indorse thereupon a direction to the sheriff, not to levy it upon the mortgaged property, or any part thereof. The direction must briefly describe the mortgaged property, and refer to the book and page, where the mortgage is recorded. If the execution is not collected out of the other property of the judgment debtor, the sheriff must return it wholly or partly unsatisfied, as the case requires.

Id., §§ 32 and 33.

§ 1434. [Am'd, 1896.] Notice of sale of real property; how given.

The sheriff who sells real property, by virtue of an execution, must previously give public notice of the time and place of the sale, as follows:

1. A written or printed notice thereof must be conspicuously fastened up, at least forty-two days before the sale, in three public places, in the town or city where the sale is to take place, and also in three public places, in the town or city where the property is situated, if the sale is to take place in another town or city.

2. A copy of the notice must be published, at least once in each of the six weeks, immediately preceding the sale, in a newspaper published in the county, or published in an incorporated village, a part of which is within the county; if there is a newspaper published in such county or village; or, if there is none, in the newspaper printed at Albany, in which legal notices are required to be published.

Id., § 84, am'd; L. 1896, ch. 567. In effect May 12, 1896.

§ 1435. Property, how described therein. Part may be sold.

In each notice, specified in the last section, the real property to be sold must be described with common certainty, by setting forth the name of the township or tract, and the number of the lot, if there is any, or by some other appropriate description. The validity of a sale is not affected by the fact, that the property sold is part only of the property advertised to be sold.

Id., § 35, am'd.

§ 1436. Penalty for irregularity in sale.

A sheriff who sells real property, by virtue of an execution, without having given notice thereof, as prescribed in the last two sections, or otherwise than as prescribed in this chapter, forfeits

one thousand dollars to the party injured, in addition to the damages which the latter sustains thereby.

2 R. S. 369, § 37.

§ 1437. Manner of conducting sale.

Where real property, offered for sale by virtue of an execution, consists of two or more known lots, tracts, or parcels, each lot, tract, or parcel must be separately exposed for sale. If a person who is the owner of, or is entitled by law to redeem, a distinct parcel of the property, of any other description, requires that parcel to be exposed for sale separately, the sheriff must expose it accordingly. No more real property shall be exposed for sale, than it appears to be necessary to sell, in order to satisfy the execution.

Id., § 38, am'd. See 4 T. & C. 681.

§ 1438. Sheriff to make duplicate certificates of sale.

The sheriff, who sells real property, by virtue of an execution, must make out, subscribe, and acknowledge before an officer authorized to take the acknowledgment of a deed, duplicate certificates of the sale, containing:

1. The name of each purchaser, and the time when the sale was made.
2. A particular description of the property sold.
3. The price bid for each distinct parcel separately sold.
4. The whole consideration money paid.

Id., § 42, am'd.

§ 1439. Certificate to be recorded, etc.

The sheriff must, within ten days after the sale, file one of the duplicate certificates in the office of the clerk of the county, and deliver another to the purchaser. If there are two or more purchasers, a certificate must be delivered to each. The clerk must immediately record the certificate in a book, kept by him for that purpose, and must index the record, to the name of the judgment debtor. His fees for so doing must be paid by the sheriff, as part of the expenses of the sale.

Id., § 43; and L. 1857, ch. 60, § 1 (4 Edm. 634), consolidated.

§ 1440. [Am'd, 1881.] Title to real property not divested before deed.

The right and title of the judgment debtor, or of a person holding under him, or deriving title through him, to real property, sold by virtue of an execution, is not divested by the sale, until the expiration of the period, within which it can be redeemed, as prescribed in this article, and the execution of the sheriff's deed. But if the property is not redeemed, and a deed is executed in pursuance of the sale, the grantee in the deed is deemed to have been vested with the legal estate, from the time of the sale. And if the title of such grantee or his assigns is adjudged for any reason or cause whatsoever to be null and void in any action for that purpose brought by the judgment debtor or his assigns, such judgment shall have no force or effect unless within twenty days after the entry of such judgment the plaintiff shall pay to such grantee or his assigns the sum of money which was paid upon the sale with interest from the time of the sale as prescribed in this article, including the costs and expenses of said defendant in defending this action in which such judgment was recovered, to

be adjusted by a judge of the court in which said action is brought, and in the event of plaintiff's failure to pay such purchase-money and expenses within the time aforesaid, said title shall be valid in said grantee, and in case such judgment has heretofore been recovered and an appeal has been taken therefrom which is now pending, and such judgment shall be affirmed on final appeal, the same shall have no force of effect unless within twenty days after the entry of judgment or affirmation, the plaintiff shall pay to such grantee or his assigns the sum of money which was paid upon the sale, with interest as aforesaid, including the costs and expenses of the defendant as aforesaid, in prosecuting any appeal from such judgment, and in the event of plaintiff's failure so to do, said title shall be valid in said grantee.

2 R. S. 373, § 61 (2 Edm. 387), am'd. L. 1881, ch. 681.

§ 1441. Rights of holder of the property during intermediate period.

The person entitled to the possession of real property, sold by virtue of an execution, as prescribed in the last section, may, during the period therein specified, use and enjoy the same as follows, without being chargeable with committing waste:

1. He may use and enjoy it in like manner, and for the like purposes, as it was used and enjoyed before the sale, doing no permanent injury to the freehold.

2. He may make necessary repairs to a building, or other erection thereupon. But this subdivision does not permit an alteration in the form or structure of the building or other erection.

3. He may use and improve the land, in the ordinary course of husbandry; but he is not entitled to a crop, growing thereon, at the expiration of the period of redemption.

4. He may apply any wood or timber on the land to the necessary reparation of a fence, building, or other erection, which was thereupon at the time of the sale.

5. If he actually occupies the land sold, he may take necessary fire-wood therefrom for use in his household.

2 R. S. 336, § 22 (2 Edm. 347).

§ 1442. Order to prevent waste; when and how applied for.

If, at any time during the period allowed for redemption, the judgment debtor, or any other person in possession of the property sold, commits or threatens to commit, or makes preparation for committing waste thereupon, the supreme court, or any justice thereof, within the judicial district, or the county judge of the county, in which the property, or any part thereof, is situated, may, upon the application of the purchaser, or his assignee, or the agent or attorney of either, and proof, by affidavit, of the facts, grant, without notice, an order, restraining the wrong-doer from committing waste upon the property.

Id., §§ 23 and 24, consolidated.

§ 1443. Proceedings to punish violation of the order.

If the person, against whom such an order is granted, commits waste in violation thereof, after the service upon him of the order, with a copy of the affidavit upon which it was granted, the court or judge, upon proof, by affidavit, of the facts, may grant an

order, requiring him to show cause, at a time and place therein specified, why he should not be punished for a contempt.

2 R. S. 336, §§ 25 and 26.

§ 1444. Mode and extent of punishment.

If, upon the return of the order to show cause, it satisfactorily appears, that the person, required to show cause, has violated the former order, the court or judge may either punish him, as prescribed by law for the punishment of a contempt of a court of record, other than a criminal contempt; or may grant a warrant, directed to the sheriff of the county, reciting the former order, and the violation thereof, and commanding the sheriff to commit the wrong-doer to close confinement, for a term specified therein, not more than one year. A person thus committed cannot be admitted to the liberties of the jail.

Id., §§ 27 and 28, consolidated.

§ 1445. How warrant, etc., superseded.

The warrant may be superseded, and the prisoner discharged, by an order, in the discretion of the court or judge committing him, upon his executing, to the person who applied for the warrant, an undertaking, in a sum fixed, and with sureties approved, by the court or judge, to the effect, that he will pay any judgment, which the applicant, or his assignee, or other representative, may recover against him, by reason of any waste theretofore or thereafter committed on the property; and upon his paying to the applicant, for the costs and expenses of the proceedings, a sum, fixed by the court or judge.

Id., § 29, am'd.

§ 1446. When and how real property sold may be redeemed.

Within one year after the sale of real property, by virtue of an execution, a person, specified in the next section, may redeem it, by paying to the purchaser, his executor, administrator, or assignee, or to the sheriff who made the sale, for the use of the person so entitled thereto, the sum of money which was paid upon the sale, with interest from the time of the sale, at the rate of ten per centum a year.

2 R. S. 370, § 45 (2 Edm. 384), am'd. See 5 T. & C. 140.

§ 1447. By whom such redemption may be made.

The redemption, specified in the last section, may be made, either by the judgment debtor, whose right and title were sold, or by his heir, devisee, or grantee, who has acquired, by inheritance, devise, deed, sale, by virtue of a mortgage or of an execution, or by any other means, an absolute title to the property proposed to be redeemed; or, in a case specified in section 1458 or 1459 of this act, to a portion thereof.

Id., § 46.

§ 1448. Such redemption avoids the sale.

Upon payment being made, by a person entitled to redeem real property, as prescribed in the last two sections, the sale of

the property redeemed, and the certificates of the sale, as far as they relate thereto, become null and void.

§ R. S. 370, § 49, am'd.

§ 1449. When creditor may redeem.

Real property, sold by virtue of an execution, which remains, at the expiration of one year after the sale, unredeemed by the person or persons entitled to redeem it, as prescribed in the last three sections, may be redeemed, within three months after the expiration of the year, by the creditors specified, and upon the terms and in the manner prescribed, in the following sections of this article.

Id., § 50, remodelled.

§ 1450. What sum to be paid, etc., when creditor redeems.

In a case specified in the last section, a creditor, having in his own name, or as executor, administrator, assignee, trustee, or otherwise, a judgment rendered, or a mortgage duly recorded, at any time before the expiration of fifteen months from the time of the sale, which is a lien upon the real property sold, may redeem that property, by paying the sum of money, which was paid upon the sale thereof, with interest at the rate of seven per centum a year from the time of the sale, and executing a certificate of satisfaction, as prescribed in section 1493 of this act.

Id., § 51, as am'd by L. 1847, ch. 410, §§ 1 and 2 (4 Edm. 630, 631).

§ 1451. Redemption by another creditor from a redeeming creditor.

Where a creditor has redeemed real property, as prescribed in the last section, any other creditor, who might have redeemed it from the purchaser, as therein prescribed, may redeem it from the first redeeming creditor, as follows:

1. He must reimburse to the first redeeming creditor, his executor, administrator, or assignee, the sum paid by him to redeem the property, with interest at the rate of seven per centum a year, from the time of his redemption.

2. He must execute a certificate of satisfaction, relating to his judgment or mortgage, in like manner as the first redeeming creditor was required to do.

3. If the judgment or mortgage, by virtue of which the first creditor redeemed, is prior to the judgment or mortgage of the second creditor, the second creditor must also pay to the first creditor, the sum specified in the certificate of satisfaction, executed by him upon his redemption, with interest at the rate of seven per centum a year, from the time of his redemption; unless the first redeeming creditor's judgment or mortgage had ceased, when he redeemed, to be a lien as against the second redeeming creditor; in which case, the latter need not pay any part of the sum, specified in the certificate.

Id., § 55, am'd.

§ 1452. Id.; when second redeeming creditor has the prior lien.

Where the lien of the second redeeming creditor's judgment or mortgage, is prior to that of the first redeeming creditor's

judgment or mortgage, so that the former redeems, without paying the sum, specified in the latter's certificate of satisfaction, the latter may, without executing another certificate of satisfaction, again redeem from the former, or from any subsequent redeeming creditor, in a case, where he would have been entitled to redeem, if his first certificate had not been executed; and he has the same rights, with respect to any creditor redeeming from him, as if his first certificate had been executed, when he made his second redemption.

§ 1453. Subsequent redemptions by other creditors.

A third or other creditor, who might have redeemed, as prescribed in the last four sections, may redeem from the second or any other creditor, who has redeemed, in the manner, and upon the terms and conditions, prescribed in the last two sections.

2 R. S. 372, § 56.

§ 1454. When creditor may redeem after fifteen months.

A creditor, who might have redeemed within fifteen months after the sale, as prescribed in the last four sections, may redeem from any other redeeming creditor, although the fifteen months have elapsed; provided, that he thus redeems within twenty-four hours after the last previous redemption.

L. 1847, ch. 410, part of § 4, am'd.

§ 1455. When redemption must be made at sheriff's office.

A redemption, made by a creditor, on or after the last day of the fifteen months, must be made at the sheriff's office of the county. The sheriff, or his under-sheriff, or a deputy-sheriff, in his behalf, must attend at the sheriff's office, for that purpose, on the last day of the fifteen months, and on each day thereafter, in which a redemption can be made, during the time when the sheriff's office is required by law to be kept open. In the absence of the sheriff, the redemption may be made by paying the necessary money, and delivering the necessary papers, to the under-sheriff, or to any deputy-sheriff, present at the sheriff's office. If the term of office of the sheriff, who made the sale, has expired, and he, or his under-sheriff, or a deputy-sheriff authorized, in his behalf, to receive the necessary money and the necessary papers, is not present, the money may be paid, and the papers may be delivered, to the sheriff then in office, or to the under-sheriff or a deputy-sheriff of the latter.

Id., part of § 3, remodelled. See 5 T. & C. 140.

§ 1456. Original purchaser may redeem, when also a creditor.

If the purchaser, at the execution sale, of property, which can be redeemed by a creditor, as prescribed in this article, is also a creditor of the judgment debtor, and as such could redeem from a purchaser, or a redeeming creditor, he may avail himself of his judgment or mortgage, to redeem from any other redeeming creditor.

2 R. S. 372, § 57 (2 Edm. 387).

§ 1457. Creditor may redeem again under another judgment or mortgage.

The judgment creditor, by virtue of whose execution real property has been sold, cannot avail himself of the judgment,

upon which the execution was issued, to redeem the property; nor, except as otherwise specially prescribed in this article, can a creditor, who has once redeemed, avail himself of the same judgment or mortgage, to redeem again. But if either has another judgment or mortgage, which would entitle him to redeem, he may avail himself thereof for that purpose, in the same manner and on the same terms, as any other creditor.

2 R. S. 373, § 58, am'd.

§ 1458. Redemption by person entitled to redeem part.

Where a person, who has an absolute title to, or a judgment or mortgage, which is a lien upon, a distinct parcel only of the real property, sold by virtue of an execution, would be authorized, by this article, to redeem the property, if his title or lien extended to the whole, he may redeem, from a purchaser, the entire property sold, or from a prior redeeming creditor, the entire property redeemed by that creditor; except that if his title or lien extends to a distinct parcel only of one or more parts of the property, which were separately sold, he can redeem, from a purchaser, only the part or parts thus separately sold, in which his distinct parcel is included. (See § 1482.)

Substitute for 2 R. S. 372, §§ 52 and 53; extended in its application.

§ 1459. Redemption by owners of undivided shares.

Where two or more persons own undivided shares, as joint tenants, or as tenants in common, in real property, sold by virtue of an execution, or in a distinct parcel thereof, which has been separately sold; each of them may redeem, from the purchaser, as prescribed in sections 1446 and 1447 of this act, the share or interest, belonging to him, by paying a part of the purchase-money, bid for the property, or for that distinct parcel thereof bearing the same proportion to the whole, as the share or interest, proposed to be redeemed, bears to the property, or distinct parcel separately sold, of which it is a part; together with interest on the sum so paid, from the time of the sale, at the rate of ten per centum a year.

2 R. S. 371, § 48.

§ 1460. Id.; by creditors having liens on undivided shares.

Where the judgment or mortgage of a creditor, entitled to redeem, is a lien upon an undivided share, specified in the last section, he may redeem, from a purchaser, that undivided share, by paying him the same proportion of the purchase-money, which the owner must have paid to redeem it, as prescribed in the last section; or he may redeem, from a prior redeeming creditor, the entire property redeemed by the latter, with like effect and in the same manner, as if his lien attached to the whole.

Id., § 54, am'd. •

§ 1461. Right to redeem not affected by agreement.

The sheriff, the purchaser, the judgment creditor, or a redeeming creditor, cannot, by his agreement or other act, in any manner impair or prejudice the right of any other person to redeem, as prescribed in this article.

§ 1462. To whom money paid upon redemption.

The money required to be paid by a creditor, in order to effect a redemption of real property, as prescribed in this article, may

be paid to the purchaser or creditor, from whom the property is to be redeemed, his executor, administrator, or assignee; or it may be paid, for the use of the person so entitled thereto, to the sheriff who made the sale.

2 B. S. 373, part of § 59.

§ 1403. Certificate of satisfaction required to effect redemption by creditor.

The certificate of satisfaction, required to be executed by a creditor, in order to effect a redemption of real property, must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county; must describe, with reasonable certainty, the judgment or mortgage under which he redeems, and specify the sum due thereupon; and must state, that the redemption satisfies the judgment or mortgage, in full, or to a specified amount. It must be filed in the county clerk's office, at or before the time when the money is paid to effect the redemption, unless the money is paid to the sheriff; in which case, the certificate must also be delivered, at the time of the payment, to the sheriff, who must file it in the county clerk's office, as prescribed in section 1467 of this act. The county clerk, immediately after the execution and recording of the deed, must enter, in his docket, the satisfaction, or partial satisfaction, of a judgment, specified in a certificate so filed, as required by law, when a judgment is collected, by virtue of an execution. If a mortgage, specified in the certificate, is recorded in his office, he must cancel and discharge the mortgage of record, if it is satisfied by the certificate; or, if it is only partially satisfied, he must make a minute of the partial satisfaction, upon the record thereof. If the property mortgaged is situated in a county, in which there is a register, the county clerk must transmit a certified copy of the certificate to the register, who must, in like manner, cancel and discharge the mortgage of record, or make a minute of the partial satisfaction thereof. The clerk's and register's fees, for performing the services specified in this section, must be paid by the sheriff; who may require the person entitled to a deed to pay him the amount thereof, before the deed is delivered.

§ 1464. What evidence a redeeming judgment creditor must furnish.

In order to entitle a creditor by judgment to redeem real property, as prescribed in this article, he must, when he redeems, file in the county clerk's office, or deliver to the sheriff, as the case requires, the following evidence of his right:

1. A copy of the docket of the judgment, under which he claims the right to redeem, duly certified by the county clerk.

2. Each assignment of the judgment, which is necessary to establish his right. An assignment so filed or delivered must be acknowledged or proved, and certified, in like manner as a deed to be recorded, or the execution thereof must be proved, by the affidavit of the creditor, or of a witness thereto; unless it has been filed, and entered, as prescribed in article third of title first of chapter eleventh of this act, in which case, a certified copy thereof must be filed or delivered.

3. An affidavit, made by him, or his attorney or agent, stating truly the sum remaining unpaid on the judgment, at the time of claiming the right to redeem.

2 B. S. 373, § 60, with am'ts.

§ 1465. Id.; as to mortgage creditor.

In order to entitle a creditor by mortgage to redeem real property, as prescribed in this article, he must, when he redeems file in the county clerk's office, or deliver to the sheriff, the following evidence of his right:

1. A copy of the mortgage, under which he claims the right to redeem, duly certified by the clerk or register of the county.

2. Each assignment of the mortgage, which is necessary to establish his right, acknowledged or proved, and certified, as prescribed in the last section for an assignment of a judgment, unless it has been recorded; in which case a certified copy of the record must be filed or delivered.

3. An affidavit, made by him, or by his attorney or agent, stating truly the sum remaining unpaid on the mortgage, at the time of claiming the right to redeem.

L. 1838, ch. 525, § 2 (4 Edm. 624), am'd.

§ 1466. Id.; as to executor or administrator.

In either of the cases specified in the last two sections, if the person, proposing to redeem, claims to be entitled so to do, by reason of his being an executor or administrator of a person, who, if living, would be entitled to redeem, he must file or deliver, with the other papers therein prescribed, a certified copy or a sworn copy of his letters testamentary, or letters of administration.

Id., subd. 3, amended.

§ 1467. Officers to keep papers open to inspection) when to file them.

The sheriff, to whom one or more papers, specified in the last four sections, are delivered, must keep them open, at all reasonable times during the period allowed for redemption, to the inspection of all persons interested. He must have all those papers at the sheriff's office, at the times when he is required to attend thereat, for the purpose of enabling creditors to redeem, as prescribed by law; and he must file them in the county clerk's office, within three days after the execution of the deed.

§ 1468. When redemption takes effect.

A redemption by a creditor is effected, only when he has paid all the money, required to be paid, and filed or delivered all the papers, required to be filed or delivered, as prescribed in this article, and a waiver of any of those requirements is void, as against a person who is entitled subsequently to redeem. Where a redemption is thus effected, it vests in the redeeming creditor all the right, title, and interest, which the purchaser acquired by the sale.

§ 1469. Certificate to be given, when redemption made.

Where a redemption is made, as prescribed in this article, the officer or other person, to whom money is paid, or a paper is delivered, for the purpose of effecting the redemption, must execute and deliver, to the person paying the money or delivering the paper, a certificate, stating all the facts which transpired before him, with respect to the redemption.

L. 1847, ch. 410, § 5 (4 Edm. 631), am'd.

§ 1470. Certificate may be acknowledged and recorded.

Such a certificate may be acknowledged or proved, and certified in like manner as a deed to be recorded in the county where the

property is situated. The recording thereof, in the office of the clerk or register of that county, in the book for recording deeds, has the same effect, as against subsequent purchasers and incumbrancers, as the recording of a conveyance.

L. 1847, ch. 410, § 8, am'd.

§ 1471. [Am'd, 1886.] When and by whom conveyance to be executed.

Immediately after the expiration of fifteen months from the time of *sale; except where a redemption has been made on the last day of the fifteen months, and, in that case, immediately after the expiration of twenty-four hours from the last redemption; the sheriff, who made the sale, must execute the proper deed or deeds, in order to convey to the person or persons entitled thereto, the part or parts of the property sold, which have not been redeemed by the judgment debtor, his heir, devisee, or assignee. The deed conveys to the grantee therein the right, title, and interest, which were sold by the sheriff. After the same shall have been recorded for twenty years in the county where the real estate is situated, it shall be presumptive evidence of the facts therein stated.

2 R. S. 373, § 62, am'd to accord with L. 1847, ch. 410, § 4; L. 1886, ch. 637.

§ 1472. To whom conveyance to be executed.

If any part of the property remains unredeemed by a creditor it must be conveyed, by the sheriff, to the purchaser upon the sale, except where the certificate of sale has been assigned; in which case, it must be conveyed to the last assignee. Any part or parts of the property sold, which have been redeemed by a creditor, must be conveyed by the sheriff, to the last redeeming creditor, except where he has assigned the certificate of redemption, or has executed any other assignment of his right, title, and interest in the property redeemed by him; in which case, it must be conveyed to the last assignee.

L. 1835, ch. 189, part of § 1 (4 Edm. 622), as am'd by L. 1867, ch. 116, § 1 (7 Edm. 60).

§ 1473. When conveyance made to executor or administrator; effect thereof.

Where a person, entitled to a deed, dies before the delivery of the deed, the sheriff must execute and deliver the deed to his executor or administrator. The property so conveyed must be held, in trust for the use of the heirs or devisees of the decedent, subject to the dower of his widow, if there is one; but it may be sold, in a proper case, for the payment of his debts, in the same manner as land, whereof he died seized.

2 R. S. 374, §§ 63 and 64 (2 Edm. 388), consolidated.

§ 1474. Assignment must be acknowledged and filed.

Before an assignee, or his executor or administrator, is entitled to a deed, as prescribed in the last two sections, each assignment, under which the deed is claimed, must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county where the property is situated, and must be filed in the office of the clerk of that county.

L. 1835, ch. 189, § 2 (4 Edm. 623), am'd.

* The word "the" omitted in engrossing.

§ 1475. Under-sheriff or successor to act, if sheriff dies.

Where a sheriff dies, is removed from office, or becomes otherwise disqualified to act, at any time after making a sale of real property, by virtue of an execution, the property, or a distinct parcel thereof, may be redeemed, by paying the necessary money, and delivering the necessary papers, to his under-sheriff, who must also execute and deliver the proper deed or deeds of property, not redeemed by the judgment debtor, his heir, devisee, or grantee. If the under-sheriff also dies, is removed from office, or becomes otherwise disqualified to act, the property may be redeemed, by paying the necessary money, and delivering the necessary papers, to the sheriff's successor in office, who must also execute and deliver the proper deed or deeds. The under-sheriff, or the sheriff's successor, as the case requires, possesses all the powers, and is subject to all the duties and liabilities, of the sheriff who made the sale, touching the redemption and conveyance of property sold and the proceedings relating thereto; and each provision of law, regulating those proceedings, and applicable to the sheriff who made the sale, is applicable to his under-sheriff or successor. This section applies where a sale was made, either before or after this act takes effect.

Substitute for 2 R. S. 374, §§ 65, 66 and 67 (2 Edm. 388), and L. 1867, ch. 116, § 1 (7 Edm. 60).

§ 1476. Money may be paid, etc., to under-sheriff, or deputy-sheriff, who sold property.

Where real property is sold, by virtue of an execution, by the under-sheriff or a deputy sheriff, in behalf of the sheriff, money required to be paid, or a paper required to be delivered, to the sheriff, in order to effect a redemption, as prescribed in this article, at any time before the last day of the fifteen months from the time of the sale, may be paid or delivered, either to the sheriff, or to the under-sheriff or deputy-sheriff, who made the sale.

§ 1477. Application of this article to sale by coroner, or person specially appointed, etc.

Where real property is sold, by virtue of an execution, by a person specially appointed by the court, as prescribed in section 1362 or section 1388 of this act, it may be redeemed, as prescribed in this article, as if it had been sold by the sheriff, except as follows:

1. Money, required to be paid, or a paper, required to be delivered, to the sheriff, in order to effect a redemption, as prescribed in this article, at any time before the last day of the fifteen months from the time of the sale, must be paid to the officer who made the sale; unless the person entitled to redeem, his agent or attorney, files with the clerk of the county, with the paper or papers required to be filed, or to be delivered to the sheriff, for the purpose of effecting the redemption, his affidavit, to the effect, that the officer is dead; or has been removed; or, where he is a coroner, that he is no longer in office; or that after diligent search, the affiant has been unable to find him within the county; in which case, the money may be paid into court, by paying it to the county treasurer, to the credit of the cause, with like effect, as where it is paid to the sheriff, after a sale by the latter.

2. The provisions of section 1455 of this act, apply to a redemption, upon a sale made as prescribed in this section; and the officer, who sold the property, must attend, as the sheriff is therein required to attend. If he is not present, the redemption

may be effected, as prescribed in that section, for redemption in a case, where the term of office of the sheriff, who made the sale, has expired.

§ 1478. Id., where coroner or person appointed dies, etc.

If, when the period for redemption expires, a coroner, or a person specially appointed, by the court, who has sold real property, by virtue of an execution, is dead, or has been removed, or, in the case of a coroner, if he is no longer in office, the court must, upon the application of a person entitled to a deed, appoint a person to execute the deed accordingly.

ARTICLE FOURTH.

Remedies for failure of title to real property sold, and to enforce contribution.

Sec. 1479. When evicted purchaser may recover purchase-money.

1480. Remedy of judgment creditor thereupon.

1481. Contribution between owners of real property.

1482. *Id.*; when part owner redeems.

1483. Order of contribution.

1484. Contribution, how enforced by means of original judgment.

1485. Requisites to preserve the lien.

1486. Entry upon the docket.

§ 1479. When evicted purchaser may recover purchase-money.

The purchaser of real property, sold by virtue of an execution, his heir, devisee, grantee, or assignee, who is evicted from the possession thereof, or against whom judgment is rendered, in an action to recover the same, may recover the purchase-money, with interest, from the person for whose benefit the property was sold, where the judgment was rendered, or the eviction occurred, in consequence, either:

1. Of any irregularity in the proceedings concerning the sale; or

2. Of the judgment, upon which the execution was issued, being vacated or reversed, or set aside for irregularity, or error in fact.

2 B. S. 375, § 68 (2 Edm. 389), remodelled.

§ 1480. Remedy of judgment creditor thereupon.

Where final judgment is rendered, against the defendant, in an action specified in subdivision first of the last section, the judgment, by virtue of which the sale was made, remains, in his favor, valid and effectual against the judgment debtor therein, his executor, administrator, heir, or devisee, for the purpose of collecting the sum paid on the sale, with interest. He may accordingly have a further execution upon that judgment; but the execution does not affect a purchaser in good faith, or an incumbrancer by mortgage, judgment, or otherwise, whose title or whose incumbrance accrued, before the actual levy thereof.

Id., § 69, am'd.

§ 1481. Contribution between owners of real property.

Where the real property of two or more persons is liable to satisfy a judgment, and the whole of the judgment, or more than a due proportion thereof, has been collected, by a sale of the real property of one or more of them, by virtue of an execution issued upon the judgment; the person so aggrieved, or his executor or administrator, may maintain an action, to compel a just and equal contribution by all the persons, whose real property ought to contribute as prescribed in the next section but one.

Id., § 70, am'd.

§ 1482. *Id.*; when part owner redeems.

Where the heir, devisee, or grantee, of a judgment debtor, having an absolute title to a distinct parcel of real property,

sold by virtue of an execution, redeems, as prescribed in section 1458 of this act, the property sold, or any part or parts thereof separately sold, which include his property; he may, in like manner, maintain an action, to compel a just and equal contribution by those who own the residue of the property thus redeemed.

2 R. S. 375, § 72, am'd.

§ 1483. Order of contribution.

Where an action is brought, as prescribed in the last two sections, the real property is liable to contribution in the following order:

1. If it comprises different undivided shares or distinct parcels, which have been conveyed by the judgment debtor, they are liable in succession, commencing with the portion last conveyed.

2. If it comprises different undivided shares or distinct parcels, which have been sold by virtue of two or more executions, they are liable in succession, commencing with the portion sold under the last and youngest judgment.

3. If it comprises different undivided shares or distinct parcels, some of which have been conveyed by the judgment debtor, and some of which have been sold by virtue of one or more executions, they are respectively liable in succession, according to the order prescribed in the first and second subdivisions of this section.

Id., § 71, am'd.

§ 1484. Contribution, how enforced by means of original judgment.

For the purpose of enforcing contribution, as prescribed in the last section, the court, in which the action is brought, may, and in a proper case, must, permit the plaintiff to use the original judgment, and to collect, by an execution issued thereupon, out of any real property subject to the lien thereof, the sum which ought to be contributed by that property. For that purpose, the lien of the original judgment, upon that real property, when preserved, as prescribed in the next section, continues, for the term prescribed in sections 1251 and 1255 of this act, to the extent of the sum, which ought to be so contributed, notwithstanding the payment made by the party seeking contribution.

Id., § 72, am'd.

§ 1485. Requisites to preserve the lien.

The lien of the original judgment may be preserved, as prescribed in the last section, by filing, in the clerk's office of the county where the real property is situated, within twenty days after the payment, for which contribution is claimed, an affidavit, in behalf of the person aggrieved, stating the sum paid, and his claim to use the judgment for the reimbursement thereof, with a notice, requiring the clerk to make the entries specified in the next section. But the lien is not preserved, as against a grantee or mortgagee in good faith, for a valuable consideration, without notice, and before the entries are actually made.

Id., § 73, am'd.

§ 1486. Entry upon the docket.

On filing the affidavit and notice, the clerk must make, upon the docket of the judgment, an entry, stating the sum paid, and that the judgment is claimed to be a lien to that amount. Where

it is desired to preserve the lien, upon property situated in two or more counties, a similar affidavit and notice must be filed with, and a similar entry made by the clerk of each county.

2 R. S. 375, § 74, am'd.

TITLE III.

Execution against the person.

- Sec. 1487. In what cases execution may be issued against the person.
 1488. Id.; against a woman.
 1489. When execution against property must be first issued.
 1490. Simultaneous executions not allowed against property and person.
 1491. Id.; when debtor has been taken.
 1492. New execution may issue after escape.
 1493. Id.; when debtor dies charged in execution.
 1494. Id.; when creditor discharges debtor after thirty days.
 1495. New execution not to be enforced against real property sold, etc.

§ 1487. In what cases execution may be issued against the person.

Where a judgment can be enforced by execution, as prescribed in section 1240 of this act, an execution, against the person of the judgment debtor, may be issued thereupon, subject to the exception specified in the next section, in either of the following cases:

1. Where the plaintiff's right to arrest the defendant depends upon the nature of the action.

2. [Am'd, 1879.] In any other case, where an order of arrest has been granted and executed in the action, and if it was executed against the judgment debtor where it has not been vacated.

Co. Proc., first two sentences of § 288.

§ 1488. [Am'd, 1879.] Id.; against a woman.

But an execution cannot be issued against the person of a woman, unless an order of arrest has been granted and executed in the action, and, if it was executed against the judgment debtor, has not been vacated.

1 T. & C., Addenda, 10.

§ 1489. When execution against property must be first issued.

Unless the judgment debtor is actually confined, without having been admitted to the liberties of the jail, by virtue of an execution against his person, issued in another action, or of an order of arrest or a surrender by his bail, in the same action, an execution against his person cannot be issued, until an execution against his property has been returned, wholly or partly unsatisfied. If he is a resident of the State, the execution against his property must have been issued to the county where he resides.

Co. Proc., part of § 288, am'd.

§ 1490. Simultaneous executions not allowed against property and person.

An execution against the person of the judgment debtor cannot be issued, without leave of the court, while an execution against his property, issued in the same action, remains unreturned; and an execution against his property cannot be issued, without

leave of the court, while an execution against his person, issued in the same action, remains unreturned.

2 R. S. 364, § 6 (2 Edm. 577).

§ 1491. Id.; when debtor has been taken.

Where a judgment debtor has been taken, and remains in custody, by virtue of an execution against his person, another execution cannot be issued, in the same action, against his person or his property, except in a case specially prescribed by law.

Id., § 7.

§ 1492. New execution may issue after escape.

If a judgment debtor escapes, after having been taken, by virtue of an execution against his person, he may be retaken, by virtue of a new execution against his person; or an execution against his property may be issued, as if the execution, by virtue of which he was taken, had been returned, without his having been taken.

Id., § 8.

§ 1493. Id.; when debtor dies charged in execution.

Where a judgment debtor, who has been taken by virtue of an execution against his person, dies while in custody, a new execution against his property may be issued, as if the execution, by virtue of which he was taken, had been returned without his having been taken.

2 R. S. 368, § 28 (2 Edm. 381). Sections 29 and 30 are in § 1495, post. See §§ 1380, 1381, ante.

§ 1494. Id.; when creditor charges debtor after thirty days.

At any time after a judgment debtor has remained in custody, by virtue of an execution against his person, for the space of thirty days, the judgment creditor may serve upon the sheriff a written notice, requiring him to discharge the judgment debtor from custody, by virtue of the execution. Whereupon the sheriff must discharge the judgment debtor, and return the execution accordingly. After service of such a notice, another execution, against the person of the judgment debtor, cannot be issued upon the judgment; but after his discharge, the judgment creditor may otherwise enforce the judgment, as if the execution, from which he was discharged, had been returned, without his having been taken.

L. 1857, ch. 427, § 1, amending 2 R. S. 34, § 17 (2 Edm. 34).

§ 1495. New execution not to be enforced against real property sold, etc.

A new execution against property, issued in a case specified in the last two sections, cannot be enforced against an interest in real property, including a chattel real, which was purchased in good faith, from the judgment debtor, after the recovery of the judgment upon which it is issued; or which was sold by virtue of an execution, issued upon a previous or subsequent judgment.

REAL PROPERTY.

CHAPTER XIV.

Special Provisions Regulating Actions relating to Property.

TITLE I.—Actions Relating to Real Property.

TITLE II.—Actions Relating to Chattels.

TITLE I.

Actions relating to real property.

- Article 1.** Action to recover real property.
2. Action for partition.
3. Action for dower.
4. Action to foreclose a mortgage.
5. Action to compel the determination of a claim to real property.
6. Action for waste.
7. Action for a nuisance.
8. Other actions relating to real property.
9. Provisions applicable to two or more of the actions specified in this title.
10. Evidence in actions or proceedings involving a title to real property.

ARTICLE FIRST.

Action to recover real property.

- Sec 1496.** Plaintiff may recover damages with the land.
1497. Rents and profits to be included in damages.
1498. Mortgagee cannot maintain action.
1499. Action cannot be maintained for dower.
1500. Separate action by joint tenant or tenant in common.
1501. Grantee of lands held adversely may maintain action.
1502. Against whom action to be brought.
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1527. [Repealed.]
1528. [Repealed.]
1529. Effect on possession of vacating judgment.
1530. [Repealed.]
1531. Damages recoverable; set-off by defendant.

§ 1496. Plaintiff may recover damages with the land.

In an action to recover real property, or the possession thereof, the plaintiff may demand in his complaint, and in a proper case recover, damages for withholding the property.

New in form. See Co. Civ. Proc., § 484, subd. 5; Co. Proc., § 167, subd. 5. See § 484, subd. 5.

§ 1497. Rents and profits to be included in damages.

Those damages include the rents and profits or the value of the use and occupation of the property, where either can legally be recovered by the plaintiff.

Annulling the law as settled in 57 N. Y. 151; 2 R. S. 310, §§ 43, 44 and 45 (2 Edm. 219). See § 1531, post.

§ 1498. Mortgagee cannot maintain action.

A mortgagee, or his assignee or other representative, cannot maintain such an action, to recover the mortgaged premises.

2 R. S. 312, § 57 (2 Edm. 321).

§ 1499. [Am'd, 1898.] Action cannot be maintained for dower.

Such an action can not be maintained in a case where an action for dower may be maintained, as prescribed in article third of this title; or

2. Where in any city the real property consist of a strip of land not exceeding six inches in width upon which there stands the exterior wall of a building erected partly upon said strip and partly upon the adjoining lot, and a building has been erected upon land of the plaintiff abutting on the said wall, unless said action be commenced within one year after the completion of the erection of such wall or within one year after the first day of September, eighteen hundred and ninety-eight. But an action may be maintained, if commenced within the further period of one year, for the recovery of damages by reason of the erection of such wall, and upon the satisfaction of the judgment for such damages the title of the plaintiff to such strip of land shall thereby be transferred to and vest in the defendant. If neither an action of ejectment nor an action for the recovery of damages be brought within the period hereby limited therefor, the person in possession of such lands shall be deemed to have an easement in said strip of land so long as the said wall partly erected thereon shall stand, and no longer, and in case of the destruction of such wall the owner of such strip shall have the same right to take or recover the possession thereof as if such wall had never existed.

See § 1804, post; L. 1898, ch. 517. In effect Sept. 1, 1898.

§ 1500. Separate action by joint tenant or tenant in common.

Where two or more persons are entitled to the possession of real property, as joint tenants or tenants in common, one or more of them may maintain such an action, to recover his or their undivided shares in the property, in any case where such an action might be maintained by all.

§ 1501. [Am'd, 1882.] Grantee of lands held adversely may maintain action.

Such an action may be maintained by a grantee, his heir or devisee, in the name of the grantor, or his heir, where the convey-

ance, under which he claims, is void because the property conveyed was held adversely to the grantor. The plaintiff must be allowed to prove the facts to bring the case within this section. In such an action a judgment against the plaintiff shall not award costs to the defendant; but where the defendant is entitled to costs as prescribed in section three thousand two hundred and twenty-nine of this act, they may be taxed, and the person who maintained the action in the plaintiff's name may be compelled to pay the same as prescribed in section three thousand two hundred and forty-seven of this act,

Co. Proc., § 111; 1 R. S. 739, § 147 (1 Edm. 690).

§ 1502. Against whom action to be brought.

Where the complaint demands judgment for the immediate possession of the property, if the property is actually occupied, the occupant thereof must be made defendant in the action. If it is not so occupied, the action must be brought against some person exercising acts of ownership thereupon, or claiming title thereto, or an interest therein, at the time of the commencement of the action.

2 R. S. 304, § 4 (2 Edm. 312).

§ 1503. Who may be joined as defendants.

In either of the cases specified in the last section, any other person claiming title to, or the right to the possession of, the real property sought to be recovered, as landlord, remainderman, reversioner, or otherwise adversely to the plaintiff, may be joined as defendant in an action therefor.

See Co. Proc., §§ 118 and 1500.

§ 1504. When action may be brought for non-payment of rent.

When six months' rent or more is in arrear, upon a grant reserving rent, or upon a lease of real property, and the grantor or lessor, or his heir, devisee, or assignee, has a subsisting right by law to re-enter for the failure to pay the rent, he may maintain an action to recover the property granted or demised, without any demand of the rent in arrear, or re-entry on the property.

2 R. S. 505, § 30 (2 Edm. 521).

§ 1505. Id.; when right of re-entry is reserved for want of distress.

Where a right of re-entry is reserved and given to a grantor or lessor of real property, in default of a sufficiency of goods and chattels whereon to distrain for the satisfaction of rent due, the re-entry may be made, or an action to recover the property demised or granted, may be maintained by the grantor or lessor, or his heir, devisee, or assignee, at any time after default in the payment of the rent; provided the plaintiff, at least fifteen days before the action is commenced, serves upon the defendant a written notice of his intention to re-enter, personally, or by leaving it at his dwelling-house on the premises with a person of suitable age and discretion; or, if the defendant cannot be found with due diligence, and has no dwelling-house on the premises, whereat a person of suitable age and discretion can be found, by posting it in a conspicuous place on the premises.

L. 1846, ch. 274, § 3 (4 Edm. 432), am'd.

§ 1506. Action against tenant, when proceedings to be stayed.

At any time before final judgment for the plaintiff is rendered, and the judgment-roll is filed, in an action brought as prescribed in either of the last two sections, the defendant may pay or tender to the plaintiff or his attorney, or pay into court, all the rent then in arrear, with interest and the costs of the action to be taxed; and thereupon the complaint must be dismissed.

Amending 2 R. S. 506, § 32 (2 Edm. 521).

§ 1507. Id.; amount of rent in arrear to be stated in judgment.

In such an action, a verdict, report, or decision in favor of the plaintiff, must fix the amount of rent in arrear to the plaintiff, or, if judgment is taken by default, the amount thereof must be ascertained by or under the direction of the court; and, in either case, it must be stated in the judgment.

§ 1508. Id.; when possession to be restored to defendant.

At any time within six months after possession of the property, awarded to the plaintiff in such an action, has been delivered to him by virtue of an execution issued upon a judgment rendered therein, the defendant, or any person who has succeeded to his interest, or a mortgagee of the lease, or of any part thereof, who was not in possession when final judgment was rendered, may pay or tender to the plaintiff, or his executor, administrator, or attorney, or may pay into court, for the use of the person so entitled thereto, the amount of rent in arrear, as stated in the judgment, and the costs of the action, with interest, and all other charges incurred by the plaintiff.

2 R. S. 506, § 33 (2 Edm. 521).

§ 1509. The same.

Within three months after making the payment or tender, the person who made it, or his representative, may apply to the court for an order that possession of the property be delivered to him; and thereupon, upon proof of the facts, and payment of the sum due by reason of rent accruing since the judgment was rendered, and upon compliance with all other terms to be complied with by the grantee or lessee, to the time of the application, the court must make an order, directing that possession of the property be delivered to the applicant, who shall hold and enjoy the same, without any new grant or lease thereof, according to the terms of the original grant or lease. Notice of the application must be served upon the plaintiff's attorney.

2 R. S. 506, §§ 35 and 36 (2 Edm. 522).

§ 1510. Id.; use of property, when set off against rent.

If possession of the property recovered has been delivered to the plaintiff, by virtue of an execution issued upon a judgment in the action, the order must provide for setting off the sum which the plaintiff has made, or which he might, without wilful neglect, have made, of the property, during the possession thereof, against the rent accruing after the judgment was rendered, and for reimbursement to the applicant of the balance, if any, of the sum paid into court by him, after making the set-off prescribed in this section.

Id., § 38.

§ 1511. Property claimed in action; how described in complaint.

The complaint must describe the property claimed with common certainty, by setting forth the name of the township or tract, and the number of the lot, if there is any, or in some other appropriate manner; so that, from the description, possession of the property claimed may be delivered, where the plaintiff is entitled thereto.

2 R. S. 304. § 8 (2 Edm. 313), am'd. See, also, § 1435, ante.

§ 1512. Motion for plaintiff's attorney to produce his authority.

A defendant, in an action to recover real property or the possession thereof, may, at any time before answering, upon an affidavit that evidence of the authority of the plaintiff's attorney to commence the action has not been served upon him, apply, upon notice, to the court or judge thereof, for an order directing the attorney to produce such evidence.

Amending and consolidating §§ 17 and 18, 2 R. S.

§ 1513. Order thereupon.

Upon such an application, the court or judge must, in a proper case, make an order, requiring the plaintiff's attorney to produce, as directed therein, evidence of his authority to commence the action, and staying all proceedings therein, on the part of the plaintiff, until the evidence is produced.

Id., § 19.

§ 1514. Evidence of authority.

Any written request of the plaintiff or his agent, to the plaintiff's attorney, to commence the action, or any written recognition of his authority so to do, verified by the affidavit of the attorney, or any other competent witness, is sufficient presumptive evidence of such authority.

Id., § 20.

§ 1515. When ouster to be proved.

Where the action is brought by a tenant in common, or a joint tenant, against his co-tenant, the plaintiff, besides proving his right, must also prove that the defendant actually ousted him, or did some other act, amounting to a total denial of his right.

Id., § 27.

§ 1516. Rule when there are distinct occupants.

Where there are two or more defendants, and it is alleged, in the answer of either of them, that he occupies in severalty, or that he and one or more of his co-defendants occupy jointly, one or more distinct parcels, and that one or more other defendants possess other parcels, in severalty or jointly, the court may, in its discretion, upon the application of the plaintiff, and upon such terms as justice requires, direct that the action be divided into as many actions as are necessary. If the action is not so divided, and it appears, upon the trial, that the allegation is true, the plaintiff must, before the evidence is closed, elect against which defendant or defendants he will proceed; and a judgment dismissing the complaint must thereupon be rendered, in favor of the other defendants.

Id., § 29, in substance.

§ 1517. The last section qualified.

The last section does not apply to a case, where two or more defendants occupy different apartments in a building. In such a case, in an action to recover the building and its curtilage, the plaintiff is entitled to judgment jointly against all the defendants who are liable to him.

§ 1518. When plaintiff may recover against one defendant subject to rights of others.

Section 1518 of this act does not apply to a case, where one or more defendants, answering as therein prescribed, hold under another defendant, and the plaintiff elects to proceed against the latter, subject to the rights and interests of the former. In such a case, the proceedings against the defendant so answering must be stayed until final judgment; and if the plaintiff recovers final judgment against the defendant, under whom they hold, the judgment operates as a transfer to the plaintiff of that defendant's right, title, and interest, and the costs of the defendant or defendants so answering are in the discretion of the court.

§ 1519. Verdict, etc., to state nature of plaintiff's estate.

A verdict, report, or decision, in favor of the plaintiff, in an action specified in this article, must specify the estate of the plaintiff in the property recovered, whether it is in fee, or for life, or for a term of years, stating for whose life it is, or specifying the duration of the term, if the estate is less than a fee.

§ 1520. Expiration of plaintiff's title before trial.

If the right or title of the plaintiff, in an action specified in this article, expires after the commencement of the action, but before the trial, and he would have been entitled to recover, but for the expiration, the verdict, report, or decision must be rendered according to the fact; and the plaintiff is entitled to judgment for his damages for the withholding of the property, to the time when his right or title so expired.

2 R. S. 308, § 21 (2 Edm. 316).

§ 1521. Abatement of action.

The provisions of title fourth of chapter eighth of this act, as applied to an action specified in this article, are subject to the qualification that the court may, in its discretion, proceed as prescribed either in that title or in the next two sections.

Substituted for *Id.*, § 32, and L. 1865.

§ 1522. Action to be divided, when different persons succeed to different parcels.

Where, upon the death of a party, different persons succeed to the decedent's title to, or interest in, different distinct parcels of the property sought to be recovered, the court may, upon motion, and upon such terms as justice requires, direct that the action be divided into as many actions as are necessary; and that the successor to the title or interest of the decedent, to or in each distinct parcel, be substituted as plaintiff or defendant, as the case requires, in an action relating thereto.

§ 1523. *Id.*; when different persons succeed to real property and to rents and profits.

Where the plaintiff seeks to recover damages for withholding the property, and, upon the death of a party, different persons suc-

ceed to the decedent's right or liability for those damages, and to his title to or interest in the property, the court may, upon motion made upon notice to the persons to be affected, and upon such terms as justice requires, direct the action to be divided into two actions, one to recover the possession of the property, with the rents and profits thereof accruing after the decedent's death, the other to recover the damages accruing before his death; and that the successor in interest of the decedent, with respect to the cause of action in each action, be substituted as plaintiff or defendant therein, as the case requires.

Substituted for 2 R. S. 311, § 54 (2 Edm. 320).

§ 1524. [Am'd, 1911.] Effect of judgment rendered after trial of issue of fact.

A final judgment in an action specified in this article, rendered upon the trial of an issue of fact, is conclusive, as to the title established in the action, upon each party against whom it is rendered, and every person claiming from, through or under him, by title accruing, either after the judgment-roll is filed, or after a notice of the pendency of the action is filed in the proper county clerk's office, as prescribed in article ninth of this title.

2 R. S. 309, § 36 (2 Edm. 317), as am'd by L. 1862, ch. 485; am'd by L. 1911, ch. 509, in effect Sept. 1, 1911.

§ 1525. [Repealed by L. 1911, ch. 509, in effect Sept. 1, 1911.]

§ 1526. [Am'd, 1911.] Effect of judgment by default, etc.

A final judgment for the plaintiff, rendered in an action specified in this article, otherwise than upon the trial of an issue of fact, is conclusive upon the defendant, and every person claiming from, through, or under him, by title accruing, either after the judgment-roll is filed, or after a notice of the pendency of the action is filed in the proper county clerk's office, as prescribed in article ninth of this title.

Id., § 38. Am'd by L. 1911, ch. 509, in effect Sept. 1, 1911.

§ 1527. [Repealed by L. 1911, ch. 509, in effect Sept. 1, 1911.]

§ 1528. [Repealed by L. 1911, ch. 509, in effect Sept. 1, 1911.]

§ 1529. [Am'd, 1911.] Effect on possession of vacating judgment.

Where the plaintiff has taken possession of real property by virtue of a final judgment, his possession shall not be in any way affected by the vacating of the judgment. In such a case, if the defendant thereafter recovers final judgment in the action, it must award to him the restitution of the possession of the property; and he may have an execution thereupon for the delivery of the possession to him, as if he was plaintiff.

Id., § 41. am'd. Am'd by L. 1911, ch. 509, in effect Sept. 1, 1911.

§ 1530. [Repealed by L. 1911, ch. 509, in effect Sept. 1, 1911.]

§ 1531. Damages recoverable; set-off by defendant.

In an action, brought as prescribed in this article, the plaintiff, where he recovers judgment for the property, or possession of the property, is entitled to recover, as damages, the rents and

profits, or the value of the use and occupation, of the real property recovered, for a term not exceeding six years; but the damages shall not include the value of the use of any improvements made by the defendant, or those under whom he claims. Where permanent improvements have been made, in good faith, by the defendant, or those under whom he claims, while holding, under color of title, adversely to the plaintiff, the value thereof must be allowed to the defendant, in reduction of the damages of the plaintiff, but not beyond the amount of those damages.

ARTICLE SECOND.

Action for partition.

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§ 1532. When action for partition may be brought.

Where two or more persons hold and are in possession of real property, as joint tenants or as tenants in common, in which

either of them has an estate of inheritance, or for life, or for years, any one or more of them may maintain an action for the partition of the property, according to the respective rights of the persons interested therein; and for a sale thereof, if it appears that a partition thereof cannot be made, without great prejudice to the owners.

2 R. S. 317, § 1 (2 Edm. 326), am'd. See Rules 65, 66.

§ 1533. [Am'd, 1887.] Id.; by remainderman.

Where two or more persons hold as joint tenants, or as tenants in common, a vested remainder or reversion, any one or more of them may maintain an action for the partition of the real property to which it attaches, according to their respective shares therein, subject to the interest of the person holding the particular estate therein, but no sale of the premises in such an action shall be made except by and with the consent in writing, to be acknowledged or proved and certified in like manner as a deed, to be recorded by the person or persons owning and holding such particular estate or estates; and if in such an action it shall appear in any stage thereof that partition or sale cannot be made without great prejudice to the owners, the complaint must be dismissed. The dismissal of the complaint, as herein provided, shall not affect the right of any party to bring a new action, after the determination of such particular estate.

L. 1887, ch. 683.

§ 1534. Id.; by an infant.

An action for the partition of real property shall not be brought by an infant, except by the written authority of the surrogate of the county in which the property, or a part thereof, is situated. The authority shall not be given, unless the surrogate is satisfied, by affidavit or other competent evidence, that the interests of the infant will be promoted by bringing the action. A judgment for a partition or sale shall not be rendered in such an action, unless the court is satisfied that the interests of the infant will be promoted thereby, and that fact is expressly recited in the judgment.

L. 1862, ch. 277, §§ 1 and 2, am'd.

§ 1535. Guardian ad litem; how appointed.

A guardian ad litem for an infant party, in an action for partition, can be appointed only by the court.

Id., and 2 R. S. 317, § 2 (2 Edm. 326). See, also, § 472, ante.

§ 1536. [Am'd, 1884.] Security.

The security to be given by the guardian ad litem for an infant party, in an action for partition, must be a bond to the people of this State, executed by him and one or more sureties, as the court directs, in a sum fixed by the court, conditioned for the faithful discharge of the trust committed to him as guardian, and to render a just and true account of his guardianship, in any court or place, when thereunto required. The bond must be filed with the clerk, before the guardian enters upon the execution of his duties; and it cannot be dispensed with, although he is the general guardian of the infant.

2 R. S. 317, §§ 3 and 4 (2 Edm. 326), am'd; L. 1884, ch. 404. See Rule 4.

§ 1537. When heir may maintain action for partition of devised property.

A person claiming to be entitled, as a joint tenant or a tenant in common, by reason of his being an heir of a person who died, holding and in possession of real property, may maintain an action for the partition thereof, whether he is in or out of possession, notwithstanding an apparent devise thereof to another by the decedent, and possession under such a devise. But in such an action, the plaintiff must allege and establish that the apparent devise is void.

L. 1853, ch. 238, § 2 (4 Edm. 504).

§ 1538. [Am'd, 1896, 1897, 1898, 1905, 1906.] Who must be parties.

Every person having an undivided share, in possession or otherwise, in the property, as tenant in fee, for life, by the courtesy, or for years; every person entitled to the reversion, remainder or inheritance of an undivided share, after the determination of a particular estate therein; every person who, by any contingency contained in a devise or grant, or otherwise, is or may become entitled to a beneficial interest in an undivided share thereof, provided that where a future estate or interest is limited in any contingency to the persons who shall compose a certain class upon the happening of a future event, it shall be sufficient to make parties to the action the persons who would have been entitled to such estate or interest if such event had happened immediately before the commencement of the action; every person having an inchoate right of dower in an undivided share in the property; and every person having a right of dower in the property, or any part thereof, which has not been admeasured, must be made a party to an action for a partition. But no person, other than a joint tenant, or a tenant in common of the property, shall be a plaintiff in the action. Whenever an action for the partition of real property shall be brought before the expiration of three years from the time when letters of administration or letters testamentary, as the case may be, shall have been issued upon the estate of the decedent from whom the plaintiff's title is derived, the executors or administrators, as the case may be, if any, of the estate of said decedent, shall be made parties defendant. In case no executor or administrator of such decedent shall have been appointed at the time said action is begun, that fact shall be alleged in the complaint. The executors or administrators, if any, as the case may be, of a deceased person, who, if living, should be a party to such action, shall be made parties defendant therein, and in case no executor or administrator of such deceased person shall have been appointed, that fact shall be alleged in the complaint. Where the interlocutory judgment directs a sale of the premises sought to be partitioned, or of some part thereof, the judgment may, in the discretion of the court, direct that the premises so sold pursuant to such interlocutory judgment shall be free from the lien of every debt of such decedent or decedents, except debts which were a lien upon the premises before the death of such decedent or decedents. When the action is brought before three years have elapsed from the granting of such letters of administration or letters testamentary, as the case may be, upon the estate of the decedent from whom the plaintiff derived his title, and the interlocutory judgment directs,

as above provided, that the premises shall be sold, free from the lien of debts, the final judgment shall direct that the proceeds of the sale remaining after the payment of the costs, referee's fees, expenses of sale, taxes, assessments, water rates, and liens established before the death of the decedent, including any sum allowed to a widow in satisfaction of her right of dower, therein directed to be paid, be forthwith paid into court by the referee making such sale by depositing the same with the county treasurer of the county, in which the trial of the action is placed, to the credit of the parties entitled thereto, to await the further order in the premises. Where the action is brought before three years have elapsed from the granting of letters of administration or letters testamentary, as the case may be, upon the estate of a deceased person, who, if living, should be a party to the action, and the interlocutory judgment directs, as above provided, that the premises shall be sold, free from the lien of debts, the final judgment shall direct that the share of the proceeds of such sale, which would have been his, if living, be paid into court by such referee, by depositing the same with such county treasurer, to await the further order in the premises. Upon the certificate of the surrogate of the county of which the decedent was, at the time of his death, a resident, showing that three years have elapsed since the issuing of letters testamentary or letters of administration, as the case may be, upon the estate of said decedent, and that no proceedings for the mortgage, lease or sale of the real property of said decedent for the payment of his debts or funeral expenses, or both, is pending, and upon the certificate of the county clerk of the county where the real property sold under the interlocutory judgment is located, showing that no notice provided for in section twenty-seven hundred and fifty-one of the code of civil procedure has been filed in his office, the court, wherein the final judgment was made shall, upon the application of any party to said action, make an order directing the county treasurer to pay to said party from said deposit, the amount to which he is entitled under the said final judgment, with the accumulation thereon, if any, less the fees of said county treasurer. Any party to such action may, at any time after final judgment, upon notice to the executors or administrators of the decedent from whom the party applying derived his share or interest, apply to the court in which said action is pending for leave to withdraw the deposit or the share of the deposit, adjudged in the final judgment to belong to him; and, upon said application, the court may, in its discretion, make an order directing the county treasurer to pay over to said party the deposit, or the share of the deposit, adjudged in the final judgment to belong to him, but said order shall not be made until said party so applying shall have furnished a bond to the people of the state of New York in the penalty of twice the amount of the deposit sought to be withdrawn, with two or more good and sufficient sureties, approved by the judge or justice of the court making such order, and filed with such approval, in the office of the clerk of the county in which such action is pending, to the effect that the said party so withdrawing said deposit will pay any and all claims, not exceeding the amount of said deposit, when thereunto required by order of the court or by order of the surrogate or of the surrogate's court in a proceeding to mortgage, lease or sell the real property of such decedent. Where a final ac-

counting has been had in the estate of said decedent in a surrogate's court, and certified copies of the account and decree of final settlement, showing that all of the debts of the decedent have been paid in full, is filed with the court having jurisdiction of the fund, the court may dispense with the giving of a bond and direct the immediate payment of the fund to the parties entitled thereto, subject to the provisions of article second, title three, chapter fifteen of the code of civil procedure. But where final judgment shall be rendered in any action for partition after three years have elapsed from the granting of letters of administration or letters testamentary, as the case may be, upon the estate of the decedent from whom the plaintiff derived title, and the premises shall have been sold, free from the lien of debts, as above provided, then, upon producing to the court the certificate of the surrogate of the county of which the decedent was at the time of his death a resident, showing that three years have elapsed since the issuing of letters of administration or letters testamentary, as the case may be, upon the estate of said decedent and that no proceeding for the mortgage, lease or sale of the real property of the decedent for the payment of his debts or funeral expenses, or both, is pending, and upon the certificate of the clerk of the county where the real property sold under the interlocutory judgment is located showing that no notice provided for in section twenty-seven hundred and fifty-one of the code of civil procedure has been filed in his office, the court rendering the final judgment shall direct the payment of the different shares to the several parties entitled thereto; except that the share of a deceased person, who, if living, should be a party to the action shall be paid into court as above provided, unless three years have also elapsed since the granting of letters of administration or letters testamentary, as the case may be, upon the estate of said last mentioned deceased person, and like certificates of the surrogate and county clerk are produced to the court.

Am'd by L. 1896, ch. 277; L. 1897, ch. 720; L. 1898, ch. 78; L. 1905, ch. 602; L. 1909, ch. 423. In effect Sept. 1, 1909.

§ 1539. [Am'd, 1892.] Who may be made parties.

The plaintiff may, at his election, make a tenant, by the entirety, for life, or for years, of the entire property, or whoever may be entitled to a contingent or vested remainder or reversion in the entire property, or a creditor, or other person, having a lien or interest, which attaches to the entire property, a defendant in the action. In that case, the final judgment may either award to such a party his or her entire right and interest, or the proceeds thereof, or where the right or interest is contingent direct that the proceeds or share thereof be substituted for the property and invested for whoever may eventually be entitled thereto, or may reserve and leave unaffected his or her right and interest, or any portion thereof. A person specified in this section, who is not made a party, is not affected by the judgment in the action.

2 R. S. § 36, am'd; L. 1892, ch. 581.

§ 1540. Id.; as to persons having liens.

The plaintiff may, at his election, make a creditor, having a lien on an undivided share or interest in the property, a defend-

ant in the action. In that case, he must set forth the nature of the lien, and specify the share or interest to which it attaches. If partition of the property is made, the lien, whether the creditor is or is not made a party, shall thereafter attach only to the share or interest assigned to the party upon whose share or interest the lien attached; which must be first charged with its just proportion of the costs and expenses of the action, in preference to the lien.

Id., §§ 8 and 9, and L. 1830, ch. 320, § 41 (2 Edm. 327), am'd.

§ 1541. Provision where a party is unknown. *Am'd. 1914 ch. 346.*

Where a defendant having a share or interest in the property is unknown, or where his name or part of his name is unknown, and the summons is served upon him by publication, or without the State, pursuant to an order for that purpose, as prescribed in article second of title first of chapter fifth of this act, the notice subjoined to the copy of the summons as published, or served therewith, must, in addition to the matters required in that article, state briefly the object of the action, and contain a brief description of the property.

Id., § 12, in substance; annulling the law as settled in 56 N. Y. 359.

§ 1542. Complaint to state interests of parties.

The complaint must describe the property with common certainty, and must specify the rights, shares, and interests therein of all the parties, as far as the same are known to the plaintiff. If a party, or the share, right, or interest of a party, is unknown to the plaintiff; or if a share, right, or interest is uncertain or contingent; or if the ownership of the inheritance depends upon an executory devise; or if a remainder is a contingent remainder, so that the party cannot be named; that fact must also be stated in the complaint.

Id., § 5, subd. 1 and 2, and § 7, consolidated.

§ 1543. Title of parties may be tried.

The title or interest of the plaintiff in the property, as stated in the complaint, may be controverted by the answer. The title or interest of any defendant in the property, as stated in the complaint, may also be controverted by his answer, or the answer of any other defendant; and the title or interest of any defendant, as stated in his answer, may be controverted by the answer of any other defendant. A defendant, thus controverting the title or interest of a co-defendant, must comply with section 521 of this act. The issues, joined as prescribed in this section, must be tried and determined in the action.

2 R. S. 320, §§ 18 and 19 (2 Edm. 329), am'd. See §§ 521 and 1204, ante.

§ 1544. Issues of fact triable by jury.

An issue of fact joined in the action is triable by a jury. Unless the court directs the issues to be stated, as prescribed in section 970 of this act, the issues may be tried upon the pleadings.

§ 1545. When title to be ascertained by the court.

Where a defendant has made default in appearing or pleading, or where a party is an infant, the court must ascertain the rights, shares, and interests of the several parties in the property, by a reference or otherwise, before interlocutory judgment is rendered in the action.

2 R. S. 320, § 22 and part of § 23, am'd. See Rule 66.

§ 1546. Interlocutory judgment.

The interlocutory judgment must declare what is the right, share, or interest of each party in the property, as far as the same has been ascertained, and must determine the rights of the parties therein. Where it is found, by the verdict, report, or decision, or where it appears to the court, upon an application for judgment in favor of the plaintiff, that the property, or any part thereof, is so circumstanced that a partition thereof cannot be made without great prejudice to the owners, the interlocutory judgment, except as otherwise expressly prescribed in this article, must direct that the property, or the part thereof which is so circumstanced, be sold at public auction. Otherwise, an interlocutory judgment in favor of the plaintiff, must direct that partition be made between the parties, according to their respective rights, shares, and interests.

See id., §§ 23, 24 and 31.

§ 1547. Partial partition; when made.

Where the right, share, and interest of a party has been ascertained and determined, and the rights, shares, or interests of the other parties, as between themselves, remain unascertained or undetermined, an interlocutory judgment for a partition, entered as prescribed in the last section, must direct a partition, as between the party whose share has been so determined and the other parties to the action. Where the rights, shares, and interests of two or more parties have been thus ascertained and determined, the interlocutory judgment may also direct the partition among them of a part of the property, proportionate to their aggregate shares. In either case, the court may, from time to time, as the other rights, shares, and interests are ascertained and determined, render an interlocutory judgment, directing the partition, in like manner, of the remainder of the property. Where an interlocutory judgment is rendered, in a case specified in this section, the court may direct the action to be severed, and final judgment to be rendered, with respect to the portion of the property set apart to the parties, whose rights, shares, and interests are determined, leaving the action to proceed as against the other parties, with respect to the remainder of the property; and if necessary, the court may direct that one of those parties be substituted as plaintiff.

L. 1847, ch. 430, §§ 1, 2 (4 Edm. 613).

§ 1548. Shares may be set off in common.

Where two or more parties, to an action for partition, make it appear to the court, that they desire to enjoy their shares in common with each other, the interlocutory judgment may, in the discretion of the court, direct partition to be so made, as to set

off to them their shares of the real property partitioned, without partition as between themselves, to be held by them in common.

L. 1847, ch. 430, § 4.

§ 1549. Appointment of commissioners.

Where the interlocutory judgment, in an action for partition, directs a partition, it must designate three reputable and disinterested freeholders as commissioners, to make the partition so directed.

2 R. S. 321, § 25 (2 Edm. 331).

§ 1550. Commissioners to be sworn, etc.

Each of the commissioners must, before entering upon the execution of his duties, subscribe and take an oath before an officer specified in section 842 of this act, to the effect that he will faithfully, honestly and impartially discharge the trust reposed in him. Each commissioner's oath must be filed with the clerk, before he enters upon the execution of his duties. The court may, at any time, remove either of the commissioners. If either of them dies, resigns, neglects or refuses to serve, or is removed, the court may, from time to time, by order, appoint another person in his place.

Id., §§ 26, 27. See § 1608, post.

§ 1551. Id.; when to make partition.

The commissioners must forthwith proceed to make partition, as directed by the interlocutory judgment, unless it appears to them, or a majority of them, that partition thereof, or of a particular lot, tract, or other portion thereof, cannot be made, without great prejudice to the owners; in which case, they must make a written report of that fact to the court.

Id., § 28.

§ 1552. Partition; how made.

In making the partition, the commissioners must divide the property into distinct parcels, and allot the several parcels thereof to the respective parties, quality and quantity being relatively considered, according to the respective rights and interests of the parties, as fixed by the interlocutory judgment. They must designate the several parcels by posts, stones, or other permanent monuments. They may employ a surveyor, with the necessary assistants, to aid them in so doing.

Id., § 29.

§ 1553. Provision where there is a particular estate.

Where a party has a right of dower in the property, or a part thereof, which has not been admeasured, or has an estate by the curtesy, for life or for years, in an undivided share of the property, the commissioners may allot to that party his or her share of the property, without reference to the duration of the estate. And they may make partition of the share so allotted to that party, among the parties, who are entitled to the remainder or reversion thereof, to be enjoyed by them upon the determination of the particular estate, where, in the opinion of the com-

missioners, such a partition can be made without prejudice to the rights of the parties.

L. 1847, ch. 430, § 5 (4 Edm. 614), am'd.

§ 1554. Report of commissioners.

All the commissioners must meet together in the performance of any of their duties; but the acts of a majority so met are valid. They, or a majority of them, must make a full report of their proceedings, under their hands, specifying therein the manner in which they have discharged their trust, describing the property divided, and the share or interest in a share, allotted to each party, with the quantity, courses, and distances, or other particular description of each share, and a description of the posts, stones, or other monuments; and specifying the items of their charges. Their report must be acknowledged or proved, and certified, in like manner as a deed to be recorded, and must be filed in the office of the clerk.

2 E. S. 322, §§ 30, 31, 33 (2 Edm. 331).

§ 1555. Fees and expenses.

The fees and expenses of the commissioners, including the expense of a survey, when it is made, must be taxed under the direction of the court; and the amount thereof must be paid by the plaintiff, and allowed as part of his costs.

Id., § 32; *Smith v. Broadstreet*, 5 Cow. 213.

§ 1556. Confirming or setting aside report.

The court must confirm or set aside the report, and may, if necessary, appoint new commissioners, who must proceed as directed in this article.

Id., § 34, am'd.

§ 1557. Final judgment on report; effect thereof.

Upon the confirmation, by the court, of the report of the commissioners making partition, final judgment, that the partition be firm and effectual forever, must be rendered, which is binding and conclusive upon the following persons:

1. The plaintiff; each defendant upon whom the summons was served, either personally, or without the State, or by publication, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act; and the legal representatives of each party, specified in this subdivision. So much of section 445 of this act, as requires the court to allow a defendant to defend an action, after final judgment, does not apply to an action for partition.

2. Each person claiming from, through, or under such a party, by title accruing after the filing of the judgment-roll, or after the filing, in the proper county clerk's office, of a notice of the pendency of the action, as prescribed in article ninth of this title.

3. Each person, not in being when the interlocutory judgment is rendered, who, by the happening of any contingency, becomes afterwards entitled to a beneficial interest attaching to, or an estate or interest in, a portion of the property, the person first entitled to which, or other virtual representative whereof, was a party specified in the first subdivision of this section.

But this section does not apply to a party, whose right and interest are expressly reserved and left unaffected, as prescribed

in section 1530 of this act, or to a person claiming from, through, or under such a party.

2 R. S. 323, § 35, am'd. See § 445, ante, and § 135, Co. Proc.

§ 1558. Judgment must direct delivery of possession.

The final judgment must also direct that each of the parties, who is entitled to possession of a distinct parcel allotted to him, be let into the possession thereof, either immediately, or after the determination of the particular estate, as the case requires.

See § 1875, post.

§ 1559. Costs; how awarded. Id.; against unknown parties.

The final judgment for the partition of the property, must also award, that each defendant pay to the plaintiff his proportion of the plaintiff's costs, including the extra allowance. The sum to be paid by each must be fixed by the court, according to the respective rights of the parties, and specified in the judgment. If a defendant is unknown, his proportion of the costs must be fixed and specified in like manner. An execution against an unknown defendant may be issued to collect the costs awarded against him, as if he was named in the judgment; and his right, share, or interest in the property may be sold by virtue thereof, as if he was named in the execution.

2 R. S., § 72, am'd.

§ 1560. Sale of property; when directed.

If the commissioners, or a majority of them, report that the property, or a particular lot, tract, or other portion thereof, is so circumstanced, that a partition thereof cannot be made, without great prejudice to the owners thereof, the court, if it is satisfied that the report is just and correct, may thereupon, except as otherwise expressly prescribed in this article, modify the interlocutory judgment, or render a supplemental interlocutory judgment, reciting the facts, and directing that the property, or the distinct parcel thereof so circumstanced, be sold by a referee, designated in the judgment, or by the sheriff.

Id., §§ 37 and 81. See Rules 71 and 72.

§ 1561. Reference to inquire as to creditors.

Before an interlocutory judgment for the sale of real property is rendered, in an action for partition, the court must, either with or without application by a party, direct a reference, to ascertain whether there is any creditor, not a party, who has a lien on the undivided share or interest of any party. But the court may direct or dispense with such a reference, in its discretion, where a party produces a search, certified by the clerk, or by the clerk and register, as the case requires, of the county where the property is situated; and it appears therefrom, and by the affidavits, if any, produced therewith, that there is no such outstanding lien.

Id., § 42, as am'd. L. 1830, ch. 320, § 42.

§ 1562. [Am'd, 1887.] Duty of referee.

Where a reference is directed, as prescribed in the last section, the referee must cause a notice to be published, once in each week for six successive weeks, in such newspaper published in

the county wherein the place of trial is designated, as shall be designated by the court directing said reference, and also in a newspaper published in each county wherein the property is situated, requiring each person, not a party to the action, who, at the date of the order, had a lien upon any undivided share or interest in the property, to appear before the referee, at a specified place, and on or before a specified day, to prove his lien, and the true amount due or to become due to him by reason thereof. The referee must report to the court, with all convenient speed, the name of each creditor, whose lien is satisfactorily proved before him, the nature and extent of the lien, the date thereof, and the amount due or to become due thereupon.

2 A. S., § 43; L. 1887, ch. 686. See § 1578.

§ 1563. Money to be paid into court.

If it appears by the pleadings, or by the evidence in the action, or by the report, that there was, at the date of the order, any existing lien upon the share or interest of a party in the property, the interlocutory judgment, directing the sale, must also direct the officer making it to pay into court the portion of the money, arising from the sale of the share or interest of that party, after deducting the portion of the costs and expenses for which it is liable.

Id., § 44.

§ 1564. Application for money.

Where money is paid into court, in a case specified in the last section, the party may apply to the court for an order directing that the money, or such part thereof as he claims, be paid to him. Upon such an application, he must produce the following papers:

1. An affidavit, made by himself, or, if a sufficient excuse is shown, by his agent or attorney, stating the true amount actually due on each incumbrance, and the name and residence of the owner of the incumbrance, as far as they are known, or can be ascertained with due diligence.

2. An affidavit, showing service of a notice of the application upon each owner of an incumbrance. Service of the notice, within the State, must be personal, or by leaving it at the owner's residence, with some person of suitable age and discretion, at least fourteen days previous to the application. Service, without the State, if personal, must be made at least twenty days previous to the application. If the owner of the incumbrance resides without the State, and the place of his abode cannot be ascertained, with reasonable diligence, notice may be served upon him by publishing it in the newspaper printed at Albany, in which legal notices are required to be published, once in each week for the four weeks immediately preceding the application.

Upon the application, the court must make such an order as justice requires.

Id., §§ 45 and 46. See, also, §§ 823 and 1015, ante.

§ 1565. Payment of incumbrances.

When the whole amount of the unsatisfied liens upon an undivided share, which were existing at the date of the order of reference, has been ascertained, the court must order the portion of the money so paid into court, on account of that share, to be dis-

tributed among the creditors having the liens, according to the priority of each of them. Where the incumbrancer is not a party to the action, the clerk or other officer, by whom a lien is paid off, must procure satisfaction thereof to be acknowledged or proved, as required by law, and must cause the incumbrance to be duly satisfied or cancelled of record. The expense of so doing must be paid out of the portion of the money in court, belonging to the party, by whom the incumbrance was payable.

2 R. S., §§ 47 and 48. See § 1578, post.

§ 1566. Other parties not to be delayed.

The proceedings to ascertain and settle the liens upon an undivided share, as prescribed in the last three sections, shall not affect any other party to the action, or delay the paying over or investing of money, to or for the benefit of any other party, upon whose share or interest in the property there does not appear to be any existing lien.

Id., § 49.

§ 1567. Sale of dower interest.

Where a party has an existing right of dower in the entire property directed to be sold, at the time when an interlocutory judgment for a sale is rendered in an action for partition, the court must consider and determine whether the interests of all the parties require, that the right of dower should be excepted from the sale, or that it should be sold.

Id., § 50, am'd. See § 1583, ante.

§ 1568. Purchaser to hold the property free therefrom.

If a sale of the property, including the right of dower, is directed, the interest of the party entitled to the right of dower shall pass thereby; and the purchaser, his heirs and assigns, shall hold the property free and discharged from any claim, by virtue of that right. In that case, the dowress is entitled to receive, from the proceeds of the sale of the whole property, a gross sum, in satisfaction of her right of dower, or to have one-third of those proceeds paid into court, for the purpose of being invested for her benefit, as prescribed in the next section with respect to the dowress of an undivided share.

Id., § 51, am'd.

§ 1569. [Am'd, 1913.] Gross sum to be paid to or invested for tenant in dower, etc.

A party to an action for partition, who has a right of dower, or is a tenant for life or for years, in or of an undivided share of the property sold, is entitled to receive, from the proceeds of the sale, a gross sum, to be fixed according to the principles of law applicable to annuities, in satisfaction of his or her estate or interest. The written consent of the party to receive such a gross sum, acknowledged or proved, and certified, in like manner as a deed to be recorded, must be filed, at the time of, or before, the filing of the report of sale; otherwise the court must direct that, out of the proceeds of the sale, which belong to the undivided share to which the estate or interest attaches, one-third, in case of a dowress, and in any other case arising under this section, the entire proceeds, or such a proportion thereof as fairly represents the interest of the holder of the particular estate, be

paid into court, for the purpose of being invested for his or her benefit. If it shall appear to the court that the tenant for life or for years, or the widow, is an infant, lunatic or otherwise incompetent, and that a general guardian or committee has been duly appointed, upon proof that it will be for the best interest and advantage of the estate of such infant or lunatic or incompetent person, the court may authorize and direct such guardian or committee, in the name of such infant, lunatic or incompetent person, having such estate for life, or years or dower right, to execute an instrument under seal, acknowledged or proved and certified in like manner as a deed to be recorded, whereby such guardian or committee shall consent to accept in lieu of such estate or dower, a sum, to be ascertained by the court as above provided, according to the principles applicable to life annuities; and upon presentation of such an instrument to the court, the value of the estate for life or for years or dower so ascertained by it shall be paid to such guardian or committee. Such instrument shall have the same force and effect as a deed or instrument executed and acknowledged by a competent person or a person of full age.

2 R. S., §§ 52, 53, and 54, am'd. See 2 T. & C. 483; also, § 1579, post; am'd by L. 1913, ch. 450. In effect Sept. 1, 1913.

§ 1570. [Am'd, 1892.] Interests of owners of future estates to be protected.

Where it appears, that a party to the action has an inchoate right of dower, or any other future right or estate, vested or contingent, or that any person or persons not in being who may by any contingency become entitled to any interest or estate, in the property sold, the court must fix the proportional value of the right or estate, according to the principles of law applicable to annuities and survivorships, or set aside so much of the proceeds of sale to which the contingency attaches, and must direct that proportion of the proceeds of the sale to be invested, secured or paid over, in such a manner as it deems calculated to protect the rights and interests of the parties.

L. 1840, ch. 177, § 1 (4 Edm. 511), am'd; L. 1892, ch. 581.

§ 1571. Married woman may release her interest.

A married woman may release to her husband her inchoate right of dower, in the property directed to be sold, by a written instrument, duly acknowledged by her and certified, as required by law with respect to the acknowledgment or a conveyance to bar her dower; which must be filed with the clerk. Thereupon, the share of the proceeds of the sale, arising from her contingent interest, must be paid to her husband.

Id., § 2.

§ 1572. Unknown owners.

If a person, entitled to an estate or interest in the property sold, is made a party as an unknown defendant, the court must provide for the protection of his rights, as far as may be, as if he was known and had appeared.

2 R. S. 326, § 55 (2 Edm. 336). See, also, §§ 1541 and 1557, subd. 1, ante.

§ 1573. Sale; terms of credit thereupon.

The court must, in the interlocutory judgment for a sale, direct the terms of credit which may be allowed for any portion of the purchase-money, of which it thinks proper to direct the investment, and for any portion of the purchase-money, which is required to be invested for the benefit of a person, as prescribed in this article.

Id., § 38.

§ 1574. Credit; how secured.

The portion of the purchase-money, for which credit is so allowed, must always be secured at interest, by a mortgage upon the property sold, with a bond of the purchaser; and by such additional security, if any, as the court prescribes.

Id., § 39.

§ 1575. Separate securities.

The officer making the sale may take separate mortgages and other securities in the name of the county treasurer of the county in which the property is situated, for such convenient portions of the purchase-money, as are directed by the court to be invested; and in the name of the owner, for the share of any known owner of full age, who desires to have it invested.

2 R. S. 326, § 40, am'd. See § 745, ante.

§ 1576. Report of sale.

Immediately after completing the sale, the officer making it must file with the clerk his report thereof under oath, containing a description of each parcel sold, the name of the purchaser thereof, and the price at which it was sold.

Id., § 59.

§ 1577. Final judgment; effect thereof.

If the sale is confirmed by the court, a final judgment must be entered, confirming it accordingly; directing the officer making it to execute the proper conveyances, and take the proper securities pursuant to the sale; and also directing concerning the application of the proceeds of the sale. Such a final judgment is binding and conclusive upon the same persons, upon whom a final judgment for partition is made binding and conclusive by section 1557 of this act; and it effectually bars each of those persons, who is not a purchaser at the sale, from all right, title and interest in the property sold.

Id., §§ 60, 61a and 61b, am'd. See § 1557, ante.

§ 1578. [Am'd, 1883.] Id.; effect thereof upon incumbents.

Such a final judgment is also a bar against each person, not a party, who has, at the time when it is rendered, a general lien by judgment or decree on the undivided share or interest of a party, if notice was given to appear before the referee, and make proof of liens, as prescribed in section 1562 of this act, and also against each person made a party, who then has a specific lien on any such undivided share or interest; but a person having any such specific lien appearing of record at the time of the fil-

ing of the notice of the pendency of the action, who is not made a party, is not affected by such judgment.

Id., § 61b; L. 1880, ch. 320, § 45. See §§ 1561 and 1562, ante.

§ 1579. Costs and expenses; how paid.

Where final judgment, confirming a sale, is rendered, the costs of each party to the action, and the expenses of the sale, including the officer's fees, must be deducted from the proceeds of the sale, and each party's costs must be paid to his attorney. But the court may, in its discretion, direct that the costs and expenses any trial, reference, or other proceeding in the action, be paid out of the share of any party in the proceeds, or may render judgment against any party therefor. Where a proportion of the proceeds is to be paid to, or invested for the benefit of any person, as prescribed in any provision of this article, the amount thereof must be determined by the residue of the entire proceeds, remaining after deducting the costs and expenses chargeable against them.

Id., §§ 62 and 72, am'd.

§ 1580. [Am'd, 1908.] Distribution of proceeds; duties of officer making sale.

The proceeds of a sale, after deducting therefrom the costs and expenses chargeable against them, must be immediately awarded to the parties whose rights and interests have been sold, in proportion thereto. The sum chargeable upon any share to satisfy a lien thereon, must be paid to the creditor, or retained, subject to the order of the court; and the remainder, except as otherwise prescribed in this article, must be paid by the officer making the sale, to the party owning the share, or his legal representatives or into court for his use. Within sixty days after the entry of final judgment, unless such time be extended by an order of the court entered in the office of the clerk within said sixty days, the officer making the sale must file with the clerk his report under oath of the disposition of the proceeds of the sale, accompanied by the vouchers of the persons to whom payments were ordered to the made.

5 R. S. 326, § 63. Am'd, L. 1908, ch. 294. In effect Sept. 1, 1908.

§ 1581. [Am'd, 1892, 1897.] Shares of infants.

Where a party entitled to receive a portion of the proceeds is an infant, the court may direct it to be invested in permanent securities in the name and for the benefit of the infant, or it may direct it to be paid over to the general guardian of the said infant when the guardian shall have executed to such infant a bond with two sureties which shall be approved by the court; or, if any of the moneys arising from the proceeds of such sale shall have been paid to the county treasurer, and on due proof that such money has remained uninvested in permanent securities for the space of three months, may direct the same to be paid to the general guardian of such infant upon his giving an undertaking in an amount and with securities satisfactory to the court for the faithful execution of his trust. In the case of an infant residing without the state, and having in the state or country where he or she resides a general guardian or person duly appointed under the laws of such state or country, to the

control and entitled, by the laws of such state or country, to the custody of the money of such infant, the court, upon satisfactory proof of such facts and of the sufficiency of the bond or security given by such general guardian or person in such state or country by the certificate of a judge of a court of record of such state or country, or otherwise, may direct that the portion of such infant arising upon such sale shall be paid over to such general guardian or person.

L. 1802, ch. 558; L. 1807, ch. 602. In effect Sept. 1, 1897.

§ 1582. [Am'd, 1892.] *Id.*; of unknown and absent owners.

Where a person has been made a defendant as an unknown person, or where the name of a defendant is unknown, or where the summons has been served upon a defendant without the state, or by publication, and he has not appeared in the action, the court must direct his portion to be invested in permanent securities, at interest, for his benefit, until claimed by him or his legal representatives, but after the lapse of twenty-five years from the time of the payment into court, or to the treasurer of any county, of any portion of the proceeds of the sale of real property, for unknown heirs, heretofore or hereafter to be made in any action of partition, without any claim therefor having been made by any person entitled thereto, and upon there being made and presented to the court, at a special term thereof, proof, by petition or otherwise, showing to the satisfaction of the court that due inquiry for such unknown heirs, or their representatives, has been made and that they cannot be found, and that no claim has been made for such portion of said proceeds by any person entitled thereto, proceedings shall thereupon be taken in said court, and an investigation had therein as to the heirship, death or whereabouts of such unknown heirs or their representatives, and as to the known heirs of the ancestor of such unknown heirs, the next of kin, representatives and distributees of such known heirs, and as to all persons interested in such proceeds, and their respective interests therein, and the said court shall, by an order made in the action, direct that a notice entitled in the action and signed by the petitioner, or his attorney, and directed to such unknown heirs or their representatives, and to known heirs, their next of kin, representatives or distributees, and all persons interested in such proceeds, be served upon them by the publication thereof, the same to be published once in each week for six successive weeks in a newspaper published in the county where the action was brought, and in such other newspapers as the court may direct, ordering and requiring such unknown heirs, or their representatives, and all known heirs, their next of kin, or representatives, and all persons interested in such proceeds, and each of them to be and appear in said court at a special term thereof, at a time and place to be specified in said order and notice, and at least six weeks from the date of the first publication of such notice, to then and there establish their heirship and identity, kinship and interest, and submit any proof, as to such unknown heirs, or their representatives, and the known heirs, their next of kin, representatives or distributees, and all persons interested and their interest in such proceeds,

they may desire, and that in case of their default in so doing, that the said proceeds will be distributed and paid over to the known heirs of the ancestor from whom such unknown heirs derived title thereto, and to their heirs, next of kin, representatives, distributees and assigns, and that they and each of them shall thereafter be forever barred of and from all and every cause or causes of action for such proceeds, or on account thereof, or growing out of the distribution thereof, and of and from all right, title, claim and interest in and to such proceeds, and shall be deemed to have surrendered all right, claim and interest in and to such proceeds. The order must contain a direction that a copy of the notice must be served on each of the persons named in the order, if within the state, in the manner prescribed for the service of a summons on a defendant in an action in the supreme court, at least twenty days before the time specified in the notice. The publication of such notice, as required by said order, is hereby made and shall be deemed and taken for all purposes to be due and complete service upon each and every of such unknown heirs or their representatives, and the known heirs, their next of kin, and representatives, and all persons interested in such proceeds, of due notice of the proceedings to distribute and pay out such proceeds, and shall be conclusive upon each and all of them. Proof of such personal service may be made by the affidavit of the person making the same, and proof of the publication of such notice may be made by affidavit of the publisher of such paper or papers. At the time and place specified in the said order and notice, such unknown heirs or their representatives, and all known heirs, their next of kin, representatives or distributees, devisees, and all persons interested in such proceeds, shall appear in court, in person or by attorney, and make proof establishing their heirship and identity, kinship and interest in such proceeds, and upon proof being made to the satisfaction of the court of the heirship and identity of the unknown heirs, the proceeding for distribution shall be dismissed. And if such unknown heirs or their representatives, do not so appear in court at the time and place specified in such notice and order, to establish their heirship and identity, kinship or interest, they and each of them, and every person claiming under or through them, shall thereafter be forever barred of and from all and every cause or causes of action for such proceeds, or on account thereof, or growing out of the distribution of such proceeds, and of and from all right, title, claim and interest in and to such proceeds, and shall be deemed to have surrendered all right, claim and interest in and to such proceeds. And upon proofs being made of such publication, and showing to the satisfaction of the court that such unknown heirs or their representatives can not be found, or are dead, the said court shall have power to decree accordingly, and to decree that the share or interest of such unknown heirs in such real property was vested, at the time of such sale, in the known heirs of the ancestor from whom such unknown heirs derived title thereto, and to decree that the unclaimed portion of such proceeds was vested at the time of such payment in such known heirs, and that such heirs, their heirs, next of kin, representatives, distributees, devisees and assigns,

are entitled thereto; and the said court shall make an order in such action, directing the payment to them, or their assigns, of the respective shares or portions of, or interest in such proceeds to which they are entitled; and which order shall be entered in the office of the clerk of the county where the original action was brought, and after having been so entered for three months, shall be conclusive evidence of the regularity of the proceedings upon which it is based, and of all the facts set forth therein; and, upon serving upon the county treasurer a certified copy of such order, the treasurer shall so pay over and distribute such proceeds, after deducting his lawful commissions, and shall thereupon be exempt from all liability on account thereof; and if any such proceeds shall have been paid over by any county treasurer to the treasurer of the state of New York, under the provisions of section seven hundred and fifty-three of this act, due notice of said applications and proceedings shall be given to the comptroller of the state of New York, and the said proceeds shall be paid out by the treasurer of the state of New York, as provided by sections seven hundred and fifty-one and seven hundred and fifty-three of this act, and upon such payment he shall thereupon be exempt from all liability on account thereof.

L. 1893, ch. 203.

§ 1583. Id.; of tenants of particular estates.

Where a portion of the proceeds representing an undivided share or interest, is invested for the benefit of a tenant for life, or for years, or of a widow, as prescribed in the foregoing provisions of this article, the court must cause it to be invested in permanent securities, at interest, and the interest to be paid, from time to time as it accrues, to the person for whose benefit it is invested, while his or her right continues.

2 R. S. 326, § 66, am'd. See § 1569, ante.

§ 1584. Court may require security to refund.

The court may, in its discretion; require any person, before he receives his portion of the proceeds of the sale, to give such security as it directs, to the people, or to such parties or other persons, as it prescribes, to refund the same, or a portion thereof, with interest, if it thereafter appears that he was not entitled thereto.

Id., § 67, am'd.

§ 1585. Security to be taken in name of county treasurer.

A security taken under any provision of this article, except as otherwise specially prescribed therein, must be taken in the name and official title of the county treasurer of the county in which the property sold is situated. He, and his successors in office, must hold the same for the use and benefit of the persons interested, subject to the order of the court.

Id., § 68, am'd by L. 1848, ch. 277, § 1 (4 Edm. 593). See § 745, ante.

§ 1586. Action thereupon.

The court may in its discretion, and upon such terms and conditions as justice requires, make an order, allowing a person interested in a security specified in the last section, to maintain an action thereupon in the name of the county treasurer.

2 R. S. 326, § 71, am'd. See §§ 745-754, ante.

§ 1587. Compensation to equalize partition.

Where it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights or interests of some of them, the final judgment may award compensation to be made by one party to another for equality of partition. But compensation cannot be so awarded against a party who is unknown, or whose name is unknown. Nor can it be awarded against an infant, unless it appears, that he has personal property sufficient to pay it, and that his interests will be promoted thereby.

§ 1588. Proceedings on death of parties.

If, upon the death of one of two or more plaintiffs, or one of two or more defendants, in an action for partition, the interest of the decedent in the property passed to a person, not a party to the action, the latter may be made defendant by the order of the court; and a supplemental summons may be issued, to bring him in accordingly.

2 R. S. 287, §§ 6 and 7 (2 Edm. 402, 403).

§ 1589. Rents, etc., may be adjusted.

Nothing contained in this article prevents the court from adjusting, in the interlocutory or final judgment, or otherwise, as the case requires, the rights of one or more of the parties, as against any other party or parties, by reason of the receipt, by the latter, of more than his or their proper proportion of the rents or profits of a share, or part of a share.

§ 1590. [Am'd, 1895, 1905.] Partition by guardian of infant, committee of lunatic, etc.

Where an infant, idiot, lunatic, or habitual drunkard, holds real property, in joint tenancy or in common, the general guardian of the infant, or the committee of the idiot, lunatic, or habitual drunkard, may apply to the supreme court or to the county court of the county, wherein the real property is situated, for authority to agree to a partition of the real property. Where such application affects the interests of an incompetent person who has been committed to a state institution, and is an inmate thereof, notice of such application must be given to the superintendent, acting superintendent, or state officer having special jurisdiction over the institution where the incompetent person is confined.

2 R. S. 380, 331, §§ 86 and 89 (2 Edm. 841); L. 1905, ch. 494. In effect Sept. 1, 1905.

§ 1591. Contents of petition.

Such an application must be by a petition, which must describe the real property proposed and to be partitioned; must state the rights and interests of the several owners thereof; must specify the particular partition proposed to be made; and must be verified

by affidavit. The court may order notice of the application to be given to such persons as it thinks proper.

Id., § 87.

§ 1592. [Am'd, 1886.] Court may authorize partition.

If, after due inquiry into the merits of the application, by a reference or otherwise, the court is of the opinion that the interests of the infant, or of the idiot, lunatic, or habitual drunkard will be promoted by the partition, it may make an order authorizing the petitioner to agree to the partition proposed, and in the name of the infant, or of the idiot, lunatic, or habitual drunkard, to execute releases of his right and interest in and to that part of the property which falls to the shares of the other joint-tenants or tenants in common. The court may, in its discretion, for the furtherance of the interests of said infant, idiot, lunatic, or habitual drunkard, direct partition to be so made as to set off to him or them his or their share in common with any of the other owners, provided the consent in writing thereto of such owners shall be first obtained.

2 R. S. 330, 331, §§ 87 and 90; L. 1886, ch. 208.

§ 1593. Effect of releases.

Releases so executed have the same validity and effect, as if they were executed by the person in whose behalf they are executed, and as if the infant was of full age, or the idiot, lunatic, or habitual drunkard was of sound mind, and competent to manage his affairs.

Id., §§ 88a and 91, am'd.

§ 1594. [Am'd, 1911.] When the state is interested.

The people of the state may be made a party defendant to an action for the partition of real property, in the same manner as a private person. In such a case, the summons must be served upon the attorney-general, who must appear in behalf of the people, but where the people of the state of New York are made a party defendant, as herein provided, the complaint shall set forth, in addition to the other matters required to be set forth by the code of civil procedure detailed facts showing the nature and extent of the interest in or lien on the said real property of the people of the state of New York and the reason for making the people a party. Upon failure to state such facts, the complaint shall be dismissed, as to the people of the state of New York.

Id., §§ 92 and 93, am'd. Am'd L. 1911, ch. 20, in effect Sept. 1, 1911.

§ 1595. Exemplified copy of judgment may be recorded.

An exemplified copy of the judgment-roll, or of the final judgment, in an action for partition, may be recorded, in the office for recording deeds, in each county in which any real property affected thereby is situated.

L. 1846, ch. 182, § 2 (4 Edm. 438).

ARTICLE THIRD.

Action for dower.

- Sec. 1596.** Limitation of action for dower.
1597. Against whom action to be brought.
1598. Who may be joined as defendants.
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1600. Damages may be recovered; how estimated.
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1622. Id.; payment of; or sale subject to.
1623. Report of sale.
1624. Final judgment thereon.
1625. Certain provisions of article second made applicable.

§ 1596. [Am'd, 1882.] Limitation of action for dower.

An action for dower must be commenced by a widow, within twenty years after the death of her husband; but if she is, at the time of his death, either:

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life;

The time of such a disability is not a part of the time limited by this section. And if at any time, before such claim of dower has become barred by the above lapse of twenty years, the owner or owners of the lands subject to such dower, being in possession, shall have recognized such claim of dower by any statement contained in a writing under seal, subscribed and acknowledged in the manner entitling a deed of real estate to be recorded, or if by any judgment or decree of a court of record within the same time and concerning the lands in question, wherein such owner or owners were parties, such right of dower shall have been distinctly recognized as a subsisting claim against said lands, the time after the death of her husband, and previous to such acknowledgment in writing or such recognition by judgment or decree, is not a part of the time limited by this section.

1 E. S. 742, § 18 (1 Edm. 693).

§ 1597. Against whom action to be brought.

Where the property, in which dower is claimed, is actually occupied, the occupant thereof must be made defendant in the action. Where it is not so occupied, the action must be brought

against some person exercising acts of ownership thereupon, or claiming title thereto, or an interest therein, at the time of the commencement of the action.

See § 1502, ante.

§ 1598. [Am'd, 1913.] Who may be joined as defendants.

1. In either of the cases specified in the last section, any other person, claiming title to, or the right to the possession of, the real property in which dower is claimed, may be joined as defendant in the action.

2. The people of the state of New York may be made a party defendant in an action for dower where the people of the state of New York have an interest in or a lien upon the lands affected thereby, in the same manner as a private person. In such a case the summons must be served upon the attorney-general, who must appear in behalf of the people. But where the people of the state of New York are made a party defendant, as herein provided, the complaint shall set forth, in addition to the other matters required to be set forth by the code of civil procedure, detailed facts showing the particular nature of the interest in or the lien on the said real property of the people of the state of New York and the reason for making the people a party defendant. Upon failure to state such facts the complaint shall be dismissed as to the people of the state of New York.

See §§ 452, 1508, ante. Am'd L. 1913, ch. 773. In effect Sept. 1, 1913.

§ 1599. Id.; where defendants claim in severalty.

In an action to recover dower, in a distinct parcel of real property of which the plaintiff's husband died seized, or in all the real property which he aliened by one conveyance, all the persons in possession of, or claiming title to, the property, or any part thereof, may be made defendants, although they possess or claim title to different portions thereof in severalty.

§ 1600. Damages may be recovered; how estimated.

Where a widow recovers, in an action therefor, dower in property, of which her husband died seized, she may also recover, in the same action, damages for withholding her dower, to the amount of one-third of the annual value of the mesne profits of the property, with interest; to be computed, where the action is against the heir, from her husband's death, or, where it is against any other person, from the time when she demanded her dower of the defendant; and in each case, to the time of the trial, or application for judgment, as the case may be; but not exceeding six years in the whole. The damages shall not include any thing for the use of permanent improvements, made after the death of the husband.

1 R. S. 742, §§ 19, 20 and 21 (1 Edm. 694).

§ 1601. Id.; in action against alienee of husband.

Where a widow recovers dower, in a case not specified in the last section, she may also recover, in the same action, damages for withholding her dower, to be computed from the commencement of the action; but they shall not include any thing for the use of permanent improvements, made since the property was aliened by her husband. In all other respects, the same must be computed as prescribed in the last section.

§ 1602. Id.; where several parcels, etc.

The last two sections do not authorize the recovery, against a defendant who is joined with others, of damages for withholding dower, in any portion of the property not occupied or claimed by him.

See §§ 1598 and 1599, ante.

§ 1603. Id.; against heirs, etc., aliening land.

Where a widow recovers dower in real property aliened by the heir of her husband, she may recover, in a separate action against him, her damages for withholding her dower, from the time of the death of her husband to the time of the alienation, not exceeding six years in the whole. The sum recovered from him must be deducted from the sum, which she would otherwise be entitled to recover from the grantee; and any sum recovered as damages from the grantee, must be deducted from the sum, which she would otherwise be entitled to recover from the heir.

1 R. S. 743, § 22 (1 Edm. 694).

§ 1604. Action barred by assignment of dower.

The acceptance, by a widow, of an assignment of dower, in satisfaction of her claim upon the property in question, bars an action for dower, and may be pleaded by any defendant.

Id., § 23.

§ 1605. Collusive recovery not to prejudice infant.

Where a widow, not having a right to dower, recovers dower against an infant, by the default or collusion of his guardian, the infant shall not be prejudiced thereby; but when he comes of full age, he may bring an action of ejectment against the widow, to recover the property so wrongfully awarded for dower, with damages from the time when she entered into possession, although that is more than six years before the commencement of the action.

Id., § 24, am'd.

§ 1606. Complaint.

The complaint, in an action for dower, must describe the property, as prescribed in section 1511 of this act; and must set forth the name of the plaintiff's husband.

2 R. S. 304, § 10 (2 Edm. 313), am'd. See § 1499, ante.

§ 1607. Interlocutory judgment for admeasurement.

If the defendant makes default in appearing or pleading; or if the right of the plaintiff to dower is not disputed by the answer; or if it appears, by the verdict, report, or decision upon a trial, that the plaintiff is entitled to dower in the real property described in the complaint, an interlocutory judgment must be rendered; which, except as otherwise prescribed in this article, must direct that the plaintiff's dower in the property, particularly describing it, be admeasured by a referee, designated in the judgment, or by three reputable and disinterested freeholders, designated therein, as commissioners for that purpose.

Based on 2 R. S. 311, § 55; Id. 449 (2 Edm. 320, 511).

§ 1608. Oath of commissioners, etc.; removal; filling vacancy.

Each of the commissioners, or the referee, as the case requires, must, before entering upon the execution of his duties, subscribe and take an oath, before an officer specified in section 842 of this act, to the effect, that he will faithfully, honestly and impartially discharge the trust reposed in him. The oath must be filed with the clerk, before a commissioner or a referee enters upon the

execution of his duties. The court may, at any time, remove the referee, or either of the commissioners. If either of them dies, resigns, or neglects or refuses to serve, or is removed, the court may, from time to time, appoint another person in his place.

2 R. S. 489, §§ 11 and 12 (2 Edm. 512), am'd. See § 1550, ante.

§ 1609. Dower, how admeasured.

The referee or the commissioners must execute their duties in the following manner:

1. They must, if it is practicable, and, in their opinion, for the best interests of all the parties concerned, admeasure and lay off, as speedily as possible, as the dower of the plaintiff, a distinct parcel, constituting the one-third part of the real property of which dower is to be admeasured, designating the part so laid off by posts, stones, or other permanent monuments.

2. In making the admeasurement, they must take into consideration any permanent improvements, made upon the real property, after the death of the plaintiff's husband, or after the alienation thereof by him; and, if practicable, those improvements must be awarded within the part not laid off to the plaintiff; or, if it is not practicable so to award them, a deduction must be made from the part laid off to the plaintiff, proportionate to the benefit which she will derive from so much of those improvements, as is included in the part laid off to her.

3. If it is not practicable, or if, in the opinion of the referee or commissioners, it is not for the best interests of all the parties concerned, to admeasure and lay off to the plaintiff a distinct parcel of the property, as prescribed in the foregoing subdivisions of this section, they must report that fact to the court.

4. They may employ a surveyor, with the necessary assistants, to aid in the admeasurement.

2 R. S. 489, § 13, as am'd by L. 1869, ch. 433, § 1.

§ 1610. Report thereupon.

All the commissioners must meet together in the performance of any of their duties; but the acts of a majority so met are valid. The referee, or the commissioners, or a majority of them, must make a full report of their proceedings, specifying therein the manner in which they have discharged their trust, with the items of their charges, and a particular description of the portion admeasured and laid off to the plaintiff; or, if they report that it is not practicable, or, in their opinion, it is not for the best interests of all the parties concerned, to admeasure and lay off a distinct parcel of the property, of which dower is to be admeasured, they must state the reasons for that opinion, and all the facts relating thereto. The report must be acknowledged or proved, and certified, in like manner as a deed to be recorded, and must be filed in the office of the clerk.

Id., § 13, am'd by L. 1869, ch. 433, § 2.

§ 1611. Setting aside report.

Upon the application of any party to the action, and upon good cause shown, the court may set aside the report, and, if necessary, may appoint new commissioners, or a new referee, who must proceed, as prescribed in this title, with respect to those first appointed.

Id., § 16, am'd.

§ 1612. Fees and expenses.

The fees and expenses of the commissioners, or of the referee, including the expense of a survey, when it is made, must be taxed

under the direction of the court; and the amount thereof must be paid by the plaintiff, and allowed to her, upon the taxation of her costs.

Substituted for *Id.*, § 25. See § 1555, *ante*.

§ 1613. Final judgment.

Upon the report being confirmed by the court, final judgment must be rendered. If the referee or commissioners have admeasured and laid off to the plaintiff a distinct parcel of the property, the judgment must award to her, during her natural life, the possession of that parcel, describing it, subject to the payment of all taxes, assessments, and other charges, accruing thereupon after she takes possession. If the referee or the commissioners report, that it is not practicable, or that, in his or their opinion, it is not for the best interests of all the parties concerned, so to admeasure and lay off a distinct parcel of the property, the final judgment must direct, that a sum, fixed by the court, and specified therein, equal to one-third of the rental value of the real property, as ascertained by a reference or otherwise, be paid to the plaintiff, annually or oftener, as directed in the judgment, during her natural life, for her dower in the property; and that the sum so to be paid, be and remain a charge upon the property, during her natural life. The final judgment may also award damages for the withholding of dower.

See 2 B. S. 489, § 18, and L. 1869, ch. 433, § 3 (7 Edm. 449).

§ 1614. Plaintiff may recover sum awarded; court may modify judgment.

The plaintiff may, from time to time, maintain an action against the owner, or a person who was the owner of the property, to recover any instalment of the sum, so awarded to her for her dower, which became due during his ownership, and remains unpaid. Or, if an instalment remains due and unpaid, she may maintain an action to procure a sale of the property, and enforce the payment of the instalments, due and to become due, out of the proceeds of the sale. Such an action must be conducted, as if the charge upon the real property was a mortgage to the same effect. If, at any time, it is made to appear to the court, that the rental value of the real property has materially increased or diminished, the court may, by an order, to be made upon notice to all the persons interested, modify the final judgment, by increasing or diminishing the sum to be paid to the plaintiff.

L. 1869, ch. 433, § 3.

§ 1615. Junior incumbrancers; not affected by admeasurement.

Where a portion of the property is admeasured and laid off to the plaintiff as her dower, a lien, which is inferior to the plaintiff's right of dower, attaches, during the life of the plaintiff, to the residue, or to the portion or share of the residue which was subject to it, as if the portion laid off to the plaintiff had not been a part of the property.

L. 1870, ch. 717, § 2, *am'd* by L. 1874, ch. 258 (9 Edm. 880).

§ 1616. Appeal not to stay execution, if undertaking is given.

An appeal from a final judgment, awarding to the plaintiff possession of the part admeasured and laid off to her, does not stay the execution thereof, unless the court, or a judge thereof, grants an order directing such a stay. Such an order shall not be granted, if an undertaking is given on the part of the re-

spondent, with one or more sureties, approved by the court, or a judge thereof, to the effect that, if the judgment appealed from is reversed or modified, and restitution is awarded, she will pay, to the person entitled thereto, the value of the use and occupation of the part so admeasured and laid off to her, or of the portion, restitution of which is awarded, during the time she holds possession thereof, by virtue of the judgment.

L. 1869, ch. 423, § 4 (7 Edm. 450). See §§ 1231, 1252.

§ 1617. Plaintiff may consent to receive a gross sum.

In an action for dower, the plaintiff may, at any time before an interlocutory judgment is rendered, by reason of the defendant's default in appearing or pleading, or, where an issue of fact is joined, at any time before the commencement of the trial, file with the clerk, a consent to accept a gross sum, in full satisfaction and discharge of her right of dower in the real property described in the complaint. Such a consent must be in writing, and acknowledged or proved, and certified, in like manner as a deed to be recorded. A copy thereof, with notice of the filing, must be served upon each adverse party who has appeared, or who appears after the filing.

L. 1870, ch. 717, § 1 (7 Edm. 771), am'd.

§ 1618. Defendant may consent to pay it; proceedings thereupon.

At any time after a consent is filed, as prescribed in the last section, and before an interlocutory judgment is rendered, any defendant may apply to the court, upon notice, for an order granting him leave to pay such a gross sum. Thereupon the court may, in its discretion, and upon such terms as justice requires, ascertain the value of the plaintiff's right of dower in the property, by a reference or otherwise, and make an order, directing payment, by the applicant, of the sum so ascertained, within a time fixed by the order, not exceeding sixty days after service of a copy thereof; and directing the execution by the plaintiff of a release of her right of dower, upon receipt of the money. Obedience to the order may be enforced, either by punishment for contempt, or by striking out the pleading of the offending party, and rendering judgment against him or her or in both modes.

§ 1619. Interlocutory judgment for sale.

Where the plaintiff's consent has been filed, as prescribed in the last section but one, and she is entitled to an interlocutory judgment in the action, the court must, upon the application of either party, ascertain, by reference or otherwise, whether a distinct parcel of the property can be admeasured and laid off to the plaintiff, as tenant in dower, without material injury to the interests of the parties. If it appears to the court, that a distinct parcel cannot be so admeasured and laid off, the interlocutory judgment must, except in the case specified in the next section, direct that the property be sold by the sheriff, or by a referee designated therein; and that, upon the confirmation of the sale, each party to the action, and every person deriving title from, through, or under a party, after the filing of the judgment-roll, or of a notice of the pendency of the action, as prescribed in

article ninth of this title, be barred of and from any right, title, or interest in or to the property sold.

L. 1870, ch. 717, §§ 1 and 3, am'd.

*Am'd. L. 1914
ch. 348*

§ 1680. *Id.*; directing a part to be laid off.

In a case specified in section 1617 of this act, where the property, or a part thereof, consists of one or more vacant or unimproved lots, the plaintiff's consent may contain a stipulation to take a distinct parcel, out of those lots, in lieu of a gross sum. In that case, the interlocutory judgment, instead of directing a sale, may direct if it appears to be just so to do, that commissioners be appointed to admeasure and lay off to the plaintiff a distinct parcel, out of the vacant or unimproved lots; and, if there is any other property, that it be sold, and a gross sum be paid to her out of the proceeds thereof, as prescribed in the next three sections. The plaintiff's title to each distinct parcel, admeasured and laid off to her, as prescribed in this section, is that of an estate of inheritance in fee simple. In admeasuring and laying off the same, the commissioners must consider quantity and quality relatively, according to the value of the plaintiff's right of dower in the vacant or unimproved lots, out of which the admeasurement is to be made; which must be ascertained, in proportion to the value of those lots, as prescribed, in the next three sections, for fixing a gross sum to be paid to her out of the proceeds of a sale.

Id., § 6.

L. 1916 ch. 948

§ 1621. Liens to be ascertained.

Before an interlocutory judgment is rendered for the sale of the property, the court must direct a reference to ascertain whether any person, not a party, has a lien upon the property, or any part thereof. Except as otherwise expressly prescribed in this article, the proceedings upon and subsequent to the reference must be the same, as prescribed in article second of this title, where a reference is made as prescribed in section 1561 of this act.

Id., § 2, am'd by L. 1874, ch. 268 (9 Edm. 880).

§ 1622. *Id.*; payment of; or sale subject to.

Where the interlocutory judgment directs a sale, if the right of dower of the plaintiff is inferior to any other lien upon the property, the judgment may, in the discretion of the court, direct that the property be sold either subject to the lien, or discharged from the lien; and, in the latter case, that the officer making the sale pay the amount of the lien, out of the proceeds of the sale.

Id., § 4.

§ 1623. Report of sale.

Immediately after completing the sale, and executing the proper conveyance to the purchaser, the officer making the sale must make and file with the clerk a report thereof, showing the name of the purchaser, and the purchase-price paid by him, or, if the property was sold in parcels, the name of each purchaser, and the price and a description of the parcel sold to him; the sums which the officer has paid out of the proceeds of the sale, pursuant to the interlocutory judgment; the purpose for which each payment was made; the amount and items of his fees and ex-

enses; and the net amount of the proceeds, after deducting the payments.

L. 1870, ch. 717, § 5.

§ 1624. Final judgment thereon.

Upon confirming the sale, the court must ascertain, by a reference or otherwise, the rights and interests of each of the parties in and to the proceeds of the sale, and also what gross sum of money is equal to the value of the plaintiff's dower in the net proceeds of the sale, calculated upon the principles applicable to life annuities. The court must thereupon render final judgment, confirming the sale, and directing that the gross sum so ascertained be paid to the plaintiff, in full satisfaction of her right of dower; and that the remainder of the proceeds of the sale be distributed among the persons entitled thereto.

Id., § 5, am'd.

§ 1625. Certain provisions of article second made applicable.

The provisions of article second of this title, relating to a sale made as prescribed in that article, and to the distribution, investment, and care of the proceeds, apply, as far as they are applicable, to a sale made as prescribed in this article, and to the distribution of the proceeds of a sale, as prescribed in the last section.

See §§ 1580-1586, ante.

ARTICLE FOURTH.

Action to foreclose a mortgage.

Sec. 1626. Final judgment; what to contain.

1627. Person liable for mortgage debt may be made defendant, etc.; when people of state may be made a party.

1628. Other actions for mortgage debt, when prohibited.

1629. Complaint to state whether such action brought.

1630. If judgment rendered therein, execution must be returned.

1631. Notice of pendency of action to be filed.

1632. Effect of conveyance upon sale.

1633. Disposition of surplus.

1634. When complaint to be dismissed on payment of sum due.

1635. Payment after judgment; when proceedings to be stayed.

1636. When part only of the property to be sold.

1637. When the whole property may be sold.

§ 1626. Final judgment; what to contain.

In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged, or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of the action.

2 R. S. 101, § 151 (2 Edm. 100).

§ 1627. [Am'd, 1899, 1908, 1911, 1912.] Person liable for mortgage debt may be made defendant, etc.; when people of state may be made a party.

1. Any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action; and if he has appeared or has been personally served with the summons, the final judgment may award payment by him of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds, pursuant to the directions contained therein.

*Am'd L. 1916
Ch. 331*
2. The people of the state of New York may be made a party defendant to an action for the foreclosure of a mortgage on real property, where the people of the state of New York have an interest in or a lien on the said real property subsequent to the lien of the mortgage sought to be foreclosed in said action, in the same manner as a private person. In such a case the summons must be served upon the attorney-general, who must appear in behalf of the people, but where the people of the state of New York are made a party defendant, as herein provided, the complaint shall set forth, in addition to the other matters required to be set forth by the code of civil procedure detailed facts showing the particular nature of the interest in or the lien on the said real property of the people of the state of New York, and the reason for making the people a party defendant. Upon failure to state such facts, the complaint shall be dismissed as to the people of the state of New York.

3. In all cases where, prior to September first, nineteen hundred and eight, the attorney-general shall have appeared in behalf of the people of this state, in an action for the foreclosure of a mortgage, such appearance shall be as valid and effectual as though chapter two hundred and eighty-four of the laws of nineteen hundred and eight had been in force at the time of such appearance, whether such actions were pending or concluded when such chapter took effect, anything in such chapter to the contrary notwithstanding, provided, however, that nothing herein contained shall

affect the right or title of any person claiming such real property under letters patent issued by the people of the state, for a valuable consideration before this act shall take effect.

Id., §§ 152 and 154, and Co. Proc., part of § 107. L. 1899, ch. 528; L. 1908, ch. 284; L. 1911, ch. 25; L. 1912, ch. 888, in effect Sept. 1, 1912.

§ 1628. Other actions for mortgage debt, when prohibited.

While an action to foreclose a mortgage upon real property is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained, to recover any part of the mortgage debt, without leave of the court in which the former action was brought.

Id., § 153.

§ 1629. Complaint to state whether such action brought.

The complaint, in an action to foreclose a mortgage upon real property, must state, whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part thereof has been collected.

Id., § 155.

§ 1630. If judgment rendered therein, execution must be returned.

Where final judgment for the plaintiff has been rendered, in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued, upon the judgment, to the sheriff of the county where he resides, if he resides within the State, or, if he resides without the State, to the sheriff of the county where the judgment-roll is filed; and has been returned wholly or partly unsatisfied.

2 R. S. 191, § 156. See § 1432.

§ 1631. Notice of pendency of action to be filed.

The plaintiff must, at least twenty days before a final judgment directing a sale is rendered, file, in the clerk's office of each county where the mortgaged property is situated, a notice of the pendency of the action, as prescribed in section 1670 of this act; which must specify in addition to particulars required by that section, the date of the mortgage, the parties thereto, and the time and place of recording it.

Co. Proc., part of § 132. See Rule 60.

§ 1632. Effect of conveyance upon sale.

A conveyance upon a sale, made pursuant to a final judgment, in an action to foreclose a mortgage upon real property, vests in the purchaser the same estate, only, that would have vested in the mortgagee, if the equity of redemption had been foreclosed. Such a conveyance is as valid, as if it was executed by the mortgagor and mortgagee, and is an entire bar against each of them, and against each party to the action who was duly summoned, and every person claiming from, through or under a party, by title accruing after the filing of the notice of the pendency of the action, as prescribed in the last section.

2 R. S. 191, § 158.

§ 1633. [Am'd, 1908.] Disposition of surplus; duties of officer making sale.

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If there is any surplus of the proceeds of the sale, after paying the expenses of the sale, and satisfying the mortgage debt and the costs of the action, it must be paid into court, for the use of the person or persons entitled thereto. If any part of the surplus remains in court for the period of three months, the court must, if no application has been made therefor, and may, if an application therefor is pending, direct it to be invested at inter-

est, for the benefit of the person or persons entitled thereto, to be paid upon the direction of the court. Within thirty days after completing the sale, and executing the proper conveyance to the purchaser, unless such time be extended by an order of the court entered in the office of the clerk within said thirty days, the officer making the sale must file with the clerk his report under oath of the disposition of the proceeds of the sale, accompanied by the vouchers of the persons to whom payments were ordered to be made.

Id., last clause of §§ 159 and 160. Am'd L. 1908, ch. 204. In effect Sept. 1, 1908.

§ 1634. When complaint to be dismissed on payment of sum due.

Where an action is brought to foreclose a mortgage upon real property, upon which a portion of the principal or interest is due, and another portion of either is to become due, the complaint must be dismissed, without costs against the plaintiff, upon the defendant paying into court, at any time before a final judgment directing a sale is rendered, the sum due, and the plaintiff's costs.

Id., § 161.

§ 1635. Payment after judgment; when proceedings to be stayed.

In a case specified in the last section, if, after a final judgment directing a sale is rendered, but before the sale is made, the defendant pays into court the amount due for principal and interest, and the costs of the action, together with the expenses of the proceedings to sell, if any, all proceedings upon the judgment must be stayed; but, upon a subsequent default in the payment of principal or interest, the court may make an order, directing the enforcement of the judgment, for the purpose of collecting the sum then due.

2 R. S. 191, § 162.

§ 1636. When part only of the property to be sold.

Where the mortgage debt is not all due, and the mortgaged property is so circumstanced, that it can be sold in parcels without injury to the interests of the parties, the final judgment must direct, that no more of the property be sold, in the first place, than is sufficient to satisfy the sum then due, with the costs of the action and expenses of the sale; and that upon a subsequent default in the payment of principal or interest, the plaintiff may apply for an order, directing the sale of the residue, or of so much thereof as is necessary to satisfy the amount then due, with the costs of the application and the expenses of the sale. The plaintiff may apply for and obtain such an order, as often as a default happens.

Id., part of §§ 163 and 164, consolidated.

§ 1637. When the whole property may be sold.

If, in a case specified in the last three sections, it appears that the mortgaged property is so circumstanced, that a sale of the whole will be most beneficial to the parties, the final judgment must direct, that the whole property be sold; that the proceeds of the sale, after deducting the costs of the action, and the expenses of the sale, be either applied to the satisfaction of the whole sum secured by the mortgage, with such a rebate of interest, as justice requires; or be first applied to the payment of the sum due, and the balance, or so much thereof as is necessary, be invested at interest, for the benefit of the plaintiff, to be paid to him from time to time, as any part of the principal or interest becomes due.

Id., §§ 165 and 166, am'd.

ARTICLE FIFTH.

*Action to compel the determination of a claim to real property.***Sec. 1638. Who may maintain action.**

1639. Complaint.

1640. Proceedings when defendant denies plaintiff's title.

1641. *Id.*; when he pleads title.

1642. Proceedings the same as in ejectment.

1643. Proceedings when defendant claims in reversion or remainder.

1644. Judgment awarding defendant possession, etc.

1645. Judgment for plaintiff.

1646. Effect of judgment.

1647. Action to determine widow's dower.

1648. Proceedings, if plaintiff admits defendant's claim.

1649. *Id.*; when defendant's claim is denied.

1650. This article applies to corporations.

§ 1639. [Am'd, 1891, 1904, 1910.] Who may maintain action.

Where a person has been, or he and those whose estates he has, have been for one year in possession of real property, or of any undivided interest therein, claiming it in fee, or for life, or for a term of years not less than ten, he may maintain an action against any other person to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, or from the allegations of the complaint, the defendant might make to any estate in that property in fee, or for life, or for a term of years not less than ten, in possession, reversion or remainder, or to any interest in that property, including any claim in the nature of an easement therein, whether appurtenant to any other estate or lands or not, and also including any lien or incumbrance upon said property, of the amount of value of not less than two hundred and fifty dollars. But this section does not apply to a claim for dower.

2 R. S. 312, § 1 (2 Edm. 321), as am'd by Co. Proc. § 449; L. 1848, ch. 50; L. 1864, ch. 116; L. 1885, ch. 511; L. 1860, ch. 178; L. 1864, ch. 219; L. 1891, ch. 210; L. 1904, ch. 526; L. 1910, ch. 203. In effect May 2, 1910.

§ 1639. [Am'd, 1891, 1904, 1910.] Complaint.

The complaint in such an action must set forth facts showing:

1. The plaintiff's right to the real property; whether his estate therein is in fee, or for life, or for a term of years not less than ten; and whether he holds it as heir, devisee or purchaser, with the source from or means by which his title immediately accrued to him.

2. That the property, at the commencement of the action was, and, for the one year next preceding, has been in his possession, or in the possession of himself and those from whom he derives his title, either as sole tenant, or as joint tenant, or as tenant in common with others.

3. That the defendant unjustly claims, or that it appears from the public records or from the allegations of the complaint, that the defendant might unjustly claim an estate or interest or easement therein, or a lien or incumbrance thereupon of the character specified in the last section.

The complaint must describe the property as prescribed in section fifteen hundred and eleven of this act and may contain an allegation that no personal claim is made against any defendant other than a defendant who shall assert a claim adverse to the claim of the plaintiff set forth in the complaint. The demand for judgment may be to the effect that the defendant and every person claiming under him to be barred from all claim to an estate in the property described in the complaint, or from all claim to an interest or easement therein, or a lien or incumbrance thereupon, of the character specified in the last section, or it may combine two or more of said demands with other demand for appropriate relief.

Id., § 2, am'd. See Co. Proc. § 449; L. 1891, ch. 210; L. 1904, ch. 526; L. 1910, ch. 203. In effect May 2, 1910.

§ 1640. Proceedings when defendant denies plaintiff's title.

If the defendant, in his answer, puts in issue the matters specified in subdivision second of the last section, and succeeds upon that defence, final judgment must be rendered in his favor, dismissing the complaint, and awarding to him costs against the plaintiff.

2 B. S. 312, § 7, am'd by L. 1855, ch. 511.

§ 1641. [Am'd, 1891.] Id.; when he pleads title.

The defendant may, in his answer, either with or without the defense specified in the last section, set forth facts, showing that he has an estate in the property or any part thereof, adverse to the plaintiff, in fee, or for life, or for a term of years not less than ten,* in possession, reversion, or remainder, as in a complaint for the same cause of action; or the defendant may set forth facts showing that he has an interest or an easement in, or a lien or incumbrance upon, said property; and thereupon he may demand that the complaint be dismissed, or any judgment to which he would be entitled in an action brought by him to recover that estate in said property, or to enforce in any manner the interest or easement therein, or the lien or incumbrance thereupon which he asserts; or he may combine any two or more of said demands.

L. 1891, ch. 210.

§ 1642. [Am'd, 1891.] Proceedings the same as in ejectment.

Where an issue of fact is joined in an action brought as prescribed in this article, unless the defendant merely demands that the complaint be dismissed, if the defendant claims an estate in said property, the subsequent proceedings, including the trial, judgment and execution, are the same as if it was an action of ejectment, except as otherwise expressly prescribed in this title; if the defendant claims an interest or easement in, or a lien or incumbrance upon, said property, the subsequent proceedings are the same as if it was an action brought by the defendant to establish or enforce the said interest, easement, lien or incumbrance, and the court may award any appropriate relief except as otherwise expressly prescribed in this title.

L. 1891, ch. 210.

§ 1643. Proceedings when defendant claims in reversion or remainder.

Where the defendant claims the property in question, or any part thereof, by virtue of an estate in remainder or reversion, he need not establish a right to the immediate possession thereof; but where the verdict, report, or decision finds that he has such an estate, it must specify the time when, or the contingency upon which, he will be entitled to possession; and final judgment to that effect must be rendered accordingly, without damages. In such a case, an execution for the delivery of the possession of the property may be issued upon the judgment; but only by the special order of the court, made upon an application by the defendant, or a person claiming under him, and satisfactory proof that the time has arrived when, or the contingency has happened upon which, the applicant is entitled to possession by the terms of the judgment.

2 R. S. 314, 315, §§ 13 and 16 (2 Edm. 323), am'd by L. 1855, ch. 511.

§ 1644. Judgment awarding defendant possession, etc.

Where a final judgment, in favor of the defendant, determines that he is entitled to the immediate possession of the property, it must award him possession accordingly. The final judgment must also award to him his damages for the withholding of his property, as in an action of ejectment.

2 R. S. 314, 315, § 15, am'd as on page 433.

§ 1645. [Am'd, 1891, 1910.] Judgment for plaintiff.

Final judgment for the plaintiff must be to the effect that the defendant, and every person claiming under him, by title accruing after the filing of the judgment-roll, or of the notice of the tendency of the action, as prescribed in article ninth of this title,

be forever barred from all claim to any estate of inheritance, or for life, or for a term of years not less than ten, in the property; or such judgment must be that the defendant and every person claiming under him, as above stated, be forever barred from all claim to any interest or easement in, or lien or incumbrance upon, the said property, of any kind or nature whatsoever, or of any particular interest, easement, lien or incumbrance specified in said judgment; and the court may direct any instrument purporting to create any such interest, easement, lien or incumbrance to be delivered up or to be canceled of record; or two or more of said forms of judgment may be awarded in the same action. If such a judgment is taken upon the defendant's default in appearing or pleading, it shall not award costs to either party, unless it be taken upon a default in answering, after the decision of a demurrer to the complaint. A defendant against whom no personal claim is made in the complaint shall not be entitled to costs unless awarded by the court when such defendant asserts in his answer and establishes a claim in said lands adverse to the claim of the plaintiff in said action.

L. 1891, ch. 210; L. 1910, ch. 203. In effect May 2, 1910.

§ 1646. [Am'd, 1891.] Effect of judgment.

A final judgment in favor of either party, in an action brought as prescribed in this article, is conclusive against the other party, as to the title established in the action; and also against every person claiming from, through, or under that party, by title accruing after the filing of the judgment-roll, or of the notice of the pendency of the action, as prescribed in article ninth of this title. A new trial of said action after judgment shall not be granted as a matter of right, but the court may, in its discretion in the interest of justice, grant a new trial upon an application made by any party within one year after said judgment. But where a defendant is an infant, an idiot, a lunatic, an habitual drunkard, or imprisoned on a criminal charge or in execution upon conviction of a criminal offence for a term less than life, the said defendant shall have the right, within one year after his disability is terminated, to apply for and obtain a new trial of said action, and the representatives of such a defendant shall have the same right within one year after the death of said defendant if such death occurs while the disability continues. Upon any new trial of an action, brought as prescribed in this article, the record of the evidence given upon the previous trial, may be again offered to the court by either party, and may be received in evidence, in case the same evidence cannot be again procured. The courts may make such rules and orders as to preserving th

record of the evidence given in such actions and perpetuating the proofs produced therein, either with or without the awarding of any other relief to the party whose proofs are so perpetuated, as shall be necessary or proper, and may embrace such directions in the judgment.

L. 1891, ch. 210.

§ 1647. [Am'd, 1891.] Action to determine widow's dower.

A person claiming, as owner, an estate in fee, for life, or for years, in real property, may maintain an action against a woman, who claims to have a right of dower in the whole or a part of the property, to compel the determination of her claim. But such an action cannot be commenced until after the expiration of four months after the death of defendant's husband. If the defendant is under any of the disabilities specified in the last section, the provisions of that section relating to new trials and to perpetuating proofs, shall apply to her case.

L. 1891, ch. 210.

§ 1648. Proceedings, if plaintiff admits defendant's claim.

In an action brought as specified in the last section, if the complaint admits the defendant's right of dower in the property described therein, or any part thereof, it must demand judgment that her dower be admeasured. In that case, if the defendant does not, by her answer, set forth facts showing that she is entitled to a greater right of dower, or another estate or interest in the property, than is so admitted, and demand judgment therefor, as if she was the plaintiff in an action for dower, the court must render an interlocutory judgment, directing her dower to be admeasured, with or without damages for its detention, as in an action for dower. The subsequent proceedings are the same, as if the defendant had, as plaintiff, recovered an interlocutory judgment in an action for dower.

§ 1649. Id.; when defendant's claim is denied.

Where the plaintiff insists, in his complaint, that the defendant has not a right of dower in the property, he must demand judgment that she be forever barred from such a claim. In that case, or where the plaintiff admits a right of dower in the defendant, and the defendant in her answer demands judgment for a greater right of dower, or another estate or interest in the property, than is so admitted, the provisions of this article, relating to an action to compel the determination of an adverse claim in fee, or for life, or for a term of years not less than ten, apply to all proceedings subsequent to the answer.

§ 1650. [Am'd, 1891.] This article applies to corporations.

An action may be maintained, as prescribed in this article, by or against a corporation, or by or against an unincorporated association, as if it was a natural person, or such an action may be maintained by or against the receiver or other successor of any such corporation or association.

L. 1891, ch. 210.

ARTICLE SIXTH.

Action for waste.

- Sec. 1651. Who liable to action for waste.
 1652. Action by heir, devisee, or grantor of reversion.
 1653. Id.; by ward against guardian.
 1654. Id.; by grantee of real property, sold under execution.
 1655. Judgment in action against tenant of particular estate.
 1656. Action against joint tenant or tenant in common.
 1657. Id.; interlocutory judgment for partition.
 1658. Id.; damages to be deducted from defendant's share.
 1659. View; when not necessary; when and how made.

§ 1651. Who liable to action for waste.

An action for waste lies against a tenant by the curtesy, in dower, for life, or for years, or the assignee of such a tenant, who, during his estate or term, commits waste upon the real property held by him, without a special and lawful written license so to do; or against such a tenant, who lets or grants his estate, and still retaining possession thereof, commits waste without a like license.

2 R. S. 334, §§ 1 and 2 (2 Edm. 344).

§ 1652. Action by heir, devisee, or grantor of reversion.

An heir or devisee may maintain an action for waste, committed in the time of his ancestor or testator, as well as in his own time. The grantor of a reversion may maintain an action for waste, committed before he aliened the same.

Id., § 4, am'd.

§ 1653. Id.; by ward against guardian.

Such an action may also be maintained against a guardian by his ward, either before or after the termination of the guardianship, for waste, committed upon the real property of the ward, during the guardianship.

Id., part of § 1.

§ 1654. Id.; by grantee of real property sold under execution.

Where real property is sold by virtue of an execution, the person, to whom a conveyance is executed pursuant to the sale, may maintain an action for waste, committed thereon after the sale, against the person, who was then in possession of the property.

Id., § 20.

§ 1655. Judgment in action against tenant of particular estate.

If the plaintiff recovers in an action for waste, other than an action brought as prescribed in the next section, the final judgment must award to him treble damages. Where the action is brought by the person next entitled to the reversion, and it appears, in like manner, that the injury to the estate in reversion is equal to the value of the tenant's estate or unexpired term, or that it was done maliciously, the final judgment must also award to the plaintiff the forfeiture of the defendant's estate, and the possession of the place wasted.

Id., § 10, as modified by Co. Proc., § 452. See, also, §§ 1020 and 1180, ante.

§ 1656. Action against joint tenant or tenant in common.

An action for waste may also be maintained, by a joint tenant or tenant in common, against his co-tenant, who commits waste upon the real property held in joint tenancy or in common. If the plaintiff recovers therein, he is entitled, at his election, either to a final judgment for treble damages, as specified in the last section, or to have partition of the property, as prescribed in the next two sections.

2 R. S. 334, §§ 8 and 11, consolidated.

§ 1657. Id.; interlocutory judgment for partition.

Where the plaintiff elects to have partition, as prescribed in the last section, if the pleadings, verdict, report, or decision, do not determine the rights and interests of the several parties in the property so held in joint tenancy or in common, the court must ascertain them, by a reference or otherwise. If it appears that there are persons, not parties to the action, who must have been made parties to an action for the partition of the property, they must be brought in by supplemental summons, and, if necessary, supplemental pleadings must be made. When the rights and interests of all the parties are ascertained, an interlocutory judgment for the partition or sale of the property must be rendered, and the subsequent proceedings thereon must be the same, as in an action for the partition of the property, except as otherwise prescribed in the next section.

Id., §§ 12, 13 and 14, and part of § 17, consolidated and am'd.

§ 1658. Id.; damages to be deducted from defendant's share.

The plaintiff may elect to take final judgment for the single damages awarded to him, or that, in making the partition, or in dividing the proceeds of a sale, so much of the share of the defendant in the real property, or the proceeds thereof, as will be sufficient to compensate the plaintiff for his single damages, and the costs of the action, other than the expenses of making the partition or sale, be laid off or paid, as the case may be, to the plaintiff. The residue of the property or proceeds, not laid off or distributed to the plaintiff or the defendant, must be laid off or paid to the persons entitled thereto, according to their respective rights and interests.

Id., §§ 15, 16, and last clause of § 17, am'd.

§ 1659. View; when not necessary; when and how made.

In an action for waste, it is not necessary, either upon the execution of a writ of inquiry, or upon the trial of an issue of fact, that the jury, the judge, or the referee, should view the property. Where the trial is by a referee, or by the court without a jury, the referee or the judge may, in his discretion, view the property, and direct the attorneys for the parties to attend accordingly. In any other case, the court may, in its discretion, by order, direct a view by the jury.

Substituted for Id., part of §§ 8 and 10.

ARTICLE SEVENTH.

Action for a nuisance.

Sec. 1660. When action may be brought.

1661. Defendants therein.

1662. Final judgment.

1663. Application of this article.

§ 1660. When action may be brought.

An action for a nuisance may be maintained in any case, where such an action might have been maintained under the laws in force, immediately before this act takes effect.

2 R. S. 332, § 1 (2 Edm. 343), and Co. Proc., § 454.

§ 1661. Defendants therein.

A person by whom the nuisance has been erected, and a person to whom the real property has been transferred, may be joined as defendants in such an action.

Id., § 2.

§ 1662. Final judgment.

A final judgment in favor of the plaintiff, may award him damages, or direct the removal of the nuisance, or both.

Id., § 7, am'd by Co. Proc., § 454.

§ 1663. Application of this article.

This article does not affect an action, wherein the complaint demands judgment for a sum of money only.

ARTICLE EIGHTH.

Other actions relating to real property.

Sec. 1664. Certain persons holding over deemed trespassers. Action against them.

1665. Reversioner, etc., may maintain action.

1666. Joint tenant, etc., may maintain action against his co-tenant.

1667. Action for cutting, etc., trees.

1668. Id.; when treble damages may be recovered.

1669. Treble damages for forcible entry or detainer.

§ 1664. Certain persons holding over deemed trespassers. Action against them.

A person in possession of real property, as guardian or trustee for an infant, or having an estate determinable upon one or more lives, who holds over and continues in possession, after the termination of his trust or particular estate, without the express consent of the person then immediately entitled, is a trespasser. An action may be maintained against him, or his executor or administrator, by the person so entitled, or his executor or administrator, to recover the full value of the profits, received during the wrongful occupation.

1 R. S. 749, § 7 (1 Edm. 700).

§ 1665. Reversioner, etc., may maintain action.

A person, seized of an estate in remainder or reversion, may maintain an action founded upon an injury done to the inheritance, notwithstanding any intervening estate for life or for years. Id., § 8.

§ 1666. Joint tenant, etc., may maintain action against his co-tenant.

A joint tenant or a tenant in common of real property, or his executor or administrator, may maintain an action to recover his just proportion against his co-tenant, who has received more than his own just proportion, or against his executor or administrator.

Substituted for Id., § 9.

§ 1667. Action for cutting, etc., trees.

If any person cuts down or carries off any wood, underwood, tree, or timber, or girdles or otherwise despoils a tree on the land of another, without the owner's leave; or on the common, or other land, of a city, village, or town, without having right or privilege in those lands, or license from the proper officer; an action may be maintained against him, by the owner, or the city, village, or town, as the case may be.

2 R. S. 328, § 1 (2 Edm. 349), am'd.

§ 1668. Id.; when treble damages may be recovered.

In an action brought as prescribed in the last section, the plaintiff may state in his complaint the amount of his damages, and demand judgment for treble the sum, so stated. Thereupon, if the inquisition, or, where issues of fact are tried, the verdict, report or decision, awards him any damages, he is entitled to judgment for treble the sum so awarded, except that in either of the following cases, judgment must be rendered for single damages only.

~~and~~

1. Where the verdict, report, or decision finds affirmatively that the injury, for which the action was brought, was casual and involuntary; or that the defendant, when he committed the injury, had probable cause to believe that the land was his own.

2. Where the defendant has pleaded, and the verdict, report, or decision finds affirmatively, that the injury, for which the action was brought, was committed by taking timber, for the purpose of making or repairing a public road, or a public bridge, or by taking any wood, underwood, or tree, for a like purpose, by authority of a commissioner or overseer of highways.

2 R. 8. 338, §§ 2 and 3, and part of § 1.

§ 1669. Treble damages for forcible entry or detainer.

If a person is disseized, ejected, or put out of real property, in a forcible manner; or after he has been put out, is held and kept out, by force, or by putting him in fear of personal violence, he is entitled to recover treble damages, in an action therefor against the wrong-doer.

Id., § 4, am'd. See § 1184, ante.

ARTICLE NINTH.

Provisions applicable to two or more of the actions specified in this title.

Sec. 1670. Notice of pendency of action by plaintiff.

1671. Effect of notice.

1672. Notice to be recorded and indexed.

1673. Notice of pendency of action by defendant.

1674. When and how notice may be cancelled.

1675. When and how court may compel delivery of possession of real property to purchaser.

1676. Upon sale of real property, officer to pay taxes, etc.

1677. Judgment to be entered in county where real property is situated.

1678. Sale; notice of; how conducted.

1679. Purchases by certain officers prohibited. Penalty.

1680. Reversioner, etc., may bring action after tenant's default.

1681. Defendant, how prevented from committing waste, etc.

1682. When order for survey may be made.

1683. Contents and service of order.

1684. Authority of party under order.

1685. Liability of purchaser, pending an action.

1686. Infant may maintain, etc., real action in his own name.

1687. Joinder of real actions with others.

1688. When special proceeding to recover real property not allowed.

§ 1670. [Am'd, 1904.] Notice of pendency of action by plaintiff.

In an action brought to recover a judgment affecting the title to, or the possession, use, or enjoyment of, real property, if the complaint is verified the plaintiff may, when he files his complaint, or at any time afterwards before final judgment, file, in the clerk's office of each county where the property is situated, a notice of the pendency of the action, stating the names of the parties, and the object of the action, and containing a brief description of the property in that county, affected thereby. Such a notice may be filed with the complaint, before the service of the summons; but, in that case, personal service of the summons must be made upon a defendant, within sixty days after the filing, or else, before the expiration of the same time, publication of the summons must be commenced, or service thereof must be made without the state, pursuant to an order obtained therefor, as prescribed in chapter fifth of this act.

See Co. Proc., § 132; see, § 1631, also, § 1673, post; L. 1904, ch. 518. In effect Sept. 1, 1904.

§ 1671. [Am'd, 1905.] Effect of notice.

Where a notice of the pendency of an action may be filed, as prescribed in the last section, the pendency of the action is constructive notice, from the time of so filing the notice only, to a purchaser or incumbrancer of the property affected thereby, from or against a defendant, with respect to whom the notice is directed to be indexed, as prescribed in the next section. A person, whose conveyance or incumbrance is subsequently executed, or subsequently recorded, is bound by all proceedings taken in the action, after the filing of the notice, to the same extent as if he was a party to the action. In any action, other than an action to foreclose a mortgage or for the partition of real property or for dower, in which a notice of the pendency thereof has been filed, and in which it shall appear to the court upon a motion made as hereinafter provided, that adequate relief can be secured to the plaintiff by a deposit of money, or in the discretion of the court by the giving of an undertaking, as hereinafter provided, where the cancellation of such notice is not otherwise expressly provided

for or regulated, any defendant or any other person having an interest in the property affected by the action, may apply for the cancellation of such notice. Such application shall be by motion made in the action upon notice, to be directed and approved by the court, to all the parties to the action and to such other persons as the court may direct. If the court on the hearing of the motion shall decide that adequate relief can be secured to the plaintiff and that the case is one in which the judgment sought to be enforced against the real property mentioned in said notice of pendency of action may be secured by the deposit of the amount claimed or by the giving of an undertaking, the court may make an order directing that the applicant make a deposit in court of a sum of money, or in the discretion of the court, give an undertaking with at least two sufficient sureties for the payment of any amount which the party filing such notice of pendency of action, or any other party to the action claiming an interest or lien upon such real property may recover in the action, and will pay the judgment sought to be enforced against said real property, in the event that a final judgment shall be recovered therein and conditioned for the performance of such other terms as the court may direct, and that thereupon, and upon such other terms, if any, as the court shall deem equitable, an order be made cancelling such notice of record. The sum required to be paid into court or the amount of the undertaking, shall be at least the amount claimed by the plaintiff or the value of the property affected by the action or the interest of the party filing such notice therein, with interest and costs, and if the court allow an undertaking to be given, a copy thereof with notice of filing of the same, shall be served upon the attorney for the plaintiff and upon such other parties as the court may direct and notice of not less than two days of the justification of the sureties. Upon the deposit of the sum required into court, or if an undertaking is given, upon the approval of such undertaking by the court or a judge thereof and the compliance with such other terms as may have been imposed, the court may direct that the notice of pendency of action be cancelled of record by a particular clerk or by all the clerks with whom it is filed and recorded, which cancellation must be made by a note to that effect, on the margin of the record, referring to the order. Unless the order is entered in the same clerk's office, a certified copy thereof must be filed therein, before the notice is cancelled. After a notice of pendency of action has been cancelled as herein provided, neither the proceedings in the action, nor any judgment which may be rendered therein, shall affect the real property described in any notice of pendency which has been cancelled pursuant to the provisions of this section.

Co. Proc., § 132; L. 1905, ch. 60. In effect Sept. 1, 1905.

§ 1672. [Am'd, 1913.] Notice to be recorded and indexed.

Each county clerk with whom such a notice is filed, must immediately record it in a book kept in his office for that purpose, and index it to the name of each defendant, specified in a direction, appended at the foot of the notice, and subscribed by the attorney for the plaintiff. The notice filed in partition suits must be indexed against the name of each plaintiff and of each defendant having any interest or estate in the premises. The expense of procuring a new book, when necessary, must be paid out of the county treasury, as other county charges.

L. 1864, ch. 53, §§ 1 and 2 (6 Edm. 231). Am'd by L. 1913, ch. 60. In effect Sept. 1, 1913.

§ 1673. Notice of pendency of action by defendant.

Where a defendant sets up in his answer a counterclaim, upon

which he demands an affirmative judgment affecting the title to, or the possession, use, or enjoyment of, real property, he may, at the time of filing his answer, or at any time afterwards before final judgment, file a like notice. The last three sections apply to such a notice. For the purpose of such an application, the defendant filing such a notice is regarded as a plaintiff, and the plaintiff is regarded as a defendant.

Co. Proc., § 132, in part. See § 1670, ante.

§ 1674. [Am'd, 1892.] When and how notice may be cancelled.

After the action is settled, discontinued, or abated, or final judgment is rendered therein against the party filing the notice, and the time to appeal herefrom has expired, or if a plaintiff filing the notice unreasonably neglects to proceed in the action, the court may, in its discretion, upon the application of any person aggrieved, and upon such notice as may be directed or approved by it, direct that a notice of the pendency of an action, filed as prescribed in the last four sections, be cancelled of record by a particular clerk, or by all the clerks, with whom it is filed and recorded. The cancellation must be made by a note to that effect, on the margin of the record, referring to the order. Unless the order is entered in the same clerk's office, a certified copy thereof must be filed therein, before the notice is cancelled. In a judgment creditor's action, the court may, at any stage of the proceeding, upon notice to the plaintiff or to the judgment creditor to be affected thereby, direct that a notice of the pendency thereof be cancelled, upon payment into court of the amount of the judgment or judgments sought to be enforced in such action, together with the accrued interest and such sum in addition thereto as the court may deem sufficient to cover interest likely to accrue during the pendency of the action and costs. Or, in lieu thereof, the court may, in its discretion, order that an undertaking be given in a sum double the amount of the judgment or judgments sought to be enforced, with two sufficient sureties to be approved by the court or a judge thereof, conditioned that the defendant or defendants applying therefor will pay the judgment or judgments sought to be enforced against said property, with interest and costs in the event that a final judgment shall be entered in such judgment creditor's action in favor of the judgment creditor or creditors to the effect that such real estate was, at the time of the filing of said notices of pendency of action, equitably chargeable therewith. A copy of said undertaking, with notice of the filing of the same, shall be served upon the attorney for the judgment creditor, and notice of not less than two days of the justification of the sureties. Upon the approval of such undertaking by the court or a judge thereof, the court may direct that the notice of pendency of action be cancelled of record, in the manner above provided. Where a judgment creditor's action is brought by the plaintiff as well on his own behalf as on behalf of such other creditors as may come in and contribute to the expense of such action, notice of the application to cancel such his pendens shall be given, as well to the plaintiff as to such other judgment creditors as shall, before the service of the notice of motion or order to show cause, have served upon the attorney appearing for the defendant in whose name the title shall stand at the time of the commencement of the action a notice to the effect that such judgment creditor elects to come in and contribute to the expenses of such action, which notice shall also describe the judgment by giving the name of the court in which it was recovered, such

recovery and the amount thereof, and shall be accompanied by an affidavit of the judgment creditor or his attorney to the effect that such judgment has been duly docketed, giving the date and place of such docket, and that an execution has been issued thereon to the sheriff of the proper county and has been returned unsatisfied, and the amount claimed to be due thereon. In such case the court shall provide for like deposit or like security, as the case may be, for the benefit of the judgment creditor giving such notice before the cancellation of such notice of pendency of action:

L. 1892, ch. 504.

§ 1675. When and how court may compel delivery of possession of real property to purchaser.

Where a judgment in an action specified in this title, allots to any persons a distinct parcel of real property, or contains a direction for the sale of real property, or confirms such an allotment or sale, it may also, except in a case where it is expressly prescribed in this act that the judgment may be enforced by execution, direct the delivery of the possession of the property to the person entitled thereto. If a party, or his representative or successor, who is bound by the judgment, withholds possession from the person thus declared to be entitled thereto, the court, besides punishing the disobedience as a contempt, may, in its discretion, by order, require the sheriff to put that person into possession. Such an order must be executed, as if it was an execution for the delivery of the possession of the property.

2 B. S. 101, part of § 152 (2 Edm. 199).

§ 1676. Upon sale of real property, officer to pay taxes, etc.

Where a judgment rendered in an action for partition, for dower, or to foreclose a mortgage upon real property, directs a sale of the real property, the officer making the sale must, out of the proceeds, unless the judgment otherwise directs, pay all taxes, assessments, and water rates, which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments, or water rates, which have not apparently become absolute. The sums, necessary to make those payments and redemptions, are deemed expenses of the sale, within the meaning of that expression, as used in any provision of article second, third or fourth of this title.

L. 1870, ch. 717, § 2, modified and am'd. See Rule 61.

§ 1677. Judgment to be entered in county where real property is situated.

Where real property, sold by virtue of a judgment, rendered in an action specified in the last section, is situated in a county, other than that in which the judgment is entered, the judgment must be also entered in the office of the clerk of the county wherein the property is situated, before the purchaser can be required to pay the purchase-money, or to accept a deed. The clerk of the latter county must enter it in the judgment-book kept by him, upon filing with him a copy thereof, certified by the clerk with whom it is entered.

§ 1678. [Am'd, 1894, 1896, 1898.] Sale; notice of; how conducted.

A sale made in pursuance of any provision of this title, must be at public auction to the highest bidder. Notice of such sale must be given by the officer making it, as prescribed in section fourteen hundred and thirty-four of this act for the sale by a sheriff of real property, by virtue of an execution, un-

less the property is situated wholly or partly in a city in which a daily, semi-weekly or tri-weekly newspaper is published, and, in that case, by publishing notice of the sale in such a daily, semi-weekly or tri-weekly paper, at least twice in each week for three successive weeks, or in a weekly paper published in a city, once in each of the six weeks, immediately preceding the sale, or in the counties of New York and Kings in two such daily papers. If the officer appointed to make such sale does not appear at the time and place where such sale has been advertised to take place, then in that case the attorney for the plaintiff may postpone or adjourn such sale, not to exceed four weeks, during which time such attorney may make application to the court to have another person appointed to make such sale. Notice of the postponement of the sale must be published in the paper or papers wherein the notice of sale was published. The terms of the sale must be made known at the sale, and if the property, or any part thereof, is to be sold subject to the right of dower, charge or lien, that fact must be declared at the time of the sale. If the property consists of two or more distinct buildings, farms or lots they shall be sold separately, unless otherwise ordered by the court; and provided, further, that where two or more buildings are situated on the same city lot, they be sold together.

In effect Sept. 1, 1898; L. 1898, ch. 662; L. 1896, ch. 152; L. 1894, ch. 263.

add. 1916
D. 585 **§ 1670. Purchases by certain officers prohibited. Penalty.**

A commissioner, or other officer, making a sale, as prescribed in this title, or a guardian of an infant party to the action, shall not, nor shall any person, for his benefit, directly or indirectly, purchase, or be interested in the purchase of, any of the property sold; except that a guardian may, where he is lawfully authorized so to do, purchase for the benefit or in behalf of his ward. The violation of this section is a misdemeanor; and a purchase, made contrary to this section, is void.

§ 1680. Reversioner, etc., may bring action after tenant's default.

Where a tenant for life, or for a term of years, suffers judgment to be taken against him, by consent or by default, in an action of ejectment, or an action for dower, the heir or person owning the reversion or remainder, may, after the determination of the particular estate, maintain an action of ejectment to recover the property.

2 R. S. 380, § 2 (2 Edm. 350), am'd. See § 1688, post.

§ 1681. Defendant, how prevented from committing waste, etc.

If, during the pendency of an action specified in this title, the defendant commits waste upon, or does any other damage to, the property in controversy, the court, or a judge thereof, may, upon the application of the plaintiff, and due proof of the facts by affidavit, grant, without notice or security, an order, restraining him from the commission of any further waste upon or damage to the property. Disobedience to such an order may be punished as a contempt of the court. This section does not affect the plaintiff's right to a permanent or temporary injunction in such an action.

2 R. S. 336, §§ 18 and 19 (2 Edm. 347).

§ 1682. When order for survey may be made.

If the court, in which an action relating to real property is pending, is satisfied that a survey of any of the property, in

the possession of either party, or of a boundary line between the parties, or between the property of either of them, and of another person, is necessary or expedient, to enable either party to prepare a pleading, or prepare for trial, or for any other proceeding in the action, it may, upon the application of either party, upon notice to the party in possession, make an order, granting to the applicant leave to enter upon that party's property, to make such a survey.

2 R. S. 341, § 12 (2 Edm. 352), am'd.

§ 1683. Contents and service of order.

An order, made as prescribed in the last section, must specify, by a description as definite as may be, the property or boundary line to be surveyed, and the real property of the adverse party, upon which it is necessary to enter for that purpose. A copy thereof must be served on the owner or occupant of that property, before entry thereupon.

Id., § 14, am'd.

§ 1684. Authority of party under order.

After serving a copy of the order, as prescribed in the last section, the party obtaining it, his necessary surveyors, servants, and agents, may enter, for the purpose of making the survey, upon the real property described in the order, and may there make the survey; but each person so entering is responsible for any unnecessary injury done by him; and the party procuring the order is responsible for such an injury, done by any person so entering.

Id., § 15, am'd.

§ 1685. Liability of purchaser, pending an action.

If the defendant, in an action of ejectment or an action for dower, alien the real property in question, after the filing of a notice, as specified in section 1670 of this act, and an execution against him for the plaintiff's damages is returned wholly or partly unsatisfied, an action may be maintained by the plaintiff against any person who has been in possession of the property, under the defendant's conveyance, to recover the unsatisfied portion of the damages, for a time not exceeding that, during which he possessed the property.

Id., § 19. See § 1670, ante.

§ 1686. Infant may maintain, etc., real action in his own name.

Any action specified in this title may be maintained by or against an infant in his own name; and article fourth of title second of chapter fifth of this act applies to such an action, except as otherwise prescribed in sections 1535 and 1536 of this act.

§ 1687. Joinder of real actions with others.

Nothing contained in this title is to be construed, as to prevent the plaintiff from uniting in the same complaint two or more causes of action, in any case specified in section 484 of this act.

See § 484, ante.

§ 1688. When special proceeding to recover real property not allowed.

A special proceeding to recover real property cannot be taken, except in a case specially prescribed by law.

2 R. S. 342, § 24 (2 Edm. 354).

ARTICLE TENTH.

(Added by L. 1901, ch. 302. In effect Sept. 1, 1901.)

Evidence in actions or proceedings involving a title to real property.

Sec. 1688a. Testimony perpetuated pursuant to this article may be received.

1688b. Effect of documentary evidence.

1688c. Mode of introducing testimony.

1688d. Application to take deposition and perpetuate testimony.

1688e. Petition, what to contain.

1688f. Appointment of referee; notice to appear.

1688g. Referee to take deposition.

1688h. Examination; deposition to be signed and certified.

1688i. Depositions as evidence.

§ 1688a. Testimony perpetuated pursuant to this article may be received.

In any action or proceeding involving a question as to title to real property in the state of New York, the court shall upon the offer of any party receive in evidence testimony perpetuated pursuant to the provisions of this article; provided that the testimony of a witness shall not be admissible under the provisions hereof, until the court is satisfied that such witness is deceased, or is unable personally to attend by reason of insanity, sickness or other infirmity, or is confined in a prison or jail, or is absent from the state, and his attendance can not with reasonable diligence be compelled by subpoena or his testimony taken by commission.

§ 1688b. Effect of documentary evidence.

No provision of this article shall give to any documentary evidence introduced in connection with such testimony any greater or different effect than may be due to it by reason of the testimony relative thereto or its own character.

§ 1688c. Mode of introducing testimony.

Such testimony may be introduced in such action or proceeding in any mode established by the practice of the courts for the introduction of testimony given upon a former trial of an action by a witness who has since died, and subject to objections as to

the competency of a witness or the relevancy or competency of a question put to him or the answer given by him, as if the witness were personally examined, and without being noted upon the deposition.

§ 1688d. Application to take deposition and to perpetuate testimony.

Where a person has been, or he and those under whom he claims have been, for one year in possession of real property or of an undivided interest therein, claiming it in fee or for life or for a term of years, not less than ten, he may apply to the supreme court, by petition, to take the deposition of any person or persons and to perpetuate such testimony to be received in evidence pursuant to the provisions of this article.

§ 1688e. Petition, what to contain.

The person desiring to take a deposition and to perpetuate testimony as prescribed in this article may present to a justice of the supreme court a petition duly verified, setting forth as follows:

First. A description of the real property in relation to which the petitioner desires testimony taken and perpetuated, the estate of the petitioner therein, whether in fee or for life, or for a term of years, and whether he holds as heir, devisee or purchaser, or as trustee of an express trust.

Second. That the property at the date of the petition is and for one year next preceding has been in his possession or the possession of himself and those from whom he derives title, either as sole owner or as joint tenant or as tenant in common.

Third. A general statement of the facts as to which testimony is to be taken and the circumstances which render it necessary for the protection of the petitioner's rights that the proposed testimony should be perpetuated.

Fourth. The names and residences of the persons to be examined.

Fifth. The names and residences of persons having interests which may be adversely affected by the testimony sought to be taken, so far as such names and residences are within the knowledge of the petitioner; or, where such names and residences cannot be ascertained, a statement of the class of persons having interests which may be so adversely affected.

Sixth. Any other fact necessary to show that the case comes within the provisions of this article.

§ 1688f. [Am'd, 1913.] Appointment of referee; notice to appear.

Upon the presentation of the petition, the judge shall make an order containing directions as to the persons to whom, and the

manner in which, notice shall be given of the time and place at which such application will be heard; and at the time fixed in said notice for that purpose, if it shall be shown to the satisfaction of the court that the case comes within the provisions of this article, the court shall make an order appointing a referee to take such testimony and prescribing the manner in which and the persons to whom notice shall be given of the time and place at which the testimony will be taken before said referee.

If it shall appear from the petition that the person or persons to be examined reside without the state, the judge to whom the petition may be presented may direct that a commission be issued to one or more competent persons named therein to examine the person or persons named therein under oath upon the interrogatories annexed to the commission; to take and certify the deposition of each witness, and to return the same and the commission according to the directions given in or with the commission; and for this purpose the judge shall make an order directing that interrogatories be settled on notice to persons who, from the petition it may appear, may be adversely affected by the testimony sought to be taken. All the provisions of chapter nine, title three, article two of the code of civil procedure shall apply to depositions taken without the state as herein provided; and a deposition taken and filed in accordance with the provisions thereof and of this article, shall have the same force and effect as the depositions of a witness before a referee as herein provided, if, before it may be read in evidence, the petition and order under which it was taken and proof of service of all the notices required by this article, shall be filed in the office of the clerk of the county in which the real estate is situated, and the deposition or a certified copy thereof shall be recorded in the office of the register, or, if there be none, of the county clerk, of the county in which the real estate is situated.

Am'd by L. 1918, ch. 140. In effect March 27, 1913.

§ 1688g. [Am'd, 1913.] Referee to take deposition.

Before proceeding with the testimony, the referee shall require proof that due notice of the hearing has been given in accordance with the directions in said order contained, and thereupon the referee must proceed to take the depositions of the persons proposed to be examined, as stated in the petition, at the time and place mentioned in the notice, and may from time to time adjourn the examination to another day and another place within the same county. All the provisions of sections eight hundred and fifty-four, eight hundred and fifty-five, eight hundred and fifty-six, eight hundred and fifty-seven and eight hundred and fifty-eight of the code of civil procedure apply to the examination of a person taken before a referee as prescribed in this article.

Am'd by L. 1913, ch. 140. In effect March 27, 1913.

§ 1688h. Examination; deposition to be signed and certified.

The referee upon every examination taken as prescribed in this article must insert therein every answer or declaration of the person examined, which any party to the said proceeding requires to be inserted. If upon the examination before the referee the person examined refuses to answer any question, the referee must

report the fact to the court or a judge thereof, who must determine whether the witness is bound to answer the question. The deposition when completed must be read and subscribed by the persons examined, certified to by the referee, and within ten days thereafter must, together with the petition and order under which it was taken, and proof of service of all the notices required by this article, be filed in the office of the clerk of the county in which it was taken, and the said deposition or a certified copy thereof must be recorded in the office of the register (or clerk where there is no register) of the county in which the real estate is situated.

§ 1688i. [Am'd, 1913.] Depositions as evidence.

Subject to the provisions of this article, the depositions taken before a referee or pursuant to a commission or a certified copy thereof may be read in evidence by any party to an action or proceeding, which shall involve the title to such real property, as against the person on whose petition said depositions were taken, each person to whom notice of the taking of such depositions was given as directed in the order appointing the referee, and all persons claiming from, through or under them or any of them.

Am'd by L. 1913, ch. 140. In effect March 27, 1913.

TITLE II.

Actions relating to chattels.

- Article 1. Action to recover a chattel.
2. Action to foreclose a lien upon a chattel.

ARTICLE FIRST.

Action to recover a chattel.

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§ 1689. Joinder of action with others.

Nothing in this title is to be so construed, as to prevent the plaintiff from uniting, in the same complaint, two or more causes of action, in any case specified in section 484 of this act.

See § 1687, ante.

§ 1690. [Am'd, 1894.] When it cannot be maintained.

An action to recover a chattel cannot be maintained in either of the following cases:

1. Where the chattel was taken by virtue of a warrant, against the plaintiff, for the collection of a tax, assessment or fine, issued in pursuance of a statute of the State or of the United States; unless the taking was, or the detention is, unlawful, as specified in section sixteen hundred and ninety-five of this act.

2. Where it was seized by virtue of an execution, or a warrant of attachment, against the property of the plaintiff, unless it was legally exempt from such seizure, or is unlawfully detained, as specified in section sixteen hundred and ninety-five of this act.

3. Where is* was seized by virtue of an execution, or a warrant of attachment, against the property of a person other than the plaintiff, and at the time of the commencement of the action the plaintiff had not the right to reduce it into his possession.

L. 1894, ch. 305; 2 R. S. 522, §§ 4 and 5 (2 R. S. 540), am'd.

§ 1691. Id.; after judgment against the plaintiff.

Where a chattel is replevied, in an action to recover the same, and a final judgment awarding the possession thereof to the defendant is rendered, a subsequent action to recover the same chattel cannot be maintained by the plaintiff, for the same cause of action. But the judgment does not affect his right to maintain an action to recover damages, for taking or detaining the same or any other chattel, unless it was rendered against him upon the merits.

Id., § 62.

§ 1692. Id.; by an assignee.

An action to recover a chattel, the title to which has been transferred to the plaintiff, since the wrongful taking, or during the wrongful detention thereof, with or without the damages sustained by the taking, withholding, or detention, may be maintained in any case, where, except for the transfer, such an action might be maintained, by the person from or through whom the plaintiff derives title; but not otherwise.

§ 1693. Jurisdiction, etc., when replevin precedes summons.

Where a chattel is replevied before the service of the summons, as prescribed in this article, the seizure thereof by the sheriff is regarded as equivalent to the granting of a provisional remedy, for the purpose of giving jurisdiction to the court, and enabling it to control the subsequent proceedings in the action; and as equivalent to the commencement of the action, for the purpose of determining, whether the plaintiff is entitled to maintain the action, or the defendant is liable thereto.

See § 416, ante.

§ 1694. Plaintiff may require sheriff to replevy.

The plaintiff may, when the summons is issued, or at any time afterwards, and before the service of a copy of the defendant's answer, or, where judgment is taken by default for want of an appearance or pleading, before the entry of the final judgment, cause the chattel, to recover which the action is brought, to be replevied by the sheriff of the county where

* So in the original.

it is found. For that purpose, he must deliver to the sheriff an affidavit and a written undertaking, as prescribed in the following sections of this article, with a written requisition, indorsed upon or annexed to the affidavit, and subscribed by his attorney, to the effect, that the sheriff is required to replevy the chattel described therein. The requisition may be directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the chattel is found. It is deemed the mandate of the court.

Co. Proc., §§ 206 and 209, am'd and consolidated.

§ 1695. Affidavit therefor, before commencement of action.

The affidavit, to be delivered to the sheriff, as prescribed in the last section, must particularly describe the chattel to be replevied; and must contain the following allegations:

1. That the plaintiff is the owner of the chattel, or is entitled to the possession thereof, by virtue of a special property therein; the facts with respect to which must be set forth.

2. That it is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof, according to the best knowledge, information, and belief of the person making the affidavit.

4. That it has not been taken by virtue of a warrant, against the plaintiff, for the collection of a tax, assessment, or fine, issued in pursuance of a statute of the State, or of the United States; or, if it has been taken under color of such a warrant, either that the taking was unlawful, by reason of defects in the process, or other causes specified, or that the detention is unlawful, by reason of facts specified, which have subsequently occurred.

5. That it has not been seized by virtue of an execution or warrant of attachment, against the property of the plaintiff, or of any person from or through whom the plaintiff has derived title to the chattel, since the seizure thereof; or, if it has been so seized, that it was exempt from the seizure, by reason of facts specified, or that its detention is unlawful, by reason of facts specified which have subsequently occurred.

6. Its actual value.

See Co. Proc., § 207.

§ 1696. Id.; after commencement of action.

But where the affidavit is made after the service of the summons, the allegations, required to be inserted therein by subdivisions first and second of the last section, must be to the effect, that the plaintiff, at the time of the commencement of the action, was the owner of the chattel, or was entitled to the possession thereof by virtue of a special property therein; and that it was then wrongfully detained by the defendant, as prescribed in those subdivisions.

§ 1697. Id.; where several chattels are to be replevied.

Where the affidavit describes two or more chattels of the same kind, it must state the number thereof, and where it describes a chattel in bulk, it must state the weight, measurement, or other quantity. Where it describes two or more chattels to be replevied, it may, at the election of the plaintiff, state the aggregate value of all; or, separately, the value of any chattel

or of any class of chattels, and the aggregate value of the remainder, if any. Where it states separately the value of one or more chattels or classes of chattels, the defendant may require, as prescribed in the following provisions of this article, the return of any or all of the chattels or classes of chattels, the value of which is thus stated, or of the portion thereof which has been replevied. If he procures such a return, the remainder must be delivered to the plaintiff, except as is otherwise prescribed in this article.

Explanatory of § 1695, ante.

§ 1698. Provision where a part only is replevied.

The sheriff must replevy a smaller number or a smaller quantity, if the whole of the chattel or chattels described in the affidavit cannot be found. In that case, if the aggregate value only is stated in the affidavit, the value of the entire chattel or class of chattels, as so stated, is to be deemed the value of the part replevied, for the purposes of the proceedings to procure a return thereof to the defendant.

§ 1699. Plaintiff's undertaking for replevin.

The undertaking to be delivered to the sheriff, with a requisition to replevy a chattel, must be executed by at least two sureties, who must be approved by the sheriff. It must be to the effect, that the sureties are bound in a specified sum, not less than twice the value of the chattel, as stated in the affidavit, for the prosecution of the action; for the return of the chattel to the defendant, if possession thereof is adjudged to him, or if the action abates, or is discontinued, before the chattel is returned to the defendant; and for the payment to the defendant of any sum, which the judgment awards to him against the plaintiff.

§ 1700. How chattel to be replevied.

If any chattel, described in the affidavit, is found in the possession of the defendant, or of his agent, the sheriff, to whom an affidavit, requisition, and undertaking are delivered, as prescribed in the foregoing sections of this article, must forthwith replevy it, by taking it into his possession. He must thereupon, without delay, serve on the defendant a copy of the affidavit, requisition and undertaking, by delivering the same to him personally, if he can be found within the county; or, if he cannot be so found, to his agent, if any, from whose possession the chattel is taken; or, if neither can be found within the county, by leaving the copy at the usual place of abode of either, with a person of suitable age and discretion.

See Co. Proc., remainder of § 209, am'd.

§ 1701. Id.; how taken from a building, etc.

If any chattel, described in the affidavit, is secured or concealed in a building or inclosure, the sheriff must publicly demand its delivery. If it is not delivered, pursuant to the demand, he must cause the building or inclosure to be broken open, and must take the chattel into his possession.

Co. Proc., § 214. See §§ 104, 105 and 1694, ante.

§ 1702. Replevied chattel; how kept, etc.

A sheriff, who has replevied a chattel, must retain it in his possession, keeping it in a secure place, until the person, who is

entitled to the possession thereof, is ascertained, as prescribed in this article. He must then deliver it to that person, upon request and payment of his lawful fees, and necessary expenses for taking and keeping it, as taxed by a judge of the court, or the county judge of the county where the chattel was replevied, upon such a notice as the judge deems proper.

Co. Proc., § 215, am'd.

§ 1703. When defendant may except to sureties; proceedings thereupon.

Within three days after the chattel is replevied, and a copy of the affidavit, requisition, and undertaking is served, the defendant, unless he requires a return of the chattel replevied, or of one or more of them, where two or more chattels are replevied, may serve upon the sheriff a notice, that he excepts to the plaintiff's sureties; otherwise he is deemed to have waived all objections to them. Where the defendant has not appeared, the notice must be subscribed either by him, or by his agent or attorney. The person so subscribing the notice must add to his signature his office address, as prescribed by law, with respect to a notice of appearance. Within ten days after service of such a notice, the plaintiff's attorney must serve upon defendant's attorney, or, if the defendant has not appeared, upon the sheriff, notice of the justification of the sureties. If the notice of justification is served upon the sheriff, he must immediately serve it upon the person, whose name is subscribed to the notice of exception, in the mode prescribed by law, for service of a paper upon an attorney in an action.

Id., § 210, am'd.

§ 1704. When defendant may reclaim chattel: proceedings thereupon.

The defendant, if he does not except to the plaintiff's sureties, as prescribed in the last section, may, within the time allowed to him for such an exception, serve upon the sheriff, a notice that he requires a return of the chattel replevied. With the notice, he must deliver to the sheriff the following papers:

1. An affidavit, containing an allegation, either that the defendant is the owner of the chattel, or that he is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts with respect to which must be set forth.

2. An undertaking, executed by at least two sureties, to the effect that they are bound, in a specified sum, not less than twice the value of the chattel as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if delivery thereof is adjudged, or if the action abates in consequence of the defendant's death; and for the payment to him of any sum, which the judgment awards against the defendant.

Within three days after serving a notice, requiring a return of the chattel, as prescribed in this section, the defendant must serve upon the plaintiff's attorney, notice of the justification of the sureties to the undertaking.

Id., § 211, am'd.

§ 1705. Sureties; when and how to justify.

The justification of sureties, as prescribed in either of the last two sections, must take place, either in the county where the chattel was replevied, or in the county where one of the sureties

resides. The provisions, regulating the justification of bail, contained in article third of title first of chapter seventh of this act, govern, except as otherwise expressly prescribed in this article, with respect to the notice of justification of the sureties; the officer before whom they must justify; the substitution of new sureties or a new undertaking; the examination and qualifications of the sureties; and the allowance of the undertaking. But after the allowance, the undertaking and examination must be delivered to the sheriff.

Co. Proc., § 213, with parts of §§ 210 and 212. See §§ 573, 581, ante.

§ 1706. When and to whom sheriff must deliver chattel.

If the defendant neither excepts to the plaintiff's sureties, nor requires the return of the chattel, within the time prescribed for that purpose; or if he makes default in serving notice of the justification of his sureties, or in procuring the allowance of his undertaking; or if the plaintiff, after the defendant has excepted to his sureties, duly procures the allowance of his undertaking; the sheriff must, except in the case specified in section 1709 of this act, immediately deliver the chattel to the plaintiff. If the plaintiff, after the defendant has excepted to his sureties, makes default in serving notice of justification, or in procuring the allowance of his undertaking; or if the defendant, after he has required the return of the chattel, duly procures the allowance of his undertaking; the sheriff must immediately deliver the chattel to the defendant. When the chattel is delivered by the sheriff to either party, as prescribed in this section, the sheriff ceases to be responsible for the sufficiency of the sureties of either party; until then, he is responsible for the sufficiency of the sureties of the plaintiff or of the defendant, as the case may be.

See Id., §§ 210, 211 and 212.

§ 1707. Penalty for wrong delivery by sheriff.

A sheriff, who delivers to either party, without the consent of the other, a chattel replevied by him, except as prescribed in the last section, or by virtue of an execution issued upon a judgment in the action, forfeits, to the party aggrieved, two hundred and fifty dollars; and is also liable to him for all damages which he sustains thereby.

2 R. S. 525, § 18 (2 Edm. 543).

§ 1708. Undertaking; to whom delivered.

Where the sheriff duly delivers a chattel to either party, as prescribed in the last section but one, he must, at the same time, deliver to the adverse party the undertaking received by him from the party to whom the chattel is delivered, together with the examination of the sureties, and the judge's allowance, if any.

Co. Proc., § 423, am'd.

§ 1709. Claim of title by third person; proceedings thereupon.

At any time before a chattel, which has been replevied, is actually delivered to either party, if a person, not a party to the action, claims, as against the defendant, a right to the possession thereof, existing at the time when it was replevied, an affidavit may be made and delivered to the sheriff, in his behalf, stating that he makes such a claim; specifying the chattel or chattels to which it

relates, if two or more chattels have been replevied, and the claim relates only to part of them; and setting forth the facts upon which his right of possession depends. In that case, the sheriff may, in his discretion, before he delivers the chattel to the plaintiff, serve upon the plaintiff's attorney a copy of the affidavit, with a notice that he requires indemnity against the claim. If the indemnity is not furnished, within a reasonable time after the plaintiff becomes entitled to the delivery of the chattel, the sheriff may, in his discretion, deliver it to the claimant, without incurring any liability to the plaintiff, by reason of so doing.

Co. Proc., § 216.

§ 1710. Action against sheriff upon such claim.

A person, not a party to the action, who has served an affidavit as prescribed in the last section, may maintain an action against the sheriff, who has delivered the chattel to the plaintiff, to recover his damages, by reason of the taking, detention, or delivery of the chattel. But the summons in such an action must be issued within three months after the delivery of the chattel to the plaintiff, and must be served within three months after it is issued. An action cannot be maintained against a sheriff, by a person so entitled to make a claim, except as prescribed in this section.

Substituted for last clause of § 216, Co. Proc.

§ 1711. Indemnity to sheriff against such action.

The indemnity, to be furnished to the sheriff by the plaintiff, as prescribed in the last section but one, must consist of a written undertaking to him, executed by at least two sureties, to the effect that they will indemnify him against any liability for damages, costs, or expenses, to be incurred in an action brought against him by the claimant, or a person deriving title from or through the claimant, by reason of the taking or detention of the chattel, or its delivery to the plaintiff, not exceeding a sum, to be specified in the undertaking, which must be at least five hundred dollars, and not less than the actual value of the chattel claimed, and two hundred and fifty dollars in addition thereto. Each of the sureties, besides possessing the other qualifications required by law, must be a freeholder or a householder of the sheriff's county. The sheriff, before delivering the chattel, may require the persons offered as sureties to submit to an examination, before the officer who takes the acknowledgment of the undertaking, as where persons are offered to him as bail upon an arrest. The sureties are entitled to be substituted as defendants in an action, brought as prescribed in the last section, as if the chattel had been levied upon by virtue of an execution.

Substituted for part of § 216, Co. Proc.

§ 1712. When agent, etc., may make affidavit for replevin or return.

The affidavit, to be delivered to the sheriff in behalf of the plaintiff, with a requisition to replevy a chattel, may be made by the plaintiff's agent or attorney, if the material facts are within his personal knowledge; or, if the plaintiff is not within the county where the attorney resides, or has his office, or is not capable of making the affidavit. The affidavit, to be delivered to the sheriff, either in behalf of the defendant, with a notice that he requires the return of the chattel, or in behalf of a person, not

a party, who makes a claim as prescribed in section 1709 of this act, may be made by an agent or attorney, if the material facts are within his personal knowledge, or if the defendant or claimant, as the case may be, is not within the county where the property was replevied, and capable of making the affidavit. When the affidavit is made by an attorney or agent, he must state therein what allegations, if any, are made upon his information and belief; and he must set forth therein the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why the affidavit is not made by the party or the claimant.

See §§ 525 and 526, ante, and Co. Proc., § 207.

§ 1713. Second and subsequent replevin; proceedings thereupon.

Where the sheriff has replevied a part only of a chattel, or of two or more chattels, described in the plaintiff's affidavit, and has served upon the defendant the papers required upon such a replevin, the plaintiff may, at any time before the service of a copy of the defendant's answer, or before judgment by default for want of an appearance or pleading, require the same or any other sheriff, to replevy any other part thereof. For that purpose, he must deliver to the sheriff an affidavit, containing the same allegations, and a requisition and undertaking, with respect to the part yet to be replevied, as if the action was brought to recover that part only. Where a second or subsequent replevin is made, as prescribed in this section, the proceedings are the same as if a former replevin had not been made.

§ 1714. Replevin, where order of arrest has been granted.

Where an order of arrest is granted, as prescribed in title first of chapter seventh of this act, the plaintiff's right to a replevin is subject to the following regulations:

1. If the defendant has been arrested, pursuant to the order, a subsequent replevin cannot be made of the chattel, with respect to which the order was granted.

2. If the defendant has not been arrested, a subsequent replevin of a chattel, with respect to which the order was granted, supersedes the order.

See § 549, subd. 2, ante.

§ 1715. Return, etc., by sheriff.

The sheriff must, within twenty days after he has delivered a chattel replevied by him, to the party entitled to the possession thereof, or to a third person, as prescribed in this article, file with the clerk the plaintiff's affidavit, and the accompanying requisition, with a return, stating in what manner he has executed the latter. If he has omitted to replevy a part of the chattel, or of two or more chattels, described in the affidavit, the return must state the cause of the omission.

Substitute for § 217, Co. Proc.

§ 1716. Id.; how compelled.

If the sheriff fails to comply with the last section, either party may require him so to do, within ten days after service of a notice to that effect, or to show cause, at a term of the court designated in the notice, why he should not be punished for a contempt of the court. The notice may be served at any time before final judgment.

ment, except that it cannot be served on the part of the defendant, before answer. An omission to comply with such a notice is punishable as a contempt of the court.

See § 1725, post.

§ 1717. Replevin papers to be made part of judgment-roll, etc.

The plaintiff's affidavit, with the accompanying requisition, and the return of the sheriff, must be made a part of the judgment-roll in the action; and a copy of each of them must be furnished to the court, or the referee, upon the trial of an issue of fact, with a copy of the summons and of the pleadings.

See § 1725, post.

§ 1718. Action not affected by failure to replevy.

The plaintiff may proceed in the action, and recover therein the chattel, or its value, although he has not required the sheriff to replevy it, or the sheriff has not been able to replevy it.

2 R. S. 525, § 19 (2 Edm. 543).

§ 1719. When and how plaintiff may abandon his claim as to part.

Where part only of two or more distinct chattels specified in the complaint, has been replevied, the plaintiff's attorney may, with or before the notice of trial, serve upon the defendant's attorney a notice that he abandons so much of his claim, as relates to those which have not been replevied; and thenceforth the proceedings are the same, as if the action had been brought to recover only the chattels which have been replevied. A copy of the notice must be furnished to the court, or to the referee, upon the trial of an issue of fact, with a copy of the summons and of the pleadings.

See § 1723, post.

§ 1720. Title; how stated in pleading.

An allegation, in a pleading interposed by either party, to the effect that the party pleading, or a third person, was, at the time when the action was commenced, or the chattel was replevied, as the case may be, the owner of the chattel, or that it was then his property, is a sufficient statement of title, unless the right of action or defence rests upon a right of possession, by virtue of a special property; in which case, the pleading must set forth the facts, upon which the special property depends, so as to show, that at the time when the action was commenced, or the chattel was replevied, as the case may be, the party pleading, or the third person, was entitled to the possession of the chattel.

See § 166, Co. Proc., and § 1724, post.

§ 1721. Taking, etc.; how stated in complaint.

Where the complaint contains a sufficient statement of the plaintiff's title, a general allegation, that the defendant wrongfully took the chattel, is sufficient, without setting forth the facts, showing that the taking was wrongful. Where the taking of the chattel is not complained of, but the action is founded upon its wrongful detention, the complaint must set forth the facts, showing that the detention was wrongful.

Substituted for 2 R. S. 523, § 36 (2 Edm. 546).

§ 1722. Damages when chattel injured, etc., by defendant.

Where the plaintiff recovers a chattel which was injured, or otherwise depreciated in value, while it was in the possession or under the control of the defendant, under such circumstances, that the plaintiff might recover damages for the injury or depreciation, in an action brought against the defendant therefor, he may recover the same damages in an action brought as prescribed in this article. In that case, he must set forth the facts in his complaint, and demand judgment for damages accordingly.

§ 1723. Answer of title in third person.

The defendant may by answer defend, on the ground that a third person was entitled to the chattel, without connecting himself with the latter's title.

§ 1724. Answer that property was distrained doing damage.

Where the defence is, that a chattel, to recover which the action is brought, was distrained doing damage, an allegation that the defendant, or the person by whose command he acted, was then lawfully possessed of the real property, and that the chattel was distrained, while it was doing damage thereupon, is sufficient, without setting forth the title to the real property.

Co. Proc., § 166; 2 R. S. 528, §§ 37 and 42 (2 Edm. 546).

§ 1725. Defendant may demand judgment for return.

Where a chattel has been replevied and delivered to the plaintiff, or to a person not a party to the action, as prescribed in the foregoing sections of this article, the defendant's attorney may, within the time allowed to him for the service of a notice of trial, serve upon the plaintiff's attorney, a notice, that the defendant demands judgment for the return of the chattel, or for its value, either with or without damages for the detention thereof. Upon the trial, a copy of such a notice must be furnished to the court or referee, with a copy of the summons and of the pleadings.

§ 1726. Verdict, etc., what to state.

The verdict, report, or decision must fix the damages, if any, of the prevailing party. Where it awards to the plaintiff a chattel, which has not been replevied, or where it awards to the prevailing party a chattel, which has been replevied, and afterwards delivered by the sheriff to the unsuccessful party, or to a person not a party, it must also, except in a case specified in the next section, fix the value of the chattel, at the time of the trial.

Co. Proc., § 261, am'd.

§ 1727. Substitute in certain cases for finding as to value.

A verdict, report, or decision, in favor of the defendant, shall not fix the value of the chattel, in either of the following cases:

1. Where the plaintiff is the general owner of the chattel; but it was rightfully distrained doing damage, and its value is greater than the damages sustained by the defendant, by the injury for which it was distrained; in which case, those damages must be fixed.

2. Where the plaintiff is the general owner of the chattel, but the defendant had a special property therein, and the value of the chattel is greater than the value of the special property, or the sum charged upon the chattel by reason thereof; in which case, the value of the special property, or the sum so charged, must be fixed.

In either of the cases specified in this section, the verdict, report, or decision must set forth the reason, why the value of the chattel is not fixed.

§ 1728. Verdict, etc., for part of several chattels; judgment thereupon.

Where the action is brought to recover two or more chattels, the verdict, report, or decision may award to one party one or more distinct chattels, which can be identified, and set apart from the others and the residue to the other party; and, if necessary, the complaint must be amended so as to conform thereto. The final judgment, rendered thereupon, must award to each party the same relief, with respect to the finding in his favor, as if separate judgments were rendered; except that, where each party is entitled to an absolute award of a sum of money, against the other, the smaller sum must be deducted from the greater, and the balance only must be awarded.

§ 1729. Damages how ascertained on default.

Where the plaintiff is entitled to judgment by default, for want of an appearance or pleading, the court, to which he applies for judgment, may ascertain and determine the damages to which he is entitled, and the value of the chattel, if necessary; or may direct a reference, or a writ of inquiry, for that purpose.

See § 1215, ante.

§ 1730. Final judgment; docketing the same.

Final judgment for the plaintiff must award to him possession of the chattel recovered by him, with his damages, if any. If a chattel recovered was not replevied, or if, after it was replevied, it was delivered to the defendant, or to a person not a party, as prescribed in this article, the final judgment must also award to the plaintiff the sum fixed as the value thereof, to be paid by the defendant, if possession thereof is not delivered to the plaintiff. If the defendant has demanded judgment for the return of a chattel, which was replevied, and afterwards delivered to the plaintiff, or to a person not a party, as prescribed in this article, final judgment in his favor therefor must award to him possession thereof, with his damages, if any; and it must also award to him the sum fixed as the value thereof, to be paid by the plaintiff, if possession is not delivered to the defendant. But if the case is one of those specified in section 1727 of this act, final judgment in favor of the defendant must award to him the sum, fixed as therein specified, and if it is not collected, the delivery of the chattel; or, if the chattel has not been replevied, or has been returned to him after replevin, that he is entitled to possession thereof, until the sum so awarded is collected, or otherwise paid. The judgment may be docketed, and the docket thereof creates a lien, as if it was a judgment for

the full amount of the money, including costs, which it awards, either absolutely or conditionally.

Co. Proc., § 277; 2 R. S. 532, § 61 (2 Edm. 550).

§ 1731. Execution; contents thereof.

An execution for the delivery of the possession of a chattel, and to satisfy, out of the property of the judgment debtor, a sum of money contingently awarded against him, must contain, in addition to the other matters prescribed by law the following directions:

1. Where the judgment is rendered in favor of the defendant, in a case specified in section 1727 of this act, the execution must require the sheriff to deliver possession of the chattel to the defendant, unless the plaintiff before the delivery, pays to him the sum of money awarded to the defendant, with interest and the sheriff's fees; and, in case the chattel cannot be found within his county, then to satisfy that sum out of the property of the plaintiff.

2. In any other case, where the judgment awards a sum of money, if possession of the chattel is not delivered to the prevailing party, the execution must require the sheriff, if the chattel cannot be found within his county, to satisfy the sum so awarded, with interest and his fees, out of the property of the party against whom the judgment is rendered.

A direction to satisfy a sum of money out of property, as prescribed in this section, must be in the form required by law for a like direction, where an execution against property is issued upon a judgment for a sum of money.

Id., subd. 4 of § 289; 2 R. S. 530, § 50 (2 Edm. 548).

§ 1732. Id.; sheriff's power to take chattel.

For the purpose of taking possession of a chattel, by virtue of such an execution, the powers of the sheriff are the same, as where he is required to replevy a chattel.

2 R. S. 530, § 51.

§ 1733. Action on undertaking; when maintainable.

A plaintiff, who has recovered a final judgment, cannot maintain an action against the sureties in an undertaking, given in behalf of the defendant to procure a return of the chattel, or against the bail of a defendant, who has been arrested, until after the return, wholly or partly unsatisfied or unexecuted, of an execution in his favor for the delivery of the possession of the chattel, or to satisfy a sum of money out of the property of the defendant, or for both purposes, as the case requires. A defendant, who has recovered a final judgment, cannot maintain an action against the sureties in the plaintiff's undertaking, given to procure a replevin, until after a like return of a similar execution against the plaintiff.

2 R. S. 533, § 64 (2 Edm. 551).

§ 1734. Sheriff's return, evidence therein.

In such an action against the sureties, the sheriff's return to the execution is presumptive evidence of a failure to deliver,

or to return a chattel, or to pay a sum of money, according to the terms of the undertaking.

2 R. S. 533, § 65.

§ 1735. Injury, etc., no defence.

It is not a defence to such an action, that the chattel was injured or destroyed, after it was replevied, unless the injury or destruction was effected by the act, or with the consent of the plaintiff in the action, or occurred after the chattel was taken by virtue of the execution.

§ 1736. Abatement and revival of action.

In an action to recover a chattel, the cause of action survives or continues, notwithstanding the death of either party, in favor of or against his executor or administrator. Where the court makes an order, directing the abatement of such an action, as prescribed in section 761 of this act, an action may be maintained, upon an undertaking, given for the purpose of procuring a delivery or return of a chattel, as if final judgment, awarding to the adverse party possession thereof, had been rendered in the first action, and an execution thereupon had been returned unexecuted and unsatisfied; except that damages cannot be recovered therein for a wrongful taking, withholding or detention. An action to recover the chattel cannot be maintained, after an action has been commenced upon an undertaking, as prescribed in this section.

L. 1880, ch. 370; L. 1872, ch. 498. See §§ 755-761, ante.

ARTICLE SECOND.

Action to foreclose a lien upon a chattel.

- Sec.** 1737. Action; when and in what courts maintainable.
1738. Warrant to seize chattel; proceedings thereupon.
1739. Judgment.
1740. Action in inferior court.
1741. Application of this article.

§§ 1737-1741. [Repealed by L. 1909, ch. 38. See Consolidated Laws, tit. Lien Law, §§ 206-210.]

CHAPTER XV.

Special Provisions, Regulating Other Particular Actions and Rights of Action, and Actions by or Against Particular Parties.

TITLE I.—Matrimonial Actions.

TITLE II.—Actions Relating to a Corporation.

TITLE III.—Actions Relating to the Estate of a Decedent.

TITLE IV.—Other Special Actions and Rights of Action.

TITLE V.—Other Actions by or Against Particular Parties.

TITLE I.

Matrimonial Actions.

Article 1. Action to annul a void or voidable marriage.

2. Action for a divorce.

3. Action for a separation.

4. Provisions applicable to two or more of the actions specified in this title.

ARTICLE FIRST.

Action to annul a void or voidable marriage.

Sec. 1742. Action by woman, married under 16, to annul marriage.

1743. In what other cases marriage may be annulled.

1744. Action when party was under the age of consent.

1745. Id.; when former husband or wife was living.

1746. Id.; where party was an idiot.

1747. Id.; where party was a lunatic.

1748. Action by next friend of idiot or lunatic.

1749. Issue; when entitled to succeed, etc.

1750. Action on the ground of force, fraud, etc.

1751. Custody, maintenance, etc., of issue of such a marriage.

1752. Action on the ground of physical incapacity.

1753. Certain proceedings regulated in action to annul marriage.

1754. Judgment annulling a marriage, how far conclusive.

1755. How next friend of infant, lunatic, etc., allowed to sue, etc.

§ 1742. [Am'd, 1887.] Action by woman, married under 16, to annul marriage.

An action may be maintained, by the woman, to procure a judgment, declaring a marriage contract void, and annulling the marriage, under the following circumstances:

1. Where the plaintiff had not attained the age of sixteen years at the time of the marriage.

2. Where the marriage took place without the consent of her father, mother, guardian, or other person having the legal charge of her person.

3. Where it was not followed by consummation or cohabitation, and was not ratified by any mutual assent of the parties, after the plaintiff attained the age of sixteen years.

L. 1887, ch. 22; L. 1841, ch. 257 (4 Edm. 512), am'd. See, also, 2 B. S. 142, § 21 (2 Edm. 118). See Dom. Rel. Law, ch. 272, L. 1896, in which age of consent is made eighteen years; but does not amend ch. 22, L. 1887; 82 App. Div. 335.

§ 1743. In what other cases marriage may be annulled.

An action may also be maintained to procure a judgment, declaring a marriage contract void and annulling the marriage, for

either of the following causes, existing at the time of the marriage:

1. That one or both of the parties had not attained the age of legal consent.

2. That the former husband or wife of one of the parties was living, and that the marriage with the former husband or wife was then in force.

3. That one of the parties was an idiot or a lunatic.

4. That the consent of one of the parties was obtained by force, duress, or fraud.

5. That one of the parties was physically incapable of entering into the marriage state. But an action can be maintained, under this subdivision, only where the incapacity continues, and is incurable.

2 R. S. 142, § 20 (2 Edm. 147).

§ 1744. Action when party was under the age of consent. *am'd 1882, 1913. ch. 66.*

An action to annul a marriage, on the ground that one of the parties had not attained the age of legal consent, may be maintained by the infant, or by either parent of the infant, or by the guardian of the infant's person; or the court may allow the action to be maintained by any person, as the next friend of the infant. But a marriage shall not be annulled, at the suit of a party who was of the age of legal consent when it was contracted, or where it appears that the parties, for any time after they attained that age, freely cohabited as husband and wife.

2 R. S. 142, § 21 (2 Edm. 148), am'd. See, also, § 23, and §§ 1748 and 1755, post.

§ 1745. [Am'd, 1882, 1913.] Id.: when former husband or wife was living.

An action to annul a marriage, upon the ground that the former husband or wife of one of the parties was living, the former marriage being in force, may be maintained by either of the parties during the life-time of the other, or by the former husband or wife. Where it appears, and the judgment determines, that the subsequent marriage was contracted by at least one of the parties thereto in good faith, and with the full belief that the former husband or wife was dead or that the former marriage had been annulled or dissolved, or without any knowledge on the part of the innocent party of such former marriage, the issue of the subsequent marriage, born or begotten before the final judgment, are deemed for all purposes the legitimate children of the parent who at the time of the marriage was competent to contract, and are entitled to succeed as such, in the same manner as other legitimate children, to the real and personal estate of said parent; and the issue so entitled must be specified in the judgment, and the innocent party must be awarded their custody, and he or she is entitled to appoint a guardian of their persons by will.

This section shall be construed to extend to all cases where the judgment or decree of nullity of such subsequent marriage is rendered after the passage of this act whether such subsequent marriage was contracted before or after the passage hereof.

Id., §§ 22 and 23, consolidated and am'd. Am'd L. 1882, ch. 401; L. 1913, ch. 444. In effect May 8, 1913.

§ 1746. Id.: where party was an idiot.

An action to annul a marriage, on the ground that one of the parties thereto was an idiot, may be maintained, at any time

during the life-time of either party, by any relative of the idiot, who has an interest to avoid the marriage.

2 B. S. 142, § 24.

§ 1747. Id.; where party was a lunatic.

An action to annul a marriage, on the ground that one of the parties thereto was a lunatic, may be maintained, at any time during the continuance of the lunacy, or, after the death of the lunatic, in that condition, and during the life of the other party to the marriage, by any relative of the lunatic, who has an interest to avoid the marriage. Such an action may also be maintained by the lunatic, at any time after restoration to a sound mind; but in that case, the marriage should not be annulled, if it appears that the parties freely cohabited as husband and wife, after the lunatic was restored to a sound mind.

Id., §§ 25 and 27, consolidated.

§ 1748. Action by next friend of idiot or lunatic.

Where no relative of the idiot or lunatic brings an action to annul the marriage, as prescribed in either of the last two sections, the court may allow an action for that purpose to be maintained, at any time during the life-time of both the parties to the marriage, by any person as the next friend of the idiot or lunatic. But this section does not apply, where the marriage might have been annulled, at the suit of the lunatic, as prescribed in the last section.

Id., § 26. See, also, § 1744, ante, and § 1755, post.

§ 1749. [Am'd, 1903.] Issue; when entitled to succeed, etc.

A child of a marriage, which is annulled on the ground of the idiocy or lunacy of one of its parents, is deemed, for all purposes, the legitimate child of the parent who is of sound mind. A child of a marriage, which is annulled on the ground that one or both of the parties had not attained the age of legal consent, is deemed, for all purposes, the legitimate child of both parents.

Id., § 28; L. 1903, ch. 225. In effect Sept. 1, 1903.

§ 1750. Action on the ground of force, fraud, etc.

An action to annul a marriage, on the ground that the consent of one of the parties thereto was obtained by force, duress, or fraud, may be maintained, at any time, by the party whose consent was so obtained. Such an action may also be maintained, during the life-time of the other party, by the parent or the guardian of the person of the party, whose consent was so obtained, or by any relative of that party, who has an interest to avoid the marriage. But a marriage shall not be annulled on the ground of force or duress, if it appears that, at any time before the commencement of the action, the parties thereto voluntarily cohabited as husband and wife; or on the ground of fraud, if it appears that, at any time before the commencement thereof, the parties voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud.

Id., §§ 30 and 31, am'd; L. 1862, ch. 246. See § 1743, ante.

§ 1751. Custody, maintenance, etc., of issue of such a marriage.

The court must, upon the application of the plaintiff, award the custody of the children of a marriage, which is annulled on the ground of force, duress, or fraud, to the innocent parent, unless it appears that the latter is unfit, for any reason, to have the

custody of one or more of the children, in which case the court must give such directions relating thereto, as the interests of the child or children require. The judgment may make provision for the education and maintenance of the children, out of the property of the guilty parent.

2 R. S. 142, § 32, am'd.

§ 1752. [Am'd, 1895.] Action on the ground of physical incapacity.

An action to annul a marriage, on the ground that one of the parties was physically incapable of entering into the marriage state, may be maintained by the injured party against the party whose incapacity is alleged; or such an action may be maintained by the party who was incapable against the other party, provided the incapable party was unaware of the incapacity at the time of marriage, or if aware of such incapacity, did not know it was incurable. Such an action must be commenced before five years have expired since the marriage.

L. 1895, ch. 809.

§ 1753. Certain proceedings regulated in action to annul marriage.

In an action brought as prescribed in this article, a final judgment, annulling the marriage, shall not be rendered by default, for want of an appearance or pleading, or upon the trial of an issue, without proof of the facts, upon which the allegation of nullity is founded. And the declaration or confession of either party to the marriage is not alone sufficient as proof; but other satisfactory evidence of the facts must be produced. In such an action, except where it is founded upon an allegation of the physical incapacity of one of the parties thereto, the court must, upon the application of either of the parties, make an order directing the trial, by a jury, of all the issues of fact; or it may of its own motion, make an order directing the trial, by a jury, of one or more issues of fact; for which purpose, the questions to be tried must be prepared and settled as prescribed in section 970 of this act.

Id., §§ 35 and 36 in part. See 2 R. S. 175, § 45 (2 Edm. 181); see, also, §§ 1012 and 1229, ante, and § 1757, post.

§ 1754. Judgment annulling a marriage; how far conclusive.

A final judgment, annulling a marriage, rendered during the lifetime of both the parties, is conclusive evidence of the invalidity of the marriage in every court of record or not of record, in any action or special proceeding, civil or criminal. Such a judgment, rendered after the death of either party to the marriage, is conclusive only as against the parties to the action, and those claiming under them.

Id., § 37.

§ 1755. How next friend of infant, lunatic, etc., allowed to sue, etc.

An order, allowing a person to maintain an action, as the next friend of an infant, as prescribed in section 1744 of this act, or as the next friend of an idiot or lunatic, as prescribed in section 1748 of this act, may be granted by the court, in its discretion, without notice, or upon notice to such persons and in such a manner, as

it deems proper. A motion to vacate such an order must be made at a term held by the judge who granted it, unless he is dead, out of office, or unable to hear it by reason of sickness or otherwise; or unless he expressly directs it to be heard at a term held by another judge. But where such an order has been granted, the court, to which application for final judgment is made, may dismiss the complaint, if justice so requires, although, in a like case, the party to the marriage, if plaintiff, would be entitled to judgment.

ARTICLE SECOND.

Action for a divorce.

- Sec. 1756. In what cases action may be maintained.
1757. Answer; mode of trial; judgment by default.
1758. When divorce denied, although adultery proved.
1759. Regulations when action brought by wife.
1760. *Id.*; when action brought by husband.
1761. Marriage after divorce for adultery. [Repealed.]
1761. Regulation when action brought by either husband or wife.

§ 1756. In what cases action may be maintained.

In either of the following cases, a husband or a wife may maintain an action, against the other party to the marriage to procure a judgment, divorcing the parties and dissolving the marriage, by reason of the defendant's adultery.

1. Where both parties were residents of the State, when the offence was committed.
2. Where the parties were married within this State.
3. Where the plaintiff was a resident of the State, when the offence was committed, and is a resident thereof, when the action is commenced.
4. Where the offence was committed within the State, and the injured party, when the action is commenced, is a resident of the State.

2 R. S. 144, § 38 (2 Edm. 150), am'd; L. 1862, ch. 246, § 1. See § 1768, post.

§ 1757. [Am'd. 1890, 1911.] Answer; mode of trial; judgment by default.

1. The answer of the defendant, may be made, without verifying it, notwithstanding the verification of the complaint, except that an answer containing a counterclaim, which charges adultery must be verified in respect of such counterclaim, where the complaint is verified. If the answer puts in issue the allegation of adultery, the court must, upon the application of either party, or it may, of its own motion, make an order directing the trial, by a jury, of that issue; for which purpose the questions to be tried must be prepared and settled, as prescribed in section nine hundred and seventy of this act. If the answer does not put in issue the allegation of adultery, or if the defendant makes default in appearing or pleading, the plaintiff before he is entitled to judgment, must nevertheless satisfactorily prove the material allegations of his complaint, and also, by his own testimony or otherwise, that there is no judgment or decree, in any court of the state of competent jurisdiction, against him in favor of the defendant for a divorce on the ground of adultery.

2. In an action brought to obtain a divorce on the ground of adultery, the plaintiff or defendant may serve a copy of his pleading on the co-respondent named therein. At any time within twenty days after such service on said co-respondent, he may appear to defend such action, so far as the issues affect such co-respondent. If no such service be made, then at any time before the entry of judgment any co-respondent named in any of the pleadings shall have the right, at any time before the entry of judgment, to appear either in person or by attorney, in said action and demand of plaintiff's attorney a copy of the summons and complaint, which must be served within ten days thereafter, and he may appear to defend such action, so far as the issues affect

such co-respondent. In case no one of the allegations of adultery controverted by such co-respondent shall be proved, such co-respondent shall be entitled to a bill of costs against the person naming him as such co-respondent, which bill of costs shall consist only of the sum now allowed by law as a trial fee, and disbursements, and such co-respondent shall be entitled to have an execution issue for the collection of the same.

Id., §§ 39, 40, 41; L. 1877, ch. 168; L. 1890, ch. 661; L. 1911, ch. 311, in effect Sept. 1, 1911. See §§ 1012, 1215 and 1220, ante, and § 1773, post.

§ 1758. When divorce denied, although adultery proved.

In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established:

1. Where the offence was committed by the procurement or with the connivance of the plaintiff.

2. Where the offence charged has been forgiven by the plaintiff. The forgiveness may be proved, either affirmatively, or by the voluntary cohabitation of the parties, with the knowledge of the fact.

3. Where there has been no express forgiveness, and no voluntary cohabitation of the parties, but the action was not commenced within five years after the discovery, by the plaintiff, of the offence charged.

4. Where the plaintiff has also been guilty of adultery, under such circumstances, that the defendant would have been entitled, if innocent, to a divorce.

§ B. S. 144, § 42; L. 1877, ch. 168.

§ 1759. [Am'd, 1895, 1900.] Regulations when action brought by wife.

Where the action is brought by the wife, the following regulations apply to the proceedings:

1. The legitimacy of any child of the marriage, born or begotten before the commencement of the action, is not affected by the judgment dissolving the marriage.

2. [Am'd, 1895, 1900.] The court may, in the final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, as justice requires, having regard to the circumstances of the respective parties; and may, by order, upon the application of either party to the action, and after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment whether heretofore or hereafter rendered, annul, vary or modify such a direction. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained.

L. 1895, ch. 801; L. 1900, ch. 742. In effect Sept. 1, 1900.

3. If, when final judgment is rendered, dissolving the marriage, the plaintiff is the owner of any real property; or has, in her possession or under her control, any personal property, or thing in action, which was left with her by the defendant, or acquired by her own industry, or given to her by bequest or otherwise; or if she is or may thereafter become entitled to any property,

by the decease of a relative intestate; the defendant shall not have any interest therein, absolute or contingent, before or after her death.

4. Where final judgment is rendered dissolving the marriage, the plaintiff's inchoate right of dower, in any real property, of which the defendant then is or was theretofore seized, is not affected by the judgment.

L. 1896, ch. 801.

§ 1760. Id.; when action brought by husband.

Where the action is brought by the husband, the following regulations apply to the proceedings:

1. The legitimacy of a child, born or begotten before the commencement of the offence charged, is not affected by a judgment dissolving the marriage; but the legitimacy of any other child of the wife may be determined, as one of the issues in the action. In the absence of proof to the contrary, the legitimacy of all the children, begotten before the commencement of the action, must be presumed.

2. A judgment dissolving the marriage does not impair, or otherwise affect, the plaintiff's rights and interests, in and to any real or personal property, which the defendant owns or possesses, when the judgment is rendered.

3. Where judgment is rendered dissolving the marriage, the defendant is not entitled to dower in any of the plaintiff's real property, or to a distributive share in his personal property.

2 R. S. 144, §§ 44, 47 and 48. See Real Prop. Law, § 176.

§ 1761. [Added, 1913.] Regulation when action brought by either husband or wife.

Whenever the relation of husband and wife ceases by the entry of a judgment dissolving the marriage, the defendant guilty of adultery is not entitled to any interest in any policy of insurance on the life of the plaintiff, wherein such defendant is named as a beneficiary, and the plaintiff may apply to the court granting the final decree or to a special term of the supreme court on notice to the defendant, or the attorney who appeared for defendant in action for divorce, and to the insurance company issuing the policy or policies, for an order directing the insurance company issuing the policy or policies to substitute therein such beneficiary as the plaintiff may nominate. In case where it is shown that the defendant has contributed from his or her separate estate toward the payment of the premiums on such policy, the court shall grant such order on such terms as in the discretion of the court shall be equitable. This section shall also apply in like manner when the defendant obtains a decree against the plaintiff on a counterclaim.

Added L. 1913, ch. 536. In effect Sept. 1, 1913.

ARTICLE THIRD.

Action for a separation.

Sec. 1762. For what causes action may be maintained.

1763. *Id.*; in what cases.

1764. Requisites of complaint.

1765. Defendant may set up plaintiff's misconduct.

1766. Support, maintenance, etc., of wife and children.

1767. Judgment for separation may be revoked.

§ 1762. For what causes action may be maintained.

In either of the cases specified in the next section, an action may be maintained, by a husband or wife, against the other party to the marriage, to procure a judgment, separating the parties from bed and board, forever, or for a limited time, for either of the following causes:

1. The cruel and inhuman treatment of the plaintiff by the defendant.

2. Such conduct, on the part of the defendant towards the plaintiff, as may render it unsafe and improper for the former to cohabit with the latter.

3. The abandonment of the plaintiff by the defendant.

4. Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.

2 L. S. 146, parts of §§ 50 and 51. See L. 1824, p. 249, § 12.

§ 1763. *Id.*; in what cases.

Such an action may be maintained, in either of the following cases:

1. Where both parties are residents of the State, when the action is commenced.

2. Where the parties were married within the State, and the plaintiff is a resident thereof, when the action is commenced.

3. Where the parties, having been married without the State, have become residents of the State, and have continued to be residents thereof at least one year; and the plaintiff is such a resident, when the action is commenced.

Id., §§ 50 and 51 in part.

§ 1764. Requisites of complaint.

The complaint in such an action must specify particularly the nature and circumstances of the defendant's misconduct, and must set forth the time and place of each act complained of, with reasonable certainty.

Id., § 52, and Rule 80.

§ 1765. Defendant may set up plaintiff's misconduct.

The defendant may set up, in justification, the misconduct of the plaintiff; and if that defence is established to the satisfaction of the court, the defendant is entitled to judgment.

Id., § 53.

§ 1766. Support, maintenance, etc., of wife and children.

Where the action is brought by the wife, the court may, in the final judgment of separation, give such directions as the nature and circumstances of the case require. In particular, it may compel the defendant to provide suitably for the educa-

tion and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties. And the court may, in such an action, render a judgment, compelling the defendant to make the provision specified in this section, where, under the circumstances of the case, such a judgment is proper, without rendering a judgment of separation.

See 2 R. S. 146, §§ 54 and 55.

§ 1767. Judgment for separation may be revoked.

Upon the joint application of the parties, accompanied with satisfactory evidence of their reconciliation, a judgment for a separation, forever, or for a limited period, rendered as prescribed in this article, may be revoked, at any time, by the court which rendered it, subject to such regulations and restrictions as the court thinks fit to impose.

Id., § 56.

ARTICLE FOURTH.

Provisions applicable to two or more of the actions specified in this title.

Sec. 1768. Married woman deemed a resident in certain cases.

1769. Alimony, expenses of action, and costs; how awarded.

1770. What is deemed a counterclaim.

1771. Custody and maintenance of children and support of plaintiff.

1772. Support, maintenance, etc., of wife and children. Sequestration.

1773. *Id.*: when enforced by punishment for contempt.

1774. Regulations respecting judgment.

§ 1768. Married woman deemed a resident in certain cases.

If a married woman dwells within the State, where she commences an action against her husband, as prescribed in either of the last two articles, she is deemed a resident thereof, although her husband resides elsewhere.

2 R. S. 147, § 57 (2 Edm. 154), *am'd.*

§ 1769. Alimony, expenses of action and costs; how awarded.

Where an action is brought, as prescribed in either of the last two articles, the court may, in its discretion, during the pendency thereof, from time to time, make and modify an order or orders, requiring the husband to pay any sum or sums of money necessary to enable the wife to carry on or defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties. The final judgment in such an action may award costs, in favor of or against either party, and an execution may be issued for the collection thereof, as in an ordinary case; or the court may, in the judgment, or by an order made at any time, direct the costs to be paid out of any property sequestered, or otherwise in the power of the court.

Id., § 58.

§ 1770. [Am'd, 1881.] What is deemed a counterclaim.

Where an action is brought by either husband or wife, as prescribed in either of the last two articles, a cause of action, against the plaintiff and in favor of the defendant, arising under either of said articles, may be interposed, in connection with a denial of the material allegations of the complaint, as a counterclaim.

§ 1771. [Am'd, 1895, 1904, 1908.] Custody and maintenance of children, and support of plaintiff.

Where an action is brought by either husband or wife, as prescribed in either of the last two articles, the court must, except as otherwise expressly prescribed in those articles, give, either in the final judgment, or by one or more orders, made from time to time, before final judgment, such directions as justice requires, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff. The court may, by order, upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, annul, vary or modify such directions, or in case no such direction or directions shall have been made, amend it by inserting such direction or directions as justice re-

quires for the custody, care, education and maintenance of any such child or children in such final judgment or order or orders. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained. Where an action is brought by a wife, as prescribed in article second of this chapter, and a final judgment of divorce has been rendered in her favor, the court, upon the application of the defendant on notice, and on proof of the marriage of the plaintiff after such final judgment, must by order modify such final judgment and any orders made with respect thereto, by annulling the provisions of such final judgment or orders, or of both, directing payments of money for the support of the plaintiff.

L. 1895, ch. 391; L. 1904, ch. 239; L. 1908, ch. 297. In effect Sept. 1, 1908.

§ 1772. [Am'd, 1904.] Support, maintenance, etc., of wife and children. Sequestration.

Where a judgment rendered, or an order made, as prescribed in this article, or in either of the last two articles, or a judgment for divorce or separation rendered in another state, upon the ground of adultery upon which an action has been brought in this state, and judgment rendered therein, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion, also direct him to give reasonable security, in such a manner, and within such a time, as it thinks proper, for the payment, from time to time, of the sums of money required for that purpose. If he fails to give the security, or to make any payment required by the terms of such a judgment or order, whether he has or has not given security therefor; or to pay any sum of money which he is required to pay by an order, made as prescribed in section seventeen hundred and sixty-nine of this act; the court may cause his personal property, and the rents and profits of his real property, to be sequestered, and may appoint a receiver thereof. The rents and profits, and other property, so sequestered, may be, from time to time, applied, under the direction of the court, to the payment of any of the sums of money specified in this section, as justice requires.

Id., § 60, am'd; L. 1904, ch. 318. In effect Sept. 1, 1904.

§ 1773. [Am'd, 1909.] Id.; when enforced by punishment for contempt.

Where the husband makes default in paying any sum of money specified in the last section, as required by the judgment or order directing the payment thereof; and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced by means of the proceedings prescribed in the last section, or by resorting to the security, if any, given as therein prescribed, the court may, in its discretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in article nineteen of the judiciary law for the punishment of a contempt of court, other than a criminal contempt. Such an order to show cause may also be made, without

any previous sequestration, or direction to give security, where the court is satisfied that they would be ineffectual.

Am'd by L. 1900, ch. 65, § 3. See note 58 of notes of Board of Statutory Consolidation at end of code.

§ 1774. [Am'd, 1902, 1903, 1905.] Regulations respecting judgment.

In an action brought as prescribed in this title, a final judgment shall not be rendered in favor of the plaintiff upon the defendant's default in appearing or pleading, unless either the summons and a copy of the complaint were personally served upon the defendant; or the copy of the summons delivered to the defendant, upon personal service of the summons, or delivered to him without the state, or published, pursuant to an order for that purpose, obtained as prescribed in chapter fifth of this act, contains the following words, or words to the same effect, legibly written or printed upon the face thereof, to wit: "Action to annul a marriage;" "Action for a divorce;" or "Action for a separation;" according to the article of this title, under which the action is brought. Where the summons is personally served, but a copy of the complaint is not served therewith; or where a copy of the summons and copy of the complaint are delivered to the defendant without the state, the certificate or affidavit proving service, must affirmatively state, in the body thereof, that such an inscription, setting forth a copy thereof, was so written or printed upon the face of the copy of the summons delivered to the defendant. No final judgment annulling a marriage, or divorcing the parties and dissolving a marriage, shall be entered, in an action brought under either article first or article second of this title, until after the expiration of three months after the filing of the decision of the court or report of the referee. Such decision or report must be filed and interlocutory judgment thereon must be entered within fifteen days after the party becomes entitled to file or enter the same, and can not be filed or entered after the expiration of said period of fifteen days unless by order of the court upon application and sufficient cause being shown for the delay. Within thirty days after the expiration of said period of three months final judgment shall be entered as of course upon said decision or report, unless for sufficient cause the court in the meantime shall have otherwise ordered. Upon filing the decision of the court or report of the referee, a judgment annulling a marriage or divorcing the parties and dissolving a marriage, shall be interlocutory only and shall provide for the entry of final judgment granting such relief three months after entry of interlocutory judgment unless otherwise ordered by the court. The final judgment must be entered within thirty days after the expiration of said period of three months and can not be entered after the expiration of such period of thirty days except by order of the court on application and sufficient cause being shown for the delay. The interlocutory judgment may, in the discretion of the court, provide for the payment of alimony until the entry of final judgment; it may include a judgment for costs, when costs are awarded, in which case said judgment for costs shall be docketed by the clerk, and thereupon shall have the same force and effect as if docketed upon the entry of final judgment therein, except that it shall not be enforceable by execution or punishment until the entry of final judgment in said action.

See ante, § 1757; L. 1902, ch. 304; L. 1903, ch. 488; L. 1905, ch. 537. In effect Sept. 1, 1906.

TITLE II.**Actions relating to a corporation.**

- Article 1.** Action by a corporation, and action against a corporation, to recover damages or property.
2. Judicial supervision of a corporation, and of the officers and members thereof.
3. Actions to procure the dissolution of a corporation, and actions to enforce the individual liability of the officers or members of a corporation, with or without a dissolution thereof.
4. Action by the people to annul a corporation.
5. Provisions applicable to two or more of the actions specified in this title.

ARTICLE FIRST.***Action by a corporation, and action against a corporation, to recover damages or property.***

- Sec. 1775.** Complaint in actions by or against corporations.
1776. When proof of corporate existence unnecessary.
1777. Mismomer, when waived.
1778. Action against a corporation, upon a note, etc.
1779. When foreign corporations may sue.
1780. When foreign corporations may be sued.

§ 1775. Complaint in actions by or against corporations.

In an action brought by or against a corporation, the complaint must aver that the plaintiff, or the defendant as the case may be, is a corporation; must state whether it is a domestic or foreign corporation; and, if the latter, the State, country, or government, by or under whose laws it was created. But the plaintiff need not set forth, or specially refer to any act or proceeding, by or under which the corporation was created.

See 2 R. S. 459, § 13 (2 Edm. 479).

§ 1776. When proof of corporate existence unnecessary.

In an action, brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation.

Id., § 3, am'd; L. 1864, ch. 422 (6 Edm. 296), and L. 1875, ch. 508.

§ 1777. Mismomer, when waived.

In an action or special proceeding, brought by or against a corporation, the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the mismomer is pleaded in the answer, or other pleading in the defendant's behalf.

Id., § 14, am'd.

§ 1778. Action against a corporation upon a note, etc.

In an action against a foreign or domestic corporation, to recover damages for the non-payment of a promissory note, or other evidence of debt, for the absolute payment of money, upon demand, or at a particular time, an order, extending the time to answer or demur. shall not be granted, except by the court, upon notice to the plaintiff's attorney. In such an action, unless the defendant serves, with a copy of his answer or demurrer, a copy of an order of a judge, directing that the issues presented by the

pleadings be tried, the plaintiff may take judgment, as in case of default in pleading, at the expiration of twenty days after service of a copy of the complaint, either personally with the summons, or upon the defendant's attorney, pursuant to his demand therefor; or, if the service of the summons was otherwise than personal, at the expiration of twenty days after the service is complete.

2 R. S. 459, §§ 8, 9 and 10.

§ 1770. When foreign corporation may sue.

An action may be maintained by a foreign corporation, in like manner, and subject to the same regulations, as where the action is brought by a domestic corporation, except as otherwise specially prescribed by law. But a foreign corporation cannot maintain an action, founded upon an act, or upon a liability or obligation, express or implied, arising out of, or made and entered into in consideration of, an act, which the laws of the State forbid a corporation or association of individuals to do, without express authority of law. This section does not affect the validity of a meeting of the stockholders or directors of a foreign corporation, held within the State, where such a meeting is authorized by the laws of the State, country, or government by or under which the corporation is created; or of an act, done at such a meeting, which is not in conflict with the same laws, or the laws of the State.

Id., §§ 1 and 2; L. 1873, ch. 634 (9 Edm. 676).

§ 1780. (Am'd, 1913.) When foreign corporation may be sued.

An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract made within the State, or relating to property situated within the State, at the time of the making thereof.

2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.

4. Where a foreign corporation is doing business within this state.

Co. Proc., § 427; 2 R. S., § 15, am'd; L. 1849, ch. 107 (2 Edm. 479). Am'd by L. 1913, ch. 60. In effect Sept. 1, 1913.

ARTICLE SECOND.

Judicial supervision of a corporation, and of the officers and members thereof.

Sec. 1781. Action against directors, etc., of a corporation, for misconduct.

1782. By whom action to be brought.

1783. This article, how construed.

§§ 1781-1783. [Repealed by L. 1909, ch. 28. See Consolidated Laws, tit. General Corporation Law, §§ 90-92.]

ARTICLE THIRD.

Actions to procure the dissolution of a corporation, and actions to enforce the individual liability of the officers or members of a corporation, with or without a dissolution thereof.

- Sec. 1784. Action by judgment creditor for sequestration, etc.
 1785. Action to dissolve corporation.
 1786. Id.; by whom to be brought.
 1787. Temporary injunction.
 1788. Receiver may be appointed. Permanent and temporary receiver.
 Powers, etc., of temporary receiver.
 1789. Additional powers and duties may be conferred upon temporary receiver.
 1790. Making stockholders, etc., parties.
 1791. When separate action may be brought against them.
 1792. Proceedings in either action.
 1793. Judgment; property of corporation to be distributed.
 1794. Id.; stock subscriptions to be recovered.
 1795. Id.; as to liabilities of directors and stockholders.
 1796. Effect of this article limited.

§§ 1784-1796. [Repealed by L. 1909, ch. 28. See Consolidated Laws, tit. General Corporation Law, §§ 100-106, 109-115.]

ARTICLE FOURTH.

Action by the people to annul a corporation.

Sec. 1797. Action by attorney-general, when legislature directs.

1798. Id., by leave of court.

1799. Leave; when and how granted.

1800. Action triable by a jury.

1801. Judgment.

1802. Injunction may issue.

1803. Copy of judgment-roll to be filed and published.

§§ 1797-1803. [Repealed by L. 1909, ch. 28. See Consolidated Laws, tit. General Corporation Law, §§ 130-136.]

ARTICLE FIFTH.

Provisions applicable to two or more of the actions specified in this title.

- Sec. 1804. Certain corporations excepted from certain articles of this title.
 1805. Officers and agents may be compelled to testify.
 1806. Injunctions staying actions by creditors.
 1807. Creditors may be brought in.
 1808. When attorney-general must bring action.
 1809. Requisites of injunction against corporations in certain cases.
 1810 Id.; of order appointing receiver in certain cases.
 1811. Id.; of judicial suspension or removal of an officer.
 1812. Application of certain provisions to joint-stock associations.
 1813. In action against stockholders, misnomer, etc., not available.

§§ 1804-1808. [Repealed by L. 1909, ch. 28. See Consolidated Laws, tit. General Corporation Law, §§ 300-304.]

§ 1809. [Am'd. 1909.] Requisites of injunction against joint-stock associations in certain cases.

An injunction order, suspending the general and ordinary business of a joint-stock association, consisting of seven or more persons, or suspending from office, or restraining from the performance of his duties, a trustee, director, or other officer thereof, can be granted only by the court, upon notice of the application therefor, to the proper officer of the association, or to the trustee, director, or other officer enjoined. If such an injunction order is made, otherwise than as prescribed in this section, it is void.

L. 1870, ch. 151, § 1 (7 Edm. 661), am'd. See §§ 1787, 1919. Am'd by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 28. See Consolidated Laws, tit. General Corporation Law, § 305. See note 59 of notes of Board of Statutory Consolidation at end of code.

§§ 1810-1811. [Repealed by L. 1909, ch. 28. See Consolidated Laws, tit. General Corporation Law, §§ 306-307.]

§ 1812. [Am'd. 1909.] Application of certain provisions to joint-stock associations.

Section eighteen hundred and nine of the code of civil procedure and sections three hundred and six and three hundred and seven of the general corporation law apply to an action or a special proceeding, against a joint-stock association created by or under the laws of the State, or a trustee, director, or other officer thereof; or against a joint-stock association created by or under the laws of another state, government, or country, or a trustee, director, or other officer thereof, where the association does business within the State, or has, within the State, a business agency or a fiscal agency, or an agency for the transfer of its stock.

Id., § 5, am'd: L. 1875, ch. 428. See § 2463. Am'd by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 28. See Consolidated Laws, tit. General Corporation Law, § 308. See note 60 of notes of Board of Statutory Consolidation at end of code.

§ 1813. [Am'd, 1909.] In action against stockholders, misnomer, etc., not available.

Where an action, authorized by a law of the State, is brought against one or more persons, as stockholders of a joint-stock association, an objection to any of the proceedings cannot be taken, by a person properly made a defendant in the action, on the ground that the plaintiff has joined with him, as a defendant in the action, a person, whose name appears on the stock-books of the association, as a stockholder thereof, by the name so appearing; but who is misnamed, or dead, or is not liable for any cause. In such a case, the court may, at any time before final judgment, upon motion of either party, amend the pleadings and other papers, without prejudice to the previous proceedings, by substituting the true name of the person intended, or by striking out the name of the person who is dead, or not liable, and, in a proper case, inserting the name of his representative or successor.

L. 1869, ch. 157, § 2 (7 Edm. 426). Am'd by L. 1909, ch. 63. Also partly repealed by L. 1909 ch. 28. See Consolidated Laws, tit. General Corporation Law, § 309. See note 61 of notes of Board of Statutory Consolidation at end of code.

TITLE III.

Actions relating to the estate of a decedent.

- Article 1.** Action by or against an executor or administrator.
2. Action by a creditor against his debtor's next of kin, legatee, heir or devisee.
3. Action to establish or impeach a will.
4. General and miscellaneous provisions.

ARTICLE FIRST.

Action by or against an executor or administrator.

- Sec. 1814.** Action, etc., by and against executor, etc., to be brought in representative capacity.
1815. When personal and representative cause of action may be joined.
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1824. Want of assets not to be pleaded by executor, etc.
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1830. Action against executor, etc., who has been superseded.
1831. False pleading by executor, etc.
1832. When inventory may be contradicted.
1833. Liability for uncollected demands.
1834. The last two sections qualified.
1835. Costs; how awarded.
1836. Id.; when awarded.
1836a. Foreign executor or administrator may sue or be sued.

§ 1814. Action, etc., by and against executor, etc., to be brought in representative capacity.

An action or special proceeding, hereafter commenced by an executor or administrator, upon a cause of action, belonging to him in his representative capacity, or an action or special proceeding, hereafter commenced against him, except where it is brought to charge him personally, must be brought by or against him in his representative capacity. A judgment, in an action hereafter commenced, recovered against an executor or administrator, without describing him in his representative capacity, cannot be enforced against the property of the decedent, except by the special direction of the court, contained therein.

§ 1815. When personal and representative causes of action may be joined.

An action may be brought against an executor or administrator, personally, and also in his representative capacity, in either of the following cases:

1. Where the complaint sets forth a cause of action against him in both capacities, or states facts, which render it uncertain, in which capacity the cause of action exists against him.
2. Where the complaint sets forth two or more causes of action against the defendant, in different capacities, all of which

grow out of the same transaction, or transactions connected with the same subject of action; do not require different places or modes of trial; and are not inconsistent with each other.

In a case specified in this section, a judgment for the plaintiff for a sum of money must distinctly show, whether it is awarded against the defendant personally, or in his representative capacity.

See § 484, subd. 9, ante.

§ 1816. Id.; separate dockets and executions.

In a case specified in the last section, or where costs, to be collected out of the individual property of an executor or administrator, are awarded in an action by or against him in his representative capacity, so much of the judgment, as awards a sum of money against him personally, may be separately docketed, and a separate execution may be issued thereupon, as if the judgment contained no award against him in his representative capacity.

See §§ 1836 and 1846, post.

§ 1817. Regulations, when some of the executors, etc., are not summoned.

In an action or special proceeding against two or more executors or administrators, representing the same decedent, all are considered as one person; and those who are first served with process, or first appear, must answer the plaintiff. Separate answers, by different executors or administrators cannot be required or allowed, except by direction of the court. Judgment in favor of the plaintiff may be entered, and, in a proper case, execution may be issued, against all the defendants, as if all had appeared. But this section does not affect the plaintiff's right to bring into court all the executors or administrators, who are parties.

2 R. S. 448, §§ 5 and 7 (2 Edm. 467), am'd.

§ 1818. Executors who have not qualified, not necessary parties.

One of two or more executors, to whom letters testamentary have not been issued, is not a necessary party to an action or special proceeding, in favor of or against the executors, in their representative capacity.

L. 1838, ch. 149, § 1 (4 Edm. 506).

§ 1819. Action by legatee, etc., against executor, etc.

If, after the expiration of one year from the granting of letters testamentary or letters of administration, an executor or administrator refuses, upon demand, to pay a legacy, or distributive share, the person entitled thereto may maintain such an action against him, as the case requires. But for the purpose of computing the time, within which such an action must be commenced, the cause of action is deemed to accrue, when the executor's or administrator's account is judicially settled, and not before.

2 R. S. 114, § 9 (2 Edm. 118). See § 1827, post.

§ 1820. Id.; by infant; guardian's bond.

The guardian ad litem of an infant, in whose favor an action is brought, as proscribed in the last section, must, unless he is also the general guardian, execute and file with the clerk,

before the commencement of the action, a bond to the infant, with at least two sufficient sureties, in a penalty fixed by a judge of the court, conditioned that the guardian will duly account to the infant, when he attains full age, or, in case of his death, to his personal representatives, for all money or property, which the guardian may receive, by reason of the legacy or distributive share.

2 R. S. 114, § 12, am'd. See § 476, ante.

§ 1821. When action barred by judgment against heir, etc.

A final judgment against an heir or devisee bars an action against the executor or administrator of the decedent, for the same cause, and every other remedy to enforce payment thereof out of the decedent's property, unless an execution against property, issued upon the judgment, has been returned wholly or partly unsatisfied, or sufficient real property to satisfy the judgment has not descended, or been devised, to the judgment debtor. But, if the judgment was recovered for a debt or legacy, expressly charged upon the estate descended or devised, the bar is absolute.

Id., §§ 7 and 8, am'd and consolidated.

§ 1822. [Am'd, 1895.] Limitation of action by creditor on claim rejected, etc.

Where an executor or administrator disputes or rejects a claim against the estate of a decedent, exhibited to him, either before or after the commencement of the publication of a notice requiring the presentation of claims, as prescribed by law, unless a written consent shall be filed by the respective parties with the surrogate that said claim may be heard and determined by him upon the judicial settlement of the accounts of said executor or administrator as provided by section twenty-seven hundred and forty-three, the claimant must commence an action for the recovery thereof against the executor or administrator, within six months after the dispute or rejection, or, if no part of the debt is then due, within six months after a part thereof becomes due; in default whereof he, and all the persons claiming under him, are forever barred from maintaining such an action thereupon, and from every other remedy to enforce payment thereof out of the decedent's property.

2 R. S. 89, § 38 (2 Edm. 91); L. 1895, ch. 595. See §§ 1836, 2743.

§ 1823. Decedent's real property not bound by judgment against executor, etc.

Real property, which belonged to a decedent, is not bound, or in any way affected, by a judgment against his executor or administrator, and is not liable to be sold by virtue of an execution issued upon such a judgment, unless the judgment is expressly made, by its terms, a lien upon specific real property therein described, or expressly directs the sale thereof.

2 R. S. 449, § 12 (2 Edm. 468). See § 1815, ante.

§ 1824. Want of assets not to be pleaded by executor, etc.

In an action against an executor or administrator, in his representative capacity, wherein the complaint demands judgment for a sum of money, the existence, sufficiency, or want of assets,

shall not be pleaded by either party; and the plaintiff's right of recovery is not affected thereby, except with respect to the costs to be awarded, as prescribed by law. A judgment in such an action is not evidence of assets in the defendant's hands.

Substituted for 2 R. S. 88 and 89, §§ 31, 39 and 40 (2 Edm. 90 and 92), and 2 R. S. 448, 450 and 451, §§ 6, 10-22 (2 Edm. 467, 470).

§ 1825. Leave to issue execution against executor, etc.

An execution shall not be issued, upon a judgment for a sum of money, against an executor or administrator, in his representative capacity, until an order permitting it to be issued has been made by the surrogate from whose court the letters were issued. Such an order must specify the sum to be collected, and the execution must be indorsed with a direction to collect that sum.

2 R. S. 88, § 32 (2 Edm. 90), am'd. See §§ 1380, 2552.

§ 1826. Id.; how procured; order; and contents thereof.

At least six days' notice of the application for an order specified in the last section, must be personally served upon the executor or administrator, unless it appears that service cannot be so made with due diligence; in which case notice must be given to such persons, and in such manner as the surrogate directs, by an order to show cause why the application should not be granted. Where it appears that the assets, after payment of all sums chargeable against them for expenses, and for claims entitled to priority as against the plaintiff, are not, or will not be, sufficient to pay all the debts, legacies or other claims of the class to which the plaintiff's claim belongs, the sum, directed to be collected by the execution, shall not exceed the plaintiff's just proportion of the assets. In that case, one or more orders may be afterwards made in like manner, and one or more executions may be afterwards issued, whenever it appears that the sum directed to be collected by the first execution is less than the plaintiff's just proportion.

Id., § 33, in part, and 2 R. S. 115, § 13 (2 Edm. 119). See § 1381, subd. 2 § 2726, subd. 1.

§ 1827. Security may be required from a legatee.

Where a judgment has been rendered against an executor or administrator, for a legacy or distributive share, the surrogate, before granting an order permitting an execution to be issued thereupon, may, and in a proper case must, require the applicant to file in his office an undertaking to the defendant, in such a sum and with such sureties as the surrogate directs, to the effect that if, after collection of any sum of money by virtue of the execution, the remaining assets are not sufficient to pay all sums for which the defendant is chargeable for expenses, claims entitled to priority as against the applicant, and the other legacies or distributive shares, of the class to which the applicant's claim belongs, the plaintiff will refund to the defendant the sum so collected, or such ratable part thereof, with the other legatees or representatives of the same class, as is necessary to make up the deficiency.

Substituted for 2 R. S. 114, 115, §§ 10 and 11 (2 Edm. 118).

§ 1828. Actions, etc., when not to abate.

An executor, administrator, or a person appointed by the surrogate, as prescribed in chapter eighteenth of this act, to dispose

of the real property of a decedent, is deemed a trustee, appointed by virtue of a statute, within the meaning of that expression as used in section 766 of this act.

Substituted for 2 R. S. 77, § 40 (2 Edm. 78); 2 R. S. 115, § 14 (2 Edm. 119), and L. 1850, ch. 162 (4 Edm. 508).

§ 1829. Execution on former judgment.

An execution may be issued, in the name of an executor or administrator, in his representative capacity, upon a judgment recovered by any person who preceded him in the administration of the same estate, in any case where it might have been issued in favor of the original plaintiff, and without a substitution.

2 R. S. 449, § 13 (2 Edm. 468). See § 1376, ante.

§ 1830. Action against executor, etc., who has been superseded.

If an executor or administrator is defendant in an action or special proceeding, pending when his powers cease, the plaintiff may, in a proper case, proceed therein against him, to charge him personally; but a judgment or other determination, thereafter rendered or made against him, is not of any force, as against the estate of the decedent, or a person succeeding to the administration thereof.

2 R. S. 115, § 15 (2 Edm. 119).

§ 1831. False pleading by executor, etc.

An executor or administrator cannot be made personally liable to the adverse party, for a debt or for damages, by reason of his having made a false allegation in pleading.

2 R. S. 438, § 10 (2 Edm. 468).

§ 1832. When inventory may be contradicted.

In an action or special proceeding, to which an executor or administrator is a party, wherein the question whether he has administered the estate of the decedent, or any part thereof, is in issue, or is the subject of inquiry, and the inventory of assets, filed by him, is given in evidence, either party may rebut the same, by proof, either

1. That any property was omitted in the inventory, or was not returned therein at its true value; or

2. That any property has perished, or has been lost, without the fault of the executor or administrator; or has been fairly sold by him, at private or public sale, at a less price than the value so returned; or that, since the return of the inventory, it has deteriorated or enhanced in value.

Id., § 14, am'd.

§ 1833. Liability for uncollected demands.

In such an action or special proceeding, the executor or administrator shall not be charged with a demand or right of action, included in the inventory, unless it appears that the same has been collected, or might have been collected, with due diligence.

Id., § 15, am'd.

§ 1834. The last two sections qualified.

The last two sections do not vary any rule of evidence respecting any proof which an executor or administrator may now make.

Id., § 16.

§ 1835. Costs; how awarded.

Where a judgment for a sum of money only is rendered against an executor or administrator, in an action brought against him in his representative capacity, costs shall not be awarded against him, except as prescribed in the next section.

2 R. S. 90, § 41 (2 Edm. 92). See Co. Proc., § 317.

§ 1836. [Am'd, 1895, 1897, 1906.] Id.; when awarded, et cetera.

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Where it appears in a case specified in the last section that the plaintiff's demand was presented within the time limited by a notice published as prescribed by law, requiring creditors to present their claims and that the payment thereof was unreasonably resisted or neglected, or that the defendant did not file the consent provided in section eighteen hundred and twenty-two at least ten days before the expiration of six months from the rejection thereof the court may award costs against the executor or administrator to be collected either out of his individual property or out of the property of the decedent as the court directs, having reference to the facts which appear upon the trial. Where the action is brought in the supreme court, or any county court, the facts must be certified by the judge or referee before whom the trial took place.

L. 1895, ch. 595, superseding amendment in ch. 946. See ch. 946, § 4. L. 1897, ch. 469; L. 1906, ch. 60. In effect Sept. 1, 1906. See §§ 2718, 2743, 3246

§ 1836-a. [Added, 1911.] Foreign executor or administrator may sue or be sued.

An executor or administrator duly appointed in any other state, territory or district of the United States or in any foreign country may sue or be sued in any court in this state in his capacity of executor or administrator in like manner and under like restrictions as a nonresident may sue or be sued, if, within twenty days after any such executor or administrator shall commence, or appear in, any action or proceeding in any court in this state or within twenty days after he shall be required or directed by summons or otherwise to appear therein, there shall be filed in the office of the clerk of the court, in which such action or proceeding shall be brought or be pending, a copy of the letters testamentary or letters of administration issued to such executor or administrator duly authenticated as prescribed by section twenty-seven hundred and four of the code of civil procedure; in default whereof all proceedings in such action or proceeding may be stayed until such duly authenticated copy of such letters shall be so filed.

Added by L. 1911, ch. 831, in effect July 10, 1911.

ARTICLE SECOND.

Action by a creditor, against his debtor's next of kin, legatee, heir or devisee.

Sec. 1837. When action lies against next of kin, legatee, etc.

1838. Action may be joint or several.

1839. In joint action, recovery to be apportioned.

1840. Recovery in a several action.

1841. Requisites to recovery in action against legatee.

1842. Id.; in action against a preferred legatee.

1843. Liability of heirs and devisees.

1844. When action therefor may be brought against heirs and devisees.

1845. Effect of application to sell real property.

1846. Action must be joint.

1847. Recovery to be apportioned.

1848. Requisites to recovery against heirs.

1849. Id.; against devisees.

1850. Deductions for prior recoveries.

1851. Complaint to describe land descended, etc.

1852. Judgment; when to be satisfied out of land.

1853. Id.; when not a lien on land aliened.

1854. How judgment taken, when land aliened.

1855. Classification of debts to be enforced under this article.

1856. Defence by reason of other prior or equal claims.

1857. Id.; when such a claim is paid.

1858. Action not suspended by infancy.

1859. This article not applicable, where will charges real property, etc.

1860. One action, where same person is heir, devisee, etc.

§ 1837. When action lies against next of kin, legatee, etc.

An action may be maintained, as prescribed in this article, against the surviving husband or wife of a decedent, and the next of kin of an intestate, or the next of kin or legatees of a testator to recover, to the extent of the assets paid or distributed to them, for a debt of the decedent, upon which the action might have been maintained, against the executor or administrator. The neglect of the creditor to present his claim to the executor or administrator, within the time prescribed by law for that purpose, does not impair his right to maintain such an action.

2 B. S. 80, § 42 (2 Edm. 92), am'd.

§ 1838. Action may be joint or several.

An action, specified in the last section, must be brought, either jointly against the surviving husband or wife, and all the legatees or all the next of kin, as the case may be, or at the plaintiff's election, against one of them only. But where a legacy is received by two or more persons jointly, they are deemed one legatee, within the meaning of each provision of this article, relating to legatees.

2 B. S. 451, §§ 23 and 26 (2 Edm. 470), am'd.

§ 1839. In joint action, recovery to be apportioned.

Where a joint action is brought, as prescribed in the last section, the whole sum, which the plaintiff is entitled to recover, must be apportioned among the defendants, in proportion to the legacy or distributive share, as the case may be, received by each of them; and the final judgment must award, against each defendant separately, the proportionate sum thus ascertained. The costs of the action, if the plaintiff is entitled to costs, must be apportioned in like manner; except that the expenses of serv-

ing the summons upon each defendant must be taxed against him only; and one sheriff's fee, for returning an execution, may be taxed against each defendant, against whom any sum is awarded.

2 R. S. 451, part of § 34 and §§ 28-31, consolidated.

§ 1840. Recovery in a several action.

Where an action is brought against the surviving husband or wife only, or against one only of the next of kin, or legatees, the sum, which the plaintiff is entitled to recover, cannot exceed the sum which he would have been entitled to recover from the same defendant, in an action brought, as prescribed in the last section.

Id., §§ 24, 25 and 26, consolidated.

§ 1841. Requisites to recovery in action against legatee.

If the action is brought against a legatee, or against all the legatees, the plaintiff must show, either

1. That no assets were delivered by the executor or administrator of the decedent, to the surviving husband or wife, or next of kin; or

2. That the value of assets, so delivered, has been recovered by some other creditor; or

3. That those assets, after payment of the expenses of administration and preferred demands, are not sufficient to satisfy the demand of the plaintiff; in which case, he can recover only for the deficiency.

Id., § 27, am'd.

§ 1842. Id.; in action against a preferred legatee.

Where some of the legatees are preferred to others, an action may be maintained, as prescribed in the last five sections, against one or all of those who are equally preferred, or equally deferred, as if the legatees of that class were all the legatees. But where it is brought against a preferred legatee, or a class of preferred legatees, the plaintiff must show, in addition to the matters, with respect to the next of kin, required by the provisions of the last section, the same matters, with respect to each legatee, or class of legatees, to whom the defendant or defendants are preferred.

§ 1843. [Repealed by L. 1909, ch. 18. See Consolidated Laws, tit. Decedent Estate Law, § 101.]

§ 1844. [Am'd, 1909.] When action therefor may be brought against heirs and devisees.

An action, to enforce the liability declared in section one hundred and one of the decedent estate law, cannot be maintained, except in one of the following cases:

1. Where three years have elapsed since the death of the decedent, and no letters testamentary, or letters of administration, upon his estate, have been granted within the State. (See § 2750.)

2. Where three years have elapsed, since letters testamentary, or letters of administration, upon his estate, were granted, within the State.

2 R. S. 109, § 53 (2 Edm. 113). Am'd by L. 1909, ch. 65, § 3. See note 62 of notes of Board of Statutory Consolidation at end of code.

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§ 1845. Effect of application to sell real property.

Where it appears that, at the time of the commencement of such an action, a petition, seasonably presented, as prescribed by law, praying for a decree to dispose of real property of the decedent, for the payment of his debts, was pending in a surrogate's court, having jurisdiction, the proceedings in the action, subsequent to the complaint, must be stayed by the court, until the petition is disposed of, unless the plaintiff elects to discontinue. If a decree to dispose of real property, pursuant to the prayer of the petition, is granted, the action must be dismissed, unless the plaintiff has alleged in his complaint, or alleges in a supplemental complaint, that real property, other than that included in the decree, descended or was devised to the defendants. If the plaintiff elects to proceed under such an allegation, he is entitled to a preference in payment, out of the real property, with respect to which the allegation is made; but he cannot share, as a creditor, in the distribution of the money, arising from the disposal of the real property, described in the decree; and the judgment in the action does not charge, or in any way affect, that property.

Id., § 53.

§ 1846, [Am'd, 1909.] Action must be joint.

An action against heirs or devisees, brought as prescribed in section one hundred and one of the decedent estate law and the last two sections of this act, must be brought jointly against all the heirs, to whom any real property descended from the decedent, or jointly against all the devisees, as the case may be.

L. 1837, ch. 460, § 73 (4 Edm. 500), am'd. Am'd by L. 1909, ch. 65, § 3. See note 63 of notes of Board of Statutory Consolidation at end of code.

§ 1847. Recovery to be apportioned.

In such an action, the sum, which the plaintiff is entitled to recover, for damages and costs, must be apportioned among all the defendants, in proportion to the value of the real property descended to each heir, or devised to each devisee, as the case may be, as prescribed in section 1839 of this act, for a similar apportionment among legatees or next of kin, in proportion to the assets received by them. The final judgment must, in like manner, award against each defendant the proportionate sum, with which he is chargeable.

2 R. S. 455, §§ 52 and 53 (2 Edm. 474).

§ 1848. Requisites to recovery against heirs.

Where the action is brought against heirs, the plaintiff must show, either

1. That the decedent's assets, if any, within the State were not sufficient to pay the plaintiff's debt, in addition to the expenses of administration, and debts of a prior class; or

2. That the plaintiff has been unable, or will be unable, with due diligence, to collect his debt, by proceedings in the proper surrogate's court, and by action against the executor or administrator, and against the surviving husband or wife, legatees, and next of kin.

The executor's or administrator's account, as rendered to, and settled by, the surrogate, may be used as presumptive evidence of any of the facts, required to be shown by this section.

2 R. S. 455, § 23, am'd by L. 1859, ch. 110. See, also, *Id.*, § 36.

§ 1849. *Id.*; against devisees.

Where the action is brought against devisees, the plaintiff must show, in addition to the matters specified in the last section, either that the real property of the decedent, which descended to his heirs, was not sufficient to pay the plaintiff's debt, or that the plaintiff has been unable, or will be unable, with due diligence, to collect his debt by an action against the heirs.

Id., §§ 56 and 59, consolidated.

§ 1850. Deductions for prior recoveries.

Where the assets, applicable to the plaintiff's debt, were sufficient to pay a part thereof, or a part thereof has been collected from the executor or administrator, or from the surviving husband or wife, next of kin, or legatees, the plaintiff can recover only for the residue, remainder unpaid or uncollected; and if the action is against devisees, he can recover only for the residue, which the real estate descended, or the amount of his recovery against the heirs, is insufficient to discharge.

Id., §§ 34 and 57, am'd and condensed.

§ 1851. Complaint to describe land descended, etc.

The complaint must describe, with common certainty, the real property, descended or devised to the defendant; and must specify its value.

Id., §§ 44 and 60.

§ 1852. Judgment; when to be satisfied out of land.

If it appears that any of the real property, which descended or was devised to a defendant, had not been aliened by him at the time of the commencement of the action, the final judgment must direct, that the debt of the plaintiff, or the proportion thereof which he is entitled to recover against that defendant, be collected out of that real property. Such a judgment is preferred, as a lien upon that property, to a judgment obtained against the defendant, for his individual debt or demand.

Id., §§ 47 and 48. See §§ 870, 872, ante.

§ 1853. *Id.*; when not a lien on land aliened.

But a judgment, rendered as prescribed in the last section, does not bind, and the execution thereupon cannot in any way affect, the title of a purchaser, in good faith and for value, acquired before a notice of the pendency of the action is filed, or final judgment is entered, and the judgment-roll filed.

Id., §§ 51 and 61, am'd and condensed.

§ 1854. How judgment taken, when land aliened.

If it appears that, before the commencement of the action, or afterwards and before the filing of a notice of the pendency of the action, the defendant aliened the real property descended or devised to him, or any part thereof, the plaintiff may, at his election, take a final judgment against him for the value of the

property so aliened, or so much thereof as may be necessary, as in an action for the defendant's own debt.

2 R. S. 453, § 49, and part of § 51.

§ 1855. [Am'd, 1909.] Classification of debts, to be enforced under this article.

Where the surviving husband or wife, next of kin, legatees, heirs, or devisees, are liable for demands against the decedent, as prescribed in this article, or section one hundred and one of the decedent estate law, they must give preference in the payment thereof, and they are so liable therefor, in the order prescribed by law, for the payment of debts by an executor or administrator. Preference of payment cannot be given to a demand, over another of the same class, except where a similar preference by an executor or administrator is allowed by law. The commencement of an action, under any provision of this article, or section one hundred and one of the decedent estate law, does not entitle the plaintiff's demand to preference over another of the same class, except as otherwise specially prescribed by law.

Id., §§ 37 and 38. Am'd by L. 1909, ch. 65, § 3. See note 64 of notes of Board of Statutory Consolidation at end of code.

§ 1856. Defense, by reason of other prior or equal claims.

Where it appears, in an action brought as prescribed in this article, that there are unsatisfied demands against the decedent's estate, of a class prior to that of the plaintiff's demand, the defendant is entitled to judgment, if the value of the property, which was received, devised, or inherited, as the case may be, by the class to which he belongs, does not exceed the amount of the valid demands of a prior class. If it exceeds the amount of those demands, the judgment against the defendant cannot exceed such a proportion of the plaintiff's demand, as the total amount of the valid demands of his class bears to the excess.

Id., §§ 39 and 40, consolidated.

§ 1857. Id.; when such a claim is paid.

Where a defendant, or a person belonging to his class, has paid a demand against the decedent's estate, of a class prior to that of the plaintiff's demand, or has paid a demand of the same class, the amount of the demand so paid must be estimated, in ascertaining the amount to be recovered, as if it was outstanding and unpaid.

Id., § 41.

§ 1858. Action not suspended by infancy.

An action against heirs or devisees, brought as prescribed in this article, is not delayed, nor is the remedy of the plaintiff suspended, by reason of the infancy of any of the parties; except that an execution shall not be issued against an infant heir or devisee, until the expiration of one year after final judgment is rendered, and the judgment-roll filed.

Id., §§ 43 and 54, consolidated.

§ 1859. [Repealed by L. 1900, ch. 18. See Consolidated Laws, tit. Decedent Estate Law, § 102.]

§ 1860. One action, where same person is heir, devisee, etc.

Where a person, who takes real property of a decedent by devise, and also by descent; or who takes personal property as next of kin, and also as legatee; or who takes both real and personal property in either capacity; or who is executor or administrator, and also takes in either of the before mentioned capacities; would be liable in one capacity, for a demand against the decedent, after the exhaustion of the remedy against him in another capacity; the plaintiff, in any action to charge him, which can be maintained, without joining with him any other person, except a person whose liability is in all respects the same, may recover any sum, for which he is liable, although the remedy against him in another capacity was not exhausted. But this section does not increase the sum, which the plaintiff is entitled to recover against him, in the capacity in which he is actually liable; nor does it charge a defendant individually, who is liable only in a representative capacity.

ARTICLE THIRD.

Action to establish or impeach a will.

- Sec. 1861. When action to establish a will may be brought.
 1862. Judgment, that will be established.
 1863. Judgment admitting the will to probate.
 1864. Contents of judgment; surrogate's duty.
 1865. Proof of lost will in certain cases.
 1866. Action to establish, etc., will, relating to real property.
 1867. Retrospective effect of this article.

§ 1861. When action to establish a will may be brought.

An action to procure a judgment, establishing a will, may be maintained, by any person interested in the establishment thereof, in either of the following cases:

1. Where a will of real or personal property, or both, has been executed, in such a manner and under such circumstances, that it might, under the laws of the State, be admitted to probate in a surrogate's court; but the original will is in another State or country, under such circumstances, that it cannot be obtained for that purpose; or has been lost or destroyed, by accident or design, before it was duly proved and recorded within the State.

2. Where a will of personal property made by a person, who resided without the State, at the time of the execution thereof, or at the time of his death, has been duly executed, according to the laws of the State or country in which it was executed, or in which the testator resided at the time of his death, and the case is not one, where the will can be admitted to probate in a surrogate's court, under the laws of the State.

2 R. S. 67, § 63a and parts of §§ 64a, 67a, 68a and the whole of §§ 68b and 69a (2 Edm. 68, 69).

§ 1862. Judgment, that will be established.

If, in such an action, the facts necessary to establish the validity of the will, as prescribed in the last section, are satisfactorily proved, final judgment must be rendered, establishing the will accordingly. But where the will of a person, who was a resident of the State at the time of his death, is established as prescribed in the last section, the judgment establishing it does not affect the construction or validity of any provision contained therein; and such a question arising with respect to any provision, must be determined in the same action, or in another action or a special proceeding, as the case requires, as if the will was executed within the State.

Id., § 65a.

§ 1863. Judgment admitting the will to probate.

Where the parties to the action, who have appeared or have been duly summoned, include all the persons who would be necessary parties to a special proceeding, in a surrogate's court, for the probate of the same will and the grant of letters thereupon, if the circumstances were such that it could have been proved in a surrogate's court: the final judgment, rendered as prescribed in the last section, must direct, that an exemplified copy thereof be transmitted to the surrogate having jurisdiction, and be recorded in his office; and that letters testamentary, or letters of administration with the will annexed, be issued thereupon from

his court, in the same manner, and with like effect, as upon a will duly proved in that court.

2 R. S. 67, last part of § 67a.

§ 1864. Contents of judgment; surrogate's duty.

A copy of the will so established, or, if it is lost or destroyed, the substance thereof must be incorporated into a final judgment, rendered as prescribed in the last section; and the surrogate must record the same, and issue letters thereupon, as directed in the judgment.

§ 1865. Proof of lost will in certain cases.

But the plaintiff is not entitled to a judgment, establishing a lost or destroyed will, as prescribed in this article, unless the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime; and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness.

Id., § 67b, am'd.

§ 1866. Action to establish, etc., will, relating to real property.

The validity, construction, or effect, under the laws of the State, of a testamentary disposition of real property situated within the State, or of an interest in such property, which would descend to the heir of an intestate, may be determined, in an action brought for that purpose, in like manner as the validity of a deed, purporting to convey land, may be determined. The judgment in such an action may perpetually enjoin any party from setting up or from impeaching the devise, or otherwise making any claim in contravention to the determination of the court, as justice requires. But this section does not apply to a case, where the question in controversy is determined by the decree of a surrogate's court, duly rendered upon allegations for that purpose, as prescribed in article first of title third of chapter eighteenth of this act, where the plaintiff was duly cited in the special proceeding in the surrogate's court, before the commencement of the action.

L. 1853, ch. 228, § 1 (4 Edm. 503).

§ 1867. Retrospective effect of this article.

The provisions of this article apply as well to wills made before, as to those made after, this article takes effect.

2 R. S. 68, §§ 56b and 68b and part of § 67a (2 Edm. 60).

ARTICLE FOURTH.

General and miscellaneous provisions.

Sec. 1868. Action by child born after will, or by witness to will.

1869. Receiver, as successor of surviving executor, etc.

1870. Next of kin defined.

§ 1868. [Repealed by L. 1900, ch. 18. See Consolidated Laws, tit. Decedent Estate Law, § 28.]

§ 1869. [Am'd, 1895.] Receiver, as successor of surviving executor, etc.

Where the estate of a decedent has been brought under the jurisdiction of the supreme court, by an action for partition or distribution, or for the construction or establishment of a will, the court may, upon the death of the sole surviving executor, appoint a receiver of the estate, pending the action, upon such terms and conditions, and upon such notice to the parties interested, as the court directs, and upon such security, if any, as to the court seems proper. For the purpose of carrying into effect the judgment and orders of the court in relation to the estate, a receiver so appointed is the successor in interest of the surviving executor; and has, subject to the direction of the court, the like power, as an administrator with the will annexed.

L. 1895, ch. 946.

§ 1870. Next of kin defined.

The term "next of kin," as used in this title, includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed assets of a decedent, after payment of debts and expenses, other than a surviving husband or wife.

See §§ 1905 and 2514, subd. 12, post.

TITLE IV.

Other special actions and rights of action.

Article 1. Judgment creditor's action.

2. Action by a private person upon an official bond.
3. Action by a private person for a penalty or forfeitures.
4. Certain actions to recover damages for wrongs.
5. Miscellaneous actions and rights of action.

ARTICLE FIRST.

Judgment creditor's action.

- Sec. 1871.** When judgment creditor may bring action.
1872. To what county execution must have issued.
1873. What property may be reached.
1874. Interest of judgment debtor in land contract may be reached.
1875. Id.; how applied.
1876. Injunction may be issued.
1877. Receiver may be appointed.
1878. How discovery may be compelled.
1879. Application of this article; what property cannot be reached.

§ 1871. When judgment creditor may bring action.

When an execution against the property of a judgment debtor, issued out of a court of record, as prescribed in the next section, has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action against the judgment debtor, and any other person, to compel the discovery of any thing in action, or other property belonging to the judgment debtor, and of any money, thing in action, or other property due to him, or held in trust for him; to prevent the transfer thereof, or the payment or delivery thereof, to him, or to any other person; and to procure satisfaction of the plaintiff's demand, as prescribed in the next section but one. Where the execution was issued as prescribed in section 1934 of this act, and a defendant not summoned in the original action is made a defendant in an action brought under this section, personal property, owned by him jointly with the defendants summoned or with any of them, may be applied to the satisfaction of the plaintiff's demand as prescribed in this article.

2 R. S. 173, § 38 (2 Edm. 180). See, also, §§ 217, 713 and 827, ante.

§ 1872. To what county execution must have issued.

To entitle the judgment creditor to maintain an action as prescribed in the last section, the execution must have been issued as follows:

1. If, at the time of the commencement of the action, the judgment debtor is a resident of the State, to the sheriff of the county where he resides.
2. If he is not then a resident of the State, to the sheriff of the county where he has an office, for the regular transaction of business in person; or if he has no such office within the State, to the sheriff of the county where the judgment-roll is filed, unless the execution was issued out of a court, other than the court in which the judgment was rendered; in which case, it must have been issued to the sheriff of the county where a transcript of the judgment is filed.

§ 1873. What property may be reached.

The final judgment in the action must direct and provide for the satisfaction of the sum due to the plaintiff, out of any money,

thing in action, or other personal property, belonging to, or due to the judgment debtor, or held in trust for him, which is discovered in the action; whether the same might or might not have been originally taken by virtue of an execution.

2 R. S. 780, § 89.

§ 1874. Interest of judgment debtor in land contract may be reached.

The final judgment in the action must also direct and provide for the satisfaction of the sum due to the plaintiff, out of the interest, if any, of the judgment debtor, in a contract for the purchase of real property by him; either by selling the interest, or by transferring it to the judgment creditor, in such a manner and upon such terms, as the court deems most conducive to the interests of the parties. Where the person, bound to perform the contract to the judgment debtor, is a defendant in the action, the final judgment may direct a specific performance of the contract to the judgment creditor, or, where the interest in the contract is directed to be sold, to the purchaser.

1 R. S. 744, § 5 (1 Edm. 696), am'd. See § 1253.

§ 1875. Id.; how applied.

In a case specified in the last section, the value of the interest of the judgment debtor holding the contract must be ascertained, under the direction of the court; and so much thereof as is necessary must be applied to the payment of the sum due to the plaintiff, and the residue, if any, to the benefit of the judgment debtor.

Id., § 6.

§ 1876. Injunction may be issued.

A temporary injunction, restraining the transfer to any person, or the payment or delivery to the judgment debtor, of any money, thing in action, or other property or interest, which may, by the provisions of this article, be applied to the satisfaction of the sum due to the plaintiff, may be granted in the action. The injunction, and the proceedings before and after it is granted, are governed by the provisions of article first of title second of chapter seventh of this act; for which purpose, the injunction is deemed to be one of those specified in section 603 of this act.

2 R. S. 174, § 89.

§ 1877. Receiver may be appointed.

The court may, by an order, or by the interlocutory or final judgment in the action, appoint a receiver of any or all of the property of the judgment debtor; and may direct the judgment debtor, or any other defendant in the action, to convey or deliver to the receiver, as justice requires, any property, real or personal, book, voucher, or other paper, or to execute any instrument, which it deems necessary, for perfecting or assuring the receiver's title or possession.

See §§ 714-716 and 718, ante.

§ 1878. How discovery may be compelled.

A discovery may be compelled in an action, brought as prescribed in this article, by directing the person, required to make it, to appear before the court, or a referee appointed by it, and to be examined under oath, concerning the matters pertaining to the discovery. But this section does not affect the right of the

plaintiff, to cause the deposition of a defendant to be taken, as prescribed in article first of title third of chapter ninth of this act.

§ 1879. Application of this article; what property cannot be reached.

This article does not apply to a case, where a judgment debtor is a corporation, created by or under the laws of the State. Nor does it authorize the discovery or seizure of, or other interference with, any property, which is expressly exempted by law from levy and sale, by virtue of an execution; or any money, thing in action, or other property, held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor; or the earnings of the judgment debtor for his personal services, rendered within sixty days next before the commencement of the action, where it is made to appear, by his oath or otherwise, that those earnings are necessary for the use of a family, wholly or partly supported by his labor.

L. 1870, ch. 151, § 3, subd. 1 (7 Edm. 461); L. 1872, ch. 1, §§ 23 and 24 (2 Edm. 180). See Co. Proc., § 297.

ARTICLE SECOND.

Action by a private person upon an official bond.

- Sec. 1880. Application for leave to sue sheriff's bond; proof required.
 1881. Order granting leave; action thereupon.
 1882. Successive actions.
 1883. Indorsement upon execution.
 1884. Collection of execution; when a defence to subsequent action.
 1885. When claimants entitled to ratable distribution.
 1886. Action upon a surrogate's bond.
 1887. Action upon a county treasurer's bond.
 1888. Actions upon official bonds of other officers.
 1889. Actions, etc., under the last three sections regulated.
 1890. Receivers, etc., deemed public officers.
 1891. Demand of money; when necessary before application.
 1892. Application may be made ex parte.

§ 1880. [Am'd, 1895.] Application for leave to sue sheriff's bond; proof required.

Where a sheriff is liable for the escape of a prisoner committed to his custody, or is guilty of any other actionable default or misconduct in his office, the person injured thereby may apply to the supreme court, for leave to prosecute the sheriff's official bond. The application must be accompanied with proof, by affidavit, of the default or misconduct complained of, and that satisfaction of the same has not been received; and with a certified copy of the official bond.

2 R. S. 476, §§ 1 and 2 (2 Edm. 498); L. 1895, ch. 946.

§ 1881. Order granting leave; action thereupon.

Upon such an application, the court must grant an order, permitting the applicant to maintain an action upon the bond. The action must be brought, in the court which granted the order, by the applicant as plaintiff; and it may be maintained, as if the applicant was the obligee named in the bond, except as otherwise expressly prescribed in this article.

Id., § 3. See, also, 1 R. S. 378, § 67 (1 Edm. 351).

§ 1882. [Am'd, 1895.] Successive actions.

The same, or any other applicant, may, in like manner, either before or after judgment in the first action, obtain an order, permitting him to maintain another action, in the same court, upon the same bond, for another default or misconduct. Any number of such orders may be successively made; and neither of the actions authorized thereby is affected by the pendency of, or the recovery of judgment in, any other, except as otherwise expressly prescribed in this article.

Id., §§ 5, 6, 7 and 8, am'd and consolidated; L. 1895, ch. 946. See § 1886, post.

§ 1883. Indorsement upon execution.

Where an execution is issued upon a judgment, recovered against the sheriff and any of his sureties, in an action, brought pursuant to the last four sections, the plaintiff's attorney must indorse thereon a direction to collect the same, in the first place, out of the property of the sheriff, and, if sufficient property of the sheriff cannot be found, then to collect the deficiency out of the property of the surety or sureties.

Id., § 15.

§ 1884. Collection of execution; when a defence to subsequent action.

It is a defence by a surety, against whom an action is brought upon a sheriff's official bond, that he, or any other surety or sureties, have been or will be compelled, for want of sufficient property of the sheriff, to pay, upon one or more judgments recovered against him or them, upon the same bond, an aggregate amount, exclusive of costs, officers' fees, and expenses, equal to the sum for which the defendant is liable, by reason of the bond. It is a partial defence, that the difference between the aggregate amount, so paid, or to be paid, and the sum for which the defendant is thus liable, is less than the amount of the plaintiff's demand.

2 R. S. 476, §§ 12, 13 and 14.

§ 1885. When claimants entitled to ratable distribution.

If the aggregate amount of the liabilities, which might be recovered by actions upon the sheriff's official bond, as prescribed in this article, exceeds the sum for which the sureties are liable, the court must, upon the application of a person who has obtained leave to prosecute the bond, made upon notice to the plaintiff's attorney, in each action then pending upon the sheriff's official bond, and in each uncollected judgment recovered thereupon, direct and provide for the distribution of the money, collected out of the property of the sureties, among the persons in favor of whom the liabilities have accrued, in proportion to the amount which each one is entitled to recover; to be ascertained by a reference, or in such other manner as the court directs. For the purposes of the motion an order may be made by a judge, forbidding the payment to the plaintiff in any action, of the sum collected or to be collected by virtue of a judgment therein. But this section does not authorize the court to compel a plaintiff to refund any money, collected and received by him, in good faith, before service of notice of such an order.

Id., §§ 17 and 18.

§ 1886. Action upon a surrogate's bond.

Where a surrogate, or an officer acting as surrogate, is guilty of any actionable default or misconduct in his office, the person injured thereby may apply for leave to prosecute the delinquent's official bond.

Id., §§ 19 and 20. See L. 1868, ch. 218 (3 Edm. 340).

§ 1887. Action upon a county treasurer's bond.

Where a certified copy of the order or judgment of a court, directing a county treasurer to pay or deliver to one or more persons designated therein any money, stocks, securities, or other investments held by him, subject to the direction of that court, is served upon the county treasurer, if he fails to obey the direction, the person injured thereby may apply for leave to prosecute his official bond. Service upon a county treasurer, as required by this section, may be made personally, or by leaving the paper, either at his office, during his absence therefrom, with a person of suitable age and discretion, having charge of the office, or at his residence, or his last residence within the county, with a person of suitable age and discretion.

See L. 1874, ch. 524, §§ 1 and 2 (9 Edm. 966).

§ 1888. Actions upon official bonds of other officers.

Where a public officer is required to give an official bond to the people, and special provision is not made by law for the prosecution of the bond, by or for the benefit of a person who has sustained, by his default, delinquency or misconduct, an injury, for which the sureties upon the bond are liable, such a person may apply for leave to prosecute the delinquent's official bond.

See L. 1874, ch. 524, §§ 1 and 2 (9 Edm. 966); R. S., §§ 21-27.

§ 1889. Actions, etc., under the last three sections regulated.

Sections 1880 to 1885 of this act, both inclusive, govern an application, made as prescribed in either of the last three sections, and each action brought pursuant to an order made thereupon, as if the delinquent officer and his sureties were named therein instead of the sheriff and his sureties.

§ 1890. Receivers, etc., deemed public officers.

A receiver, an assignee of an insolvent debtor, or a trustee or other officer, appointed by a court or a judge, is a public officer, within the meaning of the last section but one; but where he was appointed by or pursuant to the order of a court, or in a special proceeding specified in title twelfth of chapter seventeenth of this act, the application for leave to prosecute his official bond must be made to the court by which, or pursuant to whose order, he was appointed, or in which the judgment was rendered, as the case may be. An action, brought as prescribed in this section, must be brought in the court to which application is made for leave to bring it.

§ 1891. Demand of money; when necessary before application.

Where the default, by reason of which an application for leave to prosecute an official bond is made, as prescribed in this article, consists of the non-payment of money, and special provision is not otherwise made by law, the applicant must prove a demand of the money from the officer, or that a demand cannot be made, with due diligence. But such proof is not necessary where the applicant has recovered a judgment against the officer.

§ 1892. Application may be made ex parte.

An application for leave to prosecute an official bond, as prescribed in this article, may be made without notice; but in that case the officer, or either of his sureties, may apply, upon notice, to vacate an order permitting the applicant to maintain an action, upon any ground, showing that it ought not to have been granted.

ARTICLE THIRD

Action by a private person for a penalty or forfeiture.

Sec. 1893. Action by person specially aggrieved.

1894. Action by common informer.

1895. Id.; service of summons.

1896. Id.; when not barred by a collusive recovery.

1897. Indorsement upon summons.

1898. When part of a penalty may be recovered.

§ 1893. Action by person specially aggrieved.

Where a penalty or forfeiture is given by a statute, to a person aggrieved by the act or omission of another, the person to whom it is given may, if it is pecuniary, maintain an action to recover the amount thereof; or, if it consists of the forfeiture of a chattel, he may maintain an action to recover the chattel, or its value, or other damages, as the case requires.

2 R. S. 480, § 1 (2 Edm. 502), am'd.

§ 1894. Action by common informer.

Where a penalty or forfeiture is given, by a statute, to any person who sues therefor, an action to recover it may be maintained by any person in his own name; but the action cannot be compromised or settled without the leave of the court in which it is brought.

Id., §§ 5 and 6. See § 387, ante.

§ 1895. Id.; service of summons.

The summons in an action, brought as prescribed in the last section, can be served only by an officer authorized by law to collect an execution, issued out of the same court. The summons, when issued, cannot be countermanded by the plaintiff before the service thereof; and, immediately after it has been served, the officer who served it must file it, with his certificate of service, in the office of the clerk, or deliver it, with a like certificate, to the magistrate by whom it was issued, as the case requires.

Id., part of § 6.

§ 1896. Id.; when not barred by a collusive recovery.

In an action to recover a penalty or forfeiture, given by a statute, brought by any person, other than the person aggrieved, or a public officer, the plaintiff may recover, notwithstanding the recovery of a judgment, for or against the defendant, in an action brought therefor by another person, if he establishes that the former judgment was recovered collusively and fraudulently.

Id., § 14.

§ 1897. Indorsement upon summons.

In an action to recover a penalty or forfeiture, given by a statute, if a copy of the complaint is not delivered to the defendant with a copy of the summons, a general reference to the statute must be indorsed upon the copy of the summons so delivered, in the following form: "According to the provisions of," etc.; adding such a description of the statute, as will identify it with convenient certainty, and also specifying the section, if penalties or forfeitures are given, in different sections thereof, for different acts or omissions.

Id., § 2.

§ 1898. When part of a penalty may be recovered.

Where a statute gives a pecuniary penalty or forfeiture, not exceeding a specified sum, an action may be maintained to recover the sum specified; and the court, jury, or referee, by which or by whom the issues of fact are tried, or, where judgment is taken by default for failure to appear or plead, the damages are ascertained, may award to the plaintiff the whole sum, or such a part thereof, as he or it deems proportionate to the offence.

2 R. S. 480, § 15, am'd.

ARTICLE FOURTH.

Certain actions to recover damages for wrongs.

- Sec. 1899.** Civil and criminal prosecutions not merged.
1900. Action for suing, etc., in name of another. Made also a misdemeanor.
1901. Treble and other increased damages to be recovered.
1902. Action for causing death by negligence, etc.
1903. Distribution of damages recovered.
1904. Id.; amount of recovery.
1905. Next of kin defined.
1906. Action for slander of a woman.
1907. When action for libel cannot be maintained.
1908. The last section qualified.

§ 1899. Civil and criminal prosecutions not merged.

Where the violation of a right admits of a civil and also of a criminal prosecution, the one is not merged in the other.

Co. Proc., § 7.

§ 1900. Action for suing, etc., in name of another. Made also a misdemeanor.

If a person, vexatiously or maliciously, in the name of another but without the latter's consent, or in the name of an unknown person, commences or continues, or causes to be commenced or continued, an action or special proceeding, in a court, of record, or not of record, or a special proceeding before a judge or a justice of the peace; or takes, or causes to be taken, any proceeding, in the course of an action or special proceeding in such a court, or before such an officer, either before or after judgment or other final determination; an action, to recover damages therefor, may be maintained against him, by the adverse party to the action or special proceeding; and a like action may be maintained by the person, if any, whose name was thus used. He is also guilty of a misdemeanor, punishable by imprisonment, not exceeding six months.

2 R. S. 550, § 1 (2 Edm. 571). See Penal Code, § 158.

§ 1901. Treble and other increased damages to be recovered.

In an action, brought by the adverse party, as prescribed in the last section, the plaintiff, if he recovers final judgment, is

entitled to recover treble damages. In an action, brought by the person whose name was used, as prescribed in the last section, the plaintiff is entitled to recover his actual damages, and two hundred and fifty dollars in addition thereto.

Id., part of § 1. See, also, §§ 1020 and 1184, ante.

Am'd R. 1915
Ch. 1915 § 1902. [Am'd, 1909.] Action for causing death by negligence, et cetera.

The executor or administrator of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit.

L. 1847, ch. 450, § 1 (4 Edm. 526), and a portion of § 2 as am'd by L. 1849, ch. 256, and by L. 1870, ch. 78 (7 Edm. 591). Am'd by L. 1909, ch. 221. In effect Sept. 1, 1909. See § 384.

Am'd R. 1915
Ch. 1915 § 1903. [Am'd, 1904, 1911.] Distribution of damages recovered.

The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration; subject, however, to the following provision, to wit: In case the decedent shall have left him surviving a wife, or a husband, but no children, the damages recovered shall be for the sole benefit of such wife or husband. The plaintiff may deduct from the recovery the reasonable expenses of the action, the reasonable funeral expenses of the decedent, and his commissions upon the residue; which must be allowed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper.

L. 1847, ch. 450, § 2, as am'd by L. 1849 and 1870. Am'd L. 1904, ch. 515; L. 1911, ch. 122. In effect Sept. 1, 1911.

§ 1904. [Am'd, 1895, 1913.] Id.; amount of recovery.

The damages awarded to the plaintiff may be such a sum as the jury upon a writ of inquiry, or upon a trial, or, where issues of fact are tried without a jury, the court or the referee, deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought. If the decedent leaves surviving a father and a mother, the death of such father prior to the verdict shall not affect the amount of damages recoverable. When final judgment for the plaintiff is rendered, the clerk must add to the sum so awarded, interest thereupon from the decedent's death, and include it in the judgment. The inquisition, verdict, report or decision, may specify the day from which interest is to be computed; if it omits so to do, the day may be determined by the clerk, upon affidavits.

L. 1847, ch. 450, remainder of § 2, am'd by L. 1849, ch. 256; L. 1870, ch. 78 (7 Edm. 591). Am'd L. 1895, ch. 946; L. 1913, ch. 756. In effect Sept. 1, 1913.

§ 1905. [Am'd, 1913.] Next of kin defined.

The term "next of kin," as used in the foregoing section, has the meaning specified in section eighteen hundred and seventy of this act, except if decedent leaves surviving a father and mother but no widow, child or descendant, it shall mean both the father and the mother.

See § 1870, ante. Am'd L. 1913, ch. 756. In effect Sept. 1, 1913.

§ 1906. Action for slander of a woman.

In an action of slander, brought by a woman, for words imputing unchastity to her, it is not necessary to allege or prove special damages. If the plaintiff is married, the damages recovered are her separate property.

L. 1871, ch. 219, § 1 (9 Edm. 67). See § 450, ante.

§ 1907. When action for libel cannot be maintained.

An action, civil or criminal, cannot be maintained against a reporter, editor, publisher, or proprietor of a newspaper, for the publication therein of a fair and true report of any judicial, legislative, or other public and official proceedings, without proving actual malice in making the report.

L. 1854, ch. 130 §§ 1 and 2 (5 Edm. 160).

§ 1908. The last section qualified.

The last section does not apply to a libel, contained in the heading of the report; or in any other matter, added by any person concerned in the publication; or in the report of any thing said or done, at the time and place of the public and official proceedings, which was not a part thereof.

L. 1854, ch. 130, parts of §§ 1, 2.

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ARTICLE FIFTH,

Miscellaneous actions and rights of action.

Sec. 1909. When transferee of claim or demand may sue. Rights of defendant, etc.

1910. What claims or demands may be transferred.

1911. Id.; cause of action for usury.

1912. Judgment, when assignable.

1913. Action upon judgment regulated.

1914. Ancillary action for discovery abolished.

1915. Action upon a penal bond.

1916. Action by surety or trustee to recover costs, etc.

1917. Action upon lost negotiable paper.

1918. The last section qualified.

§§ 1909-1910. [Repealed by L. 1909, ch. 45. See Consolidated Laws, tit. Personal Property Law, § 41.]

§ 1911. [Repealed by L. 1909, ch. 25. See Consolidated Laws, tit. General Business Law, § 375.]

§ 1912. [Repealed by L. 1909, ch. 45. See Consolidated Laws, tit. Personal Property Law, § 41.]

§ 1913. [Am'd, 1896.] *Action upon judgment regulated.*

Except in a case where it is otherwise specially prescribed in this act, an action upon a judgment for a sum of money, rendered in a court of record of the State, cannot be maintained, between the original parties to the judgment, unless, either

1. Ten years have elapsed since the docketing of such judgment; or,

2. It was rendered against the defendant by default, for want of an appearance or pleading, and the summons was served upon him, otherwise than personally; or

3. The court in which the action is brought has previously made an order, granting leave to bring it. Notice of the application for such an order must be given to the adverse party, or the person proposed to be made the adverse party, personally, unless it satisfactorily appears to the court, that personal notice cannot be given, with due diligence; in which case, notice may be given in such a manner as the court directs.

Co. Proc., § 71. L. 1896, ch. 568. In effect Sept. 1, 1896. See, also, § 2154, post.

§ 1914. *Ancillary action for discovery abolished.*

An action cannot be maintained, to obtain a discovery under oath, in aid of the prosecution or defence of another action.

Id., § 389, am'd.

§ 1915. *Action upon a penal bond.*

A bond in a penal sum, executed within or without the State, and containing a condition to the effect, that it is to be void, upon performance of any act, has the same effect, for the purpose of maintaining an action or special proceeding, or two or more suc-

cessive actions or special proceedings thereupon, as if it contained a covenant to pay the sum, or to perform the act specified in the condition thereof. But the damages to be recovered for a breach, or successive breaches, of the condition, cannot, in the aggregate, exceed the penal sum, except where the condition is for the payment of money; in which case, they cannot exceed the penal sum, with interest thereupon, from the time when the defendant made default in the performance of the condition.

See 2 R. S. 353, §§ 12 and 13 (2 Edm. 364); also 2 R. S. 378, 379 (2 Edm. 392, 394).

§ 1916. Action by surety or trustee to recover costs, etc.

A surety, including a drawer or indorser, may recover, in an action against his principal; and an executor, administrator, or other trustee, may, where the trust estate is insufficient to reimburse him, recover, in an action against the beneficiary whom he represents; his reasonable costs and other expenses, incurred necessarily and in good faith, in the prosecution or defence, by the express or implied consent of the principal or beneficiary, of an action or special proceeding, relating to the demand secured, or to the trust estate, as the case requires. This section does not affect any special agreement relating to those costs and expenses.

L. 1858, ch. 314, § 3 (4 Edm. 483).

§ 1917. Action upon lost negotiable paper.

Where it appears, upon the trial of an action, that a negotiable promissory note or bill of exchange, upon which the action, or a counterclaim interposed in the action, is founded, was lost, while it belonged to the party claiming the amount due thereupon, he may prove the contents thereof, by parol or other secondary evidence, and may recover or set off the amount due thereupon, as if it was produced. But for that purpose, he must give to the adverse party a written undertaking, in a sum fixed by the judge or the referee, not less than twice the amount of the note or bill, with at least two sureties, approved by the judge or the referee, to the effect, that he will indemnify the adverse party, his heirs and personal representatives, against any claim by any other person, on account of the note or bill, and against all costs and expenses, by reason of such a claim.

2 R. S. 406, §§ 75 and 76 (2 Edm. 423).

§ 1918. The last section qualified.

But where an action is prosecuted or defended by the people of the State, or by a public officer in their behalf, the people, or the public officer, may prove the contents of a lost note or bill of exchange, by parol or other secondary evidence, and may recover or set off the amount due thereupon, without giving any security to the adverse party.

See L. 1855, ch. 85; 3 R. S., 5th ed. 772 (4 Edm. 645).

TITLE V.**Other actions by or against particular parties.**

- Article 1.** Action by or against an unincorporated association.
2. Action by or against certain county, town, and municipal officers.
3. Actions, and rights of action, against and between joint debtors.

ARTICLE FIRST.*Action by or against an unincorporated association.*

- Sec. 1919.** Actions, etc., by or against associations of seven or more persons.
1919a. How personal service of summons made upon certain unincorporated associations.
1920. Proceedings in case of death, etc.
1921. Effect of judgment; execution thereupon.
1922. Subsequent action against members.
1923. This article permissive; effectiveness upon statute of limitations.
1924. When objection of misnomer, etc., of parties not available.

§ 1919. [Am'd, 1900.] Actions, etc., by or against associations of seven or more persons.

An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association, consisting of seven or more persons, to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An action may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates,

or to enforce any lawful claim of such association against such member or members. An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section.

L. 1849, ch. 258, § 1; 3 R. S., 5th ed., 777 (4 Edm. 650); L. 1831, ch. 455; 3 R. S., 5th ed., 778 (4 Edm. 652). See § 448, ante. L. 1900, ch. 184. In effect Sept. 1, 1900.

§ 1920. Proceedings in case of death, etc.

The death or legal incapacity of a member of the association does not affect an action or special proceeding, brought as prescribed in the last section. If the officer, by or against whom it is brought, dies, is removed, resigns, or becomes otherwise incapacitated, during the pendency thereof, the court must make an order, directing it to be continued by or against his successor in office, or any other officer, by or against whom it might have been originally commenced.

Id., § 2.

§ 1921. [Am'd, 1898.] Effect of judgment; execution thereupon.

In such an action, the officer against whom it is brought cannot be arrested; and a judgment against him does not authorize an execution to be issued against his property, or his person; nor does the docketing thereof bind his real property, or chattels real. Where such a judgment is for a sum of money, an execution issued thereupon must require the sheriff to satisfy the same, out of any personal or real property belonging to the association, or owned, jointly or in common, by all the members thereof.

L. 1849, ch. 258, § 1. See §§ 3 and 1. L. 1898, ch. 293. In effect Oct. 1, 1898.

§ 1922. Subsequent action against members.

Where an action has been brought against an officer, or a counterclaim has been made, in an action brought by an officer, as prescribed in the last three sections, another action, for the same cause, shall not be brought against the members of the association, or any of them, until after final judgment in the first action, and the return, wholly or partly unsatisfied or unexecuted, of an execution issued thereupon. After such a return, the party in whose favor the execution was issued, may maintain an action, as follows:

1. Where he was the plaintiff, or a defendant recovering upon a counterclaim, he may maintain an action against the members of the association, or, in a proper case, against any of them, as if the first action had not been brought, or the counterclaim had not been made, as the case requires; and he may recover therein, as part of his damages, the costs of the first action, or so much thereof, as the sum, collected by virtue of the execution, was insufficient to satisfy.

2. Where he was a defendant, and the case is not within subdivision first of this section, he may maintain an action, to recover the sum remaining uncollected, against the persons who composed the association, when the action against him was commenced, or the survivors of them.

But this section does not affect the right of the person, in whose favor the judgment in the first action was rendered, to enforce a bond or undertaking, given in the course of the proceedings therein.

Part of *Id.*, § 4, *am'd*; L. 1853, ch. 153.

§ 1923. This article permissive; effect upon statute of limitations.

This article does not prevent an action from being brought by or against all the members of an association, except as prescribed in the last section. Where an action is brought against the members of the association, as prescribed in subdivision first of the last section, the time between the commencement of the action by or against the officer, and the return of the first execution issued upon the final judgment rendered therein, is not a part of the time limited by law, for the commencement of the second action.

See § 406, *ante*.

§ 1924. When objection of misnomer, etc., of parties not available.

Section 1813 of this act applies to an action brought, as prescribed in the last section but one, against the members of any association, which keeps a book for the entry of changes in the membership of the association, or the ownership of its property; and to each book so kept.

See L. 1869, ch. 157, § 2 (7 Edm. 426); also §§ 1813, *ante*, and 1945, *post*.

ARTICLE SECOND.

Actions by or against certain county, town, and municipal officers.

- Sec. 1925. Action by a tax payer against a public officer.
 1926. Actions by certain specified officers.
 1927. Actions against such officers.
 1928. The last two sections qualified.
 1929. Designation of such officers in the summons, etc.
 1930. Successor may be substituted.
 1931. When execution against officer not to issue.

§ 1925. [Am'd, 1892.] Action by a tax payer against a public officer.

An action to obtain a judgment, preventing waste of, or injury to, the estate, funds, or other property of a county, town, city or incorporated village of the State, may be maintained against any officer thereof, or any agent, commissioner, or other person, acting in its behalf, either by a citizen, resident therein, or by a corporation who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or incorporated village, or any public officer.

L. 1872, ch. 161, § 1 (9 Edm. 339); L. 1892, ch. 301.

§ 1926. [Am'd, 1897.] Actions by certain specified officers.

An action or special proceeding may be maintained, by the trustee or trustees of a school district; the overseer or overseers of the poor of a village, or city; the county superintendent or superintendents of the poor; or the supervisors of a county, upon a contract, lawfully made with those officers or their predecessors, in their official capacity; to enforce a liability created, or a duty enjoined, by law, upon those officers, or the body represented by them; to recover a penalty or a forfeiture, given to those officers, or the body represented by them; or to recover damages for an injury to the property or rights of those officers, or the body represented by them; although the cause of action accrued before the commencement of their term of office.

2 R. S. 473, § 92 (2 Edm. 494); L. 1897, ch. 302. In effect Sept. 1, 1897.

§ 1927. Actions against such officers.

An action or special proceeding may be maintained, against any of the officers specified in the last section, upon any cause of action, which accrues against them, or has accrued against their predecessors, or upon a contract made by their predecessors in their official capacity, and within the scope of their authority.

Id., § 93.

§ 1928. The last two sections qualified.

The last two sections do not apply to a case, where it is specially prescribed by law, that an action may be maintained, by or against the body, represented by an officer designated in those sections; but, in such a case, the prosecution or defence of the action, as the case may be, must be conducted by the persons then in office, who represent that body.

2 R. S. 473, § 94.

§ 1929. Designation of such officers in the summons, etc.

In an action or special proceeding, brought pursuant to section 1926 or section 1927 of this act, the officer, by or against whom it is brought, must be described in the summons, or other process by which it is commenced, and in the subsequent proceedings therein, by his individual name, with the addition of his official title. An objection, growing out of an omission to join any officer, who ought to be joined with the others, must be taken by the answer, or, in a special proceeding, before the close of the case, on the part of the defendant; otherwise it is waived.

Id., §§ 93, 96 and 99, am'd and consolidated.

§ 1930. Successor may be substituted.

In such an action or special proceeding, the court must, in a proper case, substitute a successor in office, in place of a person made a party in his official capacity, who has died or ceased to hold office; but such a successor shall not be substituted as a defendant, without his consent, unless at least fourteen days' notice of the application for the substitution, has been personally served upon him.

Id., §§ 100 and 101, am'd.

§ 1931. When execution against officer not to issue.

An execution cannot be issued upon a judgment for a sum of money, rendered against an officer in an action or special proceeding brought by or against him, in his official capacity, pursuant to this article; except where it is rendered against the trustee or trustees of a school district, or the commissioner or commissioners of highways of a town. In either of those cases, an execution may be issued against and be collected out of the property of the officer, and the sum collected must be allowed to him, in the settlement of his official accounts, except as otherwise specially prescribed by law.

Id., §§ 107 and 108, am'd.

ARTICLE THIRD.

Actions and rights of action against and between joint debtors

Sec. 1932. Judgment against defendants jointly indebted, when all are not served.

- 1933. Effect of such judgment.
- 1934. Execution; indorsement thereupon.
- 1935. How collected.
- 1936. Judgment, how docketed; effect of docketing.
- 1937. Action to charge defendants not personally summoned.
- 1938. Complaint in such action.
- 1939. Answer.
- 1940. Provisional remedies.
- 1941. Judgment.
- 1942. Joint debtors may compound separately. Mode and effect.
- 1943. Satisfying judgment.
- 1944. Rights of the debtors not released.
- 1945. Action against persons engaged in transportation.
- 1946. When partner not sued remains liable.
- 1947. Continuance of partnership business during action for accounting, etc.

§ 1932. Judgment against defendants jointly indebted, when all are not served.

In an action, wherein the complaint demands judgment for a sum of money against two or more defendants, alleged to be jointly indebted upon contract, if the summons is served upon one or more, but not upon all of the defendants, the plaintiff may proceed against the defendant or defendants, upon whom it is served, unless the court otherwise directs; and, if he recovers final judgment, it may be taken against all the defendants thus jointly indebted.

Co. Proc., § 136, subd. 1. See, also, § 1935, post.

§ 1933. Effect of such judgment.

Such a judgment is conclusive evidence of the liability of each defendant, upon whom the summons was personally served, or who appeared in the action. Where it is taken against a defendant, upon whom the summons was served by publication, or without the State, pursuant to an order for that purpose, it has the effect as against that defendant, specified in section 445 of this act. As against such a defendant, who is allowed to defend after judgment, or as against a defendant not summoned, it is evidence only of the extent of the plaintiff's demand, after the liability of that defendant has been established, by other evidence.

2 R. S. 377, § 2 (2 Edm. 391). See § 1278, ante.

§ 1934. Execution; indorsement thereupon.

An execution upon such a judgment must be issued, in form, against all the defendants; but the attorney for the judgment creditor must indorse thereupon a direction to the sheriff, containing the name of each defendant, who was not summoned, and restricting the enforcement of the execution, as prescribed in the next section.

Id., § 3.

§ 1935. How collected.

An execution against the person, issued upon such a judgment, shall not be enforced against the person of a defendant, whose name is so indorsed thereupon. An execution against property,

issued upon such a judgment, shall not be levied upon the sole property of such a defendant; but it may be collected out of personal property owned by him, jointly with the other defendants, who were summoned, or with any of them; and out of the real and personal property of the latter, or of any of them.

2 R. S. 377, § 4.

§ 1936. Judgment, how docketed; effect of docketing.

Where a judgment has been taken, as prescribed in section 1932 of this act, the clerk, with whom the judgment-roll is filed, must write upon the docket, opposite or under the name of each defendant, upon whom the summons was not served, the words, "not summoned;" and a like entry must be made by each county clerk, with whom the judgment is afterwards docketed. The judgment does not, by virtue of its being docketed, bind any real property, or chattel real, owned by such a defendant. But this section does not affect the plaintiff's right of action, to charge the judgment upon any real property.

§ 1937. Action to charge defendants not personally summoned.

After the recovery of a judgment against joint debtors, as prescribed in section 1932 of this act, an action may be maintained by the judgment creditor, against one or more of the defendants, who were not summoned in the original action, to procure a judgment, charging his or their property with the sum remaining unpaid upon the original judgment.

Co. Proc., § 375.

§ 1938. Complaint in such action.

The complaint in such an action must be verified; must contain an allegation that the judgment has not been paid; and must state the sum, remaining unpaid thereupon, at the time of the verification.

Id., § 375, am'd.

§ 1939. Answer.

The defendant's answer is restricted to defences or counterclaims, which he might have made in the original action, if the summons therein had been served upon him, when it was first served upon a defendant jointly indebted with him: objections to the judgment; and defences or counterclaims, which have arisen since it was rendered.

Id., § 375, am'd. See §§ 415 and 933, ante.

§ 1940. Provisional remedies.

For the purpose of obtaining an order of arrest, an injunction order, or a warrant of attachment, the action is regarded as being founded upon the contract, upon which the original judgment was recovered.

§ 1941. Judgment.

Where the judgment is in favor of the plaintiff, it must determine the sum remaining unpaid upon the original judgment; and it may be docketed, and an execution may be issued thereupon, as if it was a judgment for the sum so remaining unpaid, and the costs, if any. Costs must be awarded, as if the action

was brought upon the original contract, and the sum so remaining unpaid had been recovered therein.

Co. Proc., § 380, am'd.

§ 1942. [Repealed by L. 1909, ch. 17. See Consolidated Laws, tit. Debtor and Creditor Law, §§ 230, 231.]

§ 1943. [Am'd, 1909.] **Satisfying judgment.**

An instrument specified in section two hundred and thirty of the debtor and creditor law is deemed a satisfaction piece, for the purpose of discharging, as prescribed in section twelve hundred and sixty of this act, the docket of a judgment, recovered upon an indebtedness released or discharged thereby, as far as the judgment affects the compounding debtor. Where the docket of a judgment is discharged thereupon, a special entry must be made upon the docket, to the effect, that the judgment is satisfied, as to the compounding debtor only.

Part of Id., § 2. Am'd by L. 1909, ch. 310. In effect May 7, 1909. See § 1260, ante.

§ 1944. [Repealed by L. 1909, ch. 17. See Consolidated Laws, tit. Debtor and Creditor Law, §§ 232, 233.]

§ 1945. **Action against persons engaged in transportation.**

In an action brought against one or more persons, engaged as a joint-stock association, partnership, or otherwise, in the periodical transportation of passengers or property, an objection to any of the proceedings cannot be taken, by a person properly made a defendant, on the ground that the plaintiff had joined with him, as a defendant, a person not jointly engaged with him in that business, or on the ground that the plaintiff has failed so to join with a person so jointly engaged; unless the persons so engaged have at least thirty days before the commencement of the action, filed in the clerk's office of each county, in which they transport passengers or property, a statement showing the names of all of them. A statement so filed, is conclusive, for the purposes specified in this section, as against the persons filing it, until thirty days after filing, in like manner, a new statement, showing a change of interest.

L. 1836, ch. 385 (4 Edm. 621), am'd.

§ 1946. **When partner not sued remains liable.**

Where, for any cause, one or more partners have not been joined as defendants in an action upon a partnership liability, and final judgment has been taken against the persons made defendants therein, the plaintiff, if the judgment remains unsatisfied, may maintain a separate action upon the same demand, against each omitted partner, setting forth in the complaint the facts specified in this section, as well as the facts constituting his cause of action upon the demand.

Co. Proc., § 136, subd. 4, am'd.

§ 1947. **Continuance of partnership business during action for accounting, etc.**

In an action brought to dissolve a partnership, or for an accounting between partners, or affecting the continued prosecution of the business, the court may, in its discretion, by order, au-

thorize the partnership business to be continued, during the pendency of the action by one or more of the partners, upon their executing and filing with the clerk an undertaking, in such a sum and with such sureties as the order prescribes, to the effect that they will obey all orders of the court, in the action, and perform all things which the judgment therein requires them to perform. The court may impose such other conditions as it deems proper, and it may in its discretion at any time thereafter require a new undertaking to be given. The court may also ascertain the value of the partnership property, and of the interest of the respective partners by a reference or otherwise, and may direct an accounting between any of the partners; and the judgment may make such provision for the payment to the retiring partners, for their interest, and with respect to the rights of creditors, the title to the partnership property, and otherwise, as justice requires, with or without the appointment of a receiver, or a sale of the partnership property.

CHAPTER XVI.

Actions in Behalf of the People and Special Proceedings Instituted in Their Behalf, by State Writ.

TITLE I.—Actions in Behalf of the People.

TITLE II.—Special Proceedings Instituted by State Writ.

TITLE I.

Actions in behalf of the people.

- Article 1.** Action against the usurper of an office or franchise.
2. Action to vacate letters-patent.
3. Action for a fine, penalty or forfeiture, or upon a forfeited recognizance.
4. Certain actions, founded upon the spoliation, or other misappropriation of public property.
5. Action to recover property escheated, or forfeited for treason.
6. Miscellaneous provisions relating to actions, etc., in behalf of the people.

ARTICLE FIRST.

Action against the usurper of an office or franchise.

- Sec. 1948.** Attorney-general may maintain action.
1949. Proceedings when complaint names rightful incumbent.
1950. Action triable by jury.
1951. Assumption of office by person entitled.
1952. Proceedings to obtain books and papers.
1953. Damages; how recovered.
1954. One action against several persons.
1955. When injunction may be granted.
1956. Final judgment in action for usurping office, etc.

§ 1948. Attorney-general may maintain action.

The attorney-general may maintain an action, upon his own information, or upon the complaint of a private person, in either of the following cases:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises within the State, a franchise or a public office, civil or military, or an office in a domestic corporation.

2. Against a public officer, civil or military, who has done or suffered an act, which by law works a forfeiture of his office.

3. Against one or more persons who act as a corporation, within the State, without being duly incorporated; or exercises within the State, any corporate rights, privileges or franchises, not granted to them by the law of the State.

4. [Added, 1896; am'd, 1908.]

Against a foreign corporation which exercises within the state any corporate rights, privileges or franchises, not granted to it by the law of this state; or which within the state, has violated any provision of law, or, contrary to law, has done or omitted any act, or has exercised a privilege or franchise, not conferred upon it by the law of this state, where, in a similar case, a domestic corporation would, in accordance with section one hundred and thirty-one of the general corporation law, be liable to an action to vacate its charter and to annul its existence; or which exercises within the state any corporate

rights, privileges or franchises in a manner contrary to the public policy of the state.

Co. Proc., § 432; 2 R. S. 581, § 28 (2 Edm. 603); L. 1896, ch. 962. Am'd by L. 1909, ch. 65, § 8. See note 65 of notes of Board of Statutory Consolidation at end of code.

§ 1949. Proceedings when complaint names rightful incumbent.

In an action, brought as prescribed in the last section, for usurping, intruding into, unlawfully holding, or exercising an office, the attorney-general, besides stating the cause of action in the complaint, may, in his discretion, set forth therein the name of the person rightfully entitled to the office, and the facts showing his right thereto; and thereupon, and upon proof, by affidavit, that the defendant, by means of his usurpation or intrusion, has received any fees or emoluments belonging to the office, an order to arrest the defendant may be granted by the court, or a judge. The provisions of title first of chapter seventh of this act apply to such an order, and the proceedings thereupon and subsequent thereto, except where special provision is otherwise made in this title. For that purpose, the order is deemed to have been made as prescribed in section 549 of this act. Judgment may be rendered upon the right of the defendant, and of the party so alleged to be entitled; or only upon the right of the defendant, as justice requires.

Co. Proc., §§ 435 and 436; 2 R. S. 582, §§ 30 and 31 (2 Edm. 606), am'd

§ 1950. Action triable by jury.

An action brought as prescribed in this article is triable, of course and of right, by a jury, in like manner as if it was an action specified in section 968 of this act, and without procuring an order, as prescribed in section 970 of this act.

§ 1951. Assumption of office by person entitled.

Where final judgment is rendered, upon the right and in favor of the person so alleged to be entitled, he may, after taking the oath of office, and giving an official bond, as prescribed by law, take upon himself the execution of the office. He must, immediately thereafter, demand of the defendant in the action, delivery of all the books and papers in the custody, or under the control, of the defendant, belonging to the office from which the defendant has been so excluded.

Co. Proc., § 427; 2 R. S. 582, § 32 (2 Edm. 606).

§ 1952. Proceedings to obtain books and papers.

If the defendant refuses or neglects to deliver any of the books or papers, demanded as prescribed in the last section, he is guilty of a misdemeanor; and the same proceedings must be taken to compel the delivery thereof as are now or shall hereafter be prescribed by law, where a person who has held an office refuses or neglects to deliver the official books or papers to his successor.

Id., § 428, and 2 R. S. 582, § 33. See § 1323, ante.

§ 1953. [Am'd, 1884.] Damages; how recovered.

Where final judgment has been rendered, upon the right and in favor of the person so alleged to be entitled, he may recover, by action, against the defendant, the damages which he has

sustained in consequence of the defendant's usurpation, intrusion into, unlawful holding, or exercise of the office.

Co. Proc., § 439; also, 2 R. S. 582, § 34-38.

§ 1954. One action against several persons.

Where two or more persons claim to be entitled to the same office or franchise, the attorney-general may bring the action against all, to determine their respective rights thereto.

Id., § 440; 2 R. S. 582, § 45.

§ 1955. [Am'd, 1896.] When injunction may be granted.

In an action, brought as prescribed in subdivision third or fourth of section nineteen hundred and forty-eight of this act, the final judgment, in favor of the plaintiff, must perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof may be granted, upon proof, by affidavit, that the defendant or defendants have violated any of the provisions of either of the said subdivisions third or fourth of section nineteen hundred and forty-eight of this act. The provisions of title second of chapter seventh of this act apply to such a temporary injunction, and the proceedings thereupon, except where provision is otherwise made in this title. For that purpose, the injunction order is deemed to have been granted as prescribed in section six hundred and three of this act. In the trial of an action brought as prescribed in subdivisions third or fourth of section nineteen hundred and forty-eight of this act, a party or a witness is not excused from answering a question on the ground that such answer will tend to incriminate him; but such answer cannot be used as evidence against the person so answering, in a criminal action or criminal proceeding.

2 R. S. 462, § 31 and part of § 32 (2 Edm. 482); L. 1896, ch. 968. In effect May 28, 1896. See § 1948, subd. 3, ante.

§ 1956. Final judgment in action for usurping office, etc.

In any other action, brought as prescribed in this article, where a defendant is adjudged to be guilty of usurping or intruding into, or unlawfully holding or exercising an office, franchise or privilege, final judgment must be rendered, ousting and excluding him therefrom, and in favor of the people or the relator, as the case requires, for the costs of the action. As a part of the final judgment, the court may, in its discretion, also award, that the defendant, or, where there are two or more defendants, that one or more of them pay to the people a fine, not exceeding two thousand dollars. The judgment for the fine may be docketed, and execution may be issued thereupon, in favor of the people, as if it had been rendered in an action to recover the fine. The fine, when collected, must be paid into the treasury of the State.

Co. Proc., § 441; also, 2 R. S. 585, § 48 (2 Edm. 606).

ARTICLE SECOND.*Action to vacate letters-patent.*

Sec. 1957. When attorney-general may maintain action.

1958. Action triable by jury.

1959. Copy of judgment-roll to be filed, etc.

1960. Transcript to be sent to county clerk, etc.

§ 1957. When attorney-general may maintain action.

The attorney-general may maintain an action to vacate or annul letters-patent, granted by the people of the State, in either of the following cases:

1. Where they were obtained by means of a fraudulent suggestion, or concealment of a material fact, made by, or with the knowledge or consent of, the person to whom they were issued.

2. Where they were issued in ignorance of a material fact, or through mistake.

3. Where the patentee, or those claiming under him, have done or omitted an act, in violation of the terms and conditions upon which the letters-patent were granted, or have, by any other means, forfeited the interest acquired under the same.

Whenever the attorney-general has good reason to believe that any act or omission, specified in this section, can be proved, and that the person to be made defendant has no sufficient legal defence, he must commence such an action.

Co. Proc., § 433.

§ 1958. Action triable by jury.

An action, brought as prescribed in this article, is triable, of course and of right, by a jury, as if it was an action specified in section 968 of this act, and without procuring an order, as prescribed in section 970 of this act.

See § 1950, ante.

§ 1959. Copy of judgment-roll to be filed, etc.

Where final judgment, vacating or annulling letters-patent, is rendered in an action, brought as prescribed in the last section, the attorney-general must cause a copy of the judgment-roll to be forthwith filed in the office of the secretary of State; who must make an entry in the records of the commissioners of the land office stating the substance and effect of the judgment, and the time when the judgment-roll was filed. The real property, granted by those letters-patent, may thereafter be disposed of by the commissioners of the land office, as if the letters-patent had not been issued.

Co. Proc., § 446, and part of § 445, am'd and consolidated; 2 B. S. 580, §§ 24 and 25 (2 Edm. 601).

§ 1960. Transcript to be sent to county clerk, etc.

Immediately after making the entry prescribed in the last section, the secretary of State must transmit a certified transcript thereof to the clerk, or the register, as the case requires, of each county, in which the real property affected by the judgment is situated. The clerk or register must file it; and, if the letters-patent are recorded in his office, he must note the contents of the transcript in the margin of the record.

L. 1845, ch. 110, § 1 (4 Edm. 438).

ARTICLE THIRD.***Action for a fine, penalty, or forfeiture, or upon a forfeited recognizance.***

- Sec.** 1961. When action cannot be maintained.
1962. Action for forfeiture, etc.
1963. Money recovered; how disposed of.
1964. Certain proceedings in the action regulated.
1965. Recognizance; how forfeited.
1966. Action on recognizance.
1967. Money received by district-attorney; how disposed of.
1968. District-attorney to render account.

§ 1961. [Am'd, 1895.] When action cannot be maintained.

Whenever, by the decision of the appellate division of the supreme court, a construction is given to a statute, an act done, in good faith, and in conformity to that construction, after the decision was made, and before a reversal thereof by the court of appeals, is so far valid, that the party doing it is not liable to any penalty or forfeiture, for an act that was adjudged lawful by the decision of the court below. But this section does not control or affect the decision of the court of appeals, upon an appeal actually taken before the reversal.

2 R. S. 602, § 66 (2 Edm. 624), am'd; L. 1895, ch. 948.

§ 1962. Action for forfeiture, etc.

Where real or personal property has been forfeited, or a penalty incurred, to the people of the State; or to an officer, for their use, pursuant to a provision of law, the attorney-general, or the district-attorney of the county in which the action is triable, must bring an action to recover the property or penalty, in a court having jurisdiction thereof. Where the supreme court and a justice's court have concurrent jurisdiction of the action, it may be brought in either, at the election of the attorney-general or district-attorney. A recovery in such an action bars a recovery, in any other action, brought for the same cause.

See Co. Proc., § 447; 2 R. S. 481, § 3 (2 Edm. 503).

§ 1963. Money recovered; how disposed of.

Money recovered in such an action, which is not otherwise specially granted or appropriated by law, must, when collected, be paid into the treasury of the State.

See, also, *Id.*, R. S., § 3.

§ 1964. Certain proceedings in the action regulated.

Sections 1897 and 1898 of this act apply to an action, brought as prescribed in the last two sections.

See §§ 7 and 15, R. S.

§ 1965. Recognizance; how forfeited.

Where the condition of a recognizance is broken, an order of the court, directing the prosecution of the recognizance, is a sufficient forfeiture thereof.

Id., § 31.

§ 1966. [Am'd, 1909.] Action on recognizance.

Where a recognizance to the people is forfeited, and the district attorney of the county in which it was taken, brings an

action to recover the penalty thereof, it is not necessary, in such an action, to allege or prove any damages, by reason of the breach of the condition; but where the people are entitled to judgment therein, they must have judgment absolute, for the penalty of the recognizance.

2 R. S. 481, § 29, am'd. See § 288, ante, and L. 1878, ch. 379. Am'd by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 16. See Consolidated Laws, tit. County Law, § 201. See note 68 of notes of Board of Statutory Consolidation at end of code.

§§ 1967-1968. [Repealed by L. 1909, ch. 16. See Consolidated Laws, tit. County Law, § 201.]

ARTICLE FOURTH.

Certain actions, founded upon the spoliation, or other misappropriation of public property.

- Sec. 1969. Action in court of the State for public funds illegally obtained, converted, etc.
 1970. Stay of other domestic actions; parties thereto to be brought in.
 1971. Actions, etc., in foreign courts.
 1972. Money, damages, etc., vest in people, on commencement of action.
 1973. Limitation of action.
 1974. Ultimate disposition of proceeds of action in court of the State.
 1975. Id.; upon petition of corporation, etc., aggrieved.
 1976. Attorney-general must bring action.

§ 1969. Action in court of the State for public funds illegally obtained, converted, etc.

Where any money, funds, credits, or other property, held or owned by the State, or held or owned, officially or otherwise, for or in behalf of a governmental or other public interest, by a domestic municipal, or other public corporation, or by a board, officer, custodian, agency, or agent of the State, or of a city, county, town, village or other division, subdivision, department, or portion of the State, has heretofore been, or is hereafter, without right obtained, received, converted, or disposed of, an action to recover the same, or to recover damages, or other compensation, for so obtaining, receiving, paying, converting, or disposing of the same, or both, may be maintained by the people of the State, in any court of the State having jurisdiction thereof, although a right of action for the same cause exists by law in some other public authority, and whether an action therefor, in favor of the latter, is or is not pending, when the action in favor of the people is commenced.

L. 1875, ch. 49, § 1. See §§ 549, 637 and 789, ante.

§ 1970. Stay of other domestic actions; parties thereto to be brought in.

Where an action is commenced by the people, for a cause specified in the last section, the court in which it is brought may, upon the application of any party thereto, grant an order staying proceedings in any other action, brought, for the same cause, in the same or any other court of the State, by a public authority, other than the people; and, if necessary or proper, it may vacate any order or interlocutory judgment, made or rendered in such an action; and it may, by the same order, or by a subsequent order, granted upon the application of any party to either action, direct that any party to the action so stayed, be brought in, as a party to the action commenced by the people.

Id., § 2, am'd.

§ 1971. Actions, etc., in foreign courts.

The people of the State may commence and maintain, in their own name, or otherwise, as is allowable, one or more actions, suits, or other judicial proceedings, in any court, or before any tribunal of the United States, or of any other State, or of any territory of the United States, or of any foreign country, for any cause specified in the last section but one.

Part of Id., § 1.

§ 1972. Money damages, etc., vest in people, on commencement of action.

Upon the commencement by the people of the State, of any action, suit, or other judicial proceeding, as prescribed in this article, the entire cause of action, including the title to the money, funds, credits, or other property, with respect to which the suit or action is brought, and to the damages or other compensation recoverable for the obtaining, receipt, payment, conversion, or disposition thereof, is not previously so vested, is transferred to, and becomes absolutely vested in, the people of the State.

L. 1875, ch. 49, remainder of § 1.

§ 1973. Limitation of action.

The people of the State will not sue for a cause of action, specified in this article, unless it accrued within ten years before the action is commenced.

Last sentence of *id.*, § 1, *am'd.* See §§ 362, 398, 399, 401 and 403, *ante.*

§ 1974. Ultimate disposition of proceeds of action in court of the State.

Any court of the State, in which an action is brought by the people, as prescribed in this article, may, by the final judgment therein, or by a subsequent order, direct that any money, funds, damages, credits, or other property, recovered by, or awarded to, the plaintiff therein, which, if that action had not been brought, would not have vested in the people, be disposed of, as justice requires, in such a manner as to re-instate the lawful custody thereof, or to apply the same, or the proceeds thereof, to the objects and purposes for which they were authorized to be raised or procured; after paying into the State treasury, out of the proceeds of the recovery, all expenses incurred by the people in the action.

Id. first part of § 3.

§ 1975. *Id.*; upon petition of corporation, etc., aggrieved.

Any corporation, board, officer, custodian, agency, or agent, may, in behalf of any city, county, town, village, or other division, subdivision, department, or portion of the State, which was not a party to an action, brought as prescribed in this article, and which claims to be entitled to the custody or disposition of any of the money, funds, damages, credits, or other property, recovered by, or awarded to the plaintiff, by the final judgment in the action, or any of the proceeds thereof, and not disposed of as prescribed in the last section, present, at any time after the actual collection of the money, and its payment into the State treasury, or the actual receipt of the property by the people, to the supreme court, at a special term thereof held in the county of Albany, a verified petition, setting forth the facts, and praying for the relief to which he or it is entitled. Notice of the application and a copy of the petition must be served upon the attorney-general. Upon the hearing the court may make such a final order, as justice requires, for the disposition of the money or other property, as prescribed in the last section.

See, also, *id.*, § 2.

§ 1976. Attorney-general must bring action.

The attorney-general must commence an action, suit, or other judicial proceeding, as prescribed in this article, whenever he deems it for the interests of the people of the State so to do; or whenever he is so directed, in writing, by the governor.

L. 1875, ch. 49, § 4. See § 789, note.

ARTICLE FIFTH.

Action to recover property escheated, or forfeited for treason.

Sec. 1977. Attorney-general to bring ejectment for real property, escheated or forfeited.

1978. Notice to be published before trial or judgment.

1979. When unknown claimants may be made defendants.

1980. Effect of judgment against unknown claimants.

1981. Attorney-general to report recoveries to commissioners of land office.

1982. Action to recover personal property forfeited for treason.

§ 1977. Attorney-general to bring ejectment for real property, escheated or forfeited.

Whenever the attorney-general has good reason to believe, that the title to, or right of possession of, any real property, has vested in the people of the State, by escheat, or by conviction or outlawry for treason, he must commence an action of ejectment, to recover the property.

1 R. S. 282, § 1 (1 Edm. 254).

§ 1978. Notice to be published before trial or judgment.

The attorney-general must cause a notice, specifying the names of the parties, and the object of the action, and containing a brief description of the property affected thereby, to be published in the newspaper printed at Albany, in which legal notices are required to be published, in a newspaper published in the city of New-York, and in a newspaper published in each county in which any part of the property is situated, at least once in each week, for twelve successive weeks, before an issue of fact, joined in the action, is brought to trial; or where judgment is rendered therein in favor of the plaintiff, otherwise than upon the trial of an issue of fact, before final judgment is rendered.

Id., §§ 2 and 3 (1 Edm. 254).

§ 1979. When unknown claimants may be made defendants.

If the property is not occupied, and no person is known to the attorney-general as claiming title thereto, the defendant or defendants may be designated as "unknown claimants," without any other description. In all other respects, section 451 of this act applies to an action, in which the defendant or defendants are thus designated.

Part of Id., § 1.

§ 1980. Effect of judgment against unknown claimants.

Where, in an action of ejectment, to recover property alleged to be escheated, brought as prescribed in the last section, final judgment in favor of the people is rendered against unknown claimants, and the real property recovered thereby is afterwards sold and conveyed, under the direction of the commissioners of the land office, the judgment is conclusive upon the title of that property, as against all persons, except those who commence an action of ejectment for the recovery thereof, or of a part thereof, within five years after the final judgment was rendered in the action in favor of the people, and the judgment-roll was filed thereupon. But section 375 of this act applies to such an action.

Id., § 4.

§ 1981. Attorney-general to report recoveries to commissioners of land office.

The attorney-general must, from time to time, make a report to the commissioners of the land office, of all the real property recovered by the people, in any action brought pursuant to this article.

1 R. S. 282, § 9.

§ 1982. Action to recover personal property forfeited for treason.

Where personal property is forfeited to the people, upon a conviction of outlawry for treason, the attorney-general must bring, and may maintain, an action to recover the same, or the value thereof, or such other action, founded upon the forfeiture, as might be maintained by a private person, who had acquired title to the property.

1 R. S. 284, § 2 (1 Edm. 256).

ARTICLE SIXTH.

Miscellaneous provisions, relating to actions, etc., in behalf of the people.

- Sec. 1983. Scire facias, quo warranto, etc., abolished.
1984. Actions to be brought in the name of the people.
1985. Judgment for costs may be taken against the people.
1986. Relator; when to be joined as plaintiff; compensation of attorney-general.
1987. Costs; how collected against corporation and usurpers of franchise.
1988. Joinder of causes of action against same person.
1989. Consolidation of actions against several defendants.
1990. When people, municipal corporation, etc., not required to give security.

§ 1983. Scire facias, quo warranto, etc., abolished.

The writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto, have been abolished. The relief formerly obtained by means of either of those writs, may be obtained by action, where an appropriate action therefor is prescribed in this act.

Co. Proc., § 428.

§ 1984. Actions to be brought in the name of the people.

An action, brought as prescribed in this title, except an action to recover a penalty or forfeiture, expressly given by law to a particular officer, must be brought in the name of the people of the State; and the proceedings therein are the same, as in an action by a private person, except as otherwise specially prescribed in this title.

2 R. S. 552, § 13 (2 Edm. 573). See Co. Proc., § 422.

§ 1985. Judgment for costs may be taken against the people.

Where judgment is rendered or a final order is made, against the people, in a civil action brought, or special proceeding instituted, in their name, by a public officer, pursuant to a provision of law, it must be to the same effect, and in the same form, as against a private individual, who brings a like action, or institutes a like special proceeding, except as otherwise specially prescribed by law. But an execution shall not be issued against the people.

Id., § 13, am'd; Co. Proc., § 319.

§ 1986. Relator; when to be joined as plaintiff; compensation of attorney-general.

Where an action is brought by the attorney-general, as prescribed in this title, on the relation or information of a person, having an interest in the question, the complaint must allege, and the title of the action must show, that the action is brought upon the relation of that person. In such a case, the attorney-general must, as a condition of bringing the action, require the relator to give satisfactory security to indemnify the people, against the costs and expenses thereof. Where security is so given, the attorney-general is entitled to compensation for his services, to be paid by the relator, in like manner as the attorney and counsel for a private person.

Co. Proc., § 434. See §§ 1808, 3242.

§ 1987. Costs; how collected against corporation and usurpers of franchise.

Where final judgment in an action, brought as prescribed in this title, is rendered against a corporation, or person claiming to be a corporation, the court may direct the costs to be collected by execution against any of the persons claiming to be a corporation; or by warrant of attachment, or other process, against the person of any director or other officer of the corporation.

§ 1988. Joinder of causes of action against same person.

Where two or more causes of action exist, in favor of the people, against the same person, for money due upon, or damages for the non-performance of, one or more contracts of the same nature, the attorney-general must join all those causes in one action.

§ 1989. Consolidation of actions against several defendants.

Where two or more actions brought in behalf of the people, upon the same mortgage or other contract, are pending against separate defendants, claiming or defending under the same title, the attorney-general must, upon the request of the defendants, cause them to be consolidated into one action; and only one bill of costs can be taxed against the defendants.

§ 1990. [Am'd, 1894.] When people, municipal corporation, etc., not required to give security.

Each provision of this act, requiring a party to give security, for the purpose of procuring an order of arrest, an injunction order, or a warrant of attachment, or as a condition of obtaining any other relief, or taking any proceeding; or allowing the court, or a judge, to require such security to be given, is to be construed as excluding an action brought by the people of the state, or by a domestic municipal corporation; or by a public officer, in behalf of the people, or of such a corporation; except where the security, to be given in such an action, is specially regulated by the provision in question; but in any action in which a domestic municipal corporation, or a public officer in behalf of such corporation, shall be, by the foregoing provisions of this section, excused from giving security on procuring an order of arrest, an order of injunction or a warrant of attachment, such corporation shall be liable for all damages that may be so sustained by the opposite party by reason of such order of arrest, attachment or injunction in the same case and to the same extent as sureties to an undertaking would have been, if such an undertaking had been given.

L. 1894, ch. 90.

TITLE II.

Special proceedings instituted by State writ.

Article 1. Provisions applicable to two or more State writs.

1. The writ of habeas corpus, to bring up a person to testify.
2. The writ of habeas corpus, and the writ of certiorari, to inquire into the cause of detention.
4. The writ of mandamus.
5. The writ of prohibition.
6. The writ of assessment of damages.
7. The writ of certiorari, to review the determination of an inferior tribunal.

ARTICLE FIRST.

Provisions applicable to two or more State writs.

Sec. 1991. State writs enumerated.

1992. To be under seal of court.
1993. State writ at the instance of the people.
1994. Balator, when joined with people; parties, how styled.
1995. Parties may appear by attorney.
1996. Allowance to be indorsed and signed.
1997. Final order; certain proceedings same as in actions.
1998. When writ returnable.
1999. How served.
2000. Habeas corpus, how served; fees and undertaking, when required.
2001. Fees to persons not officers.
2002. Last two sections qualified.
2003. Mode of serving writ, when person conceals himself, etc.
2004. Person served to obey habeas corpus.
2005. Id.; as to certiorari.
2006. Time of returning habeas corpus.
2007. Punishment for non-payment of costs.

§ 1991. State writs enumerated.

The writ of habeas corpus to bring up a person to testify, or to answer; the writ of habeas corpus, and the writ of certiorari, to inquire into the cause of detention; the writ of mandamus; the writ of prohibition; the writ of assessment of damages, which is substituted for the writ heretofore known as the writ of ad quod damnum; and the writ of certiorari to review the determination of an inferior tribunal, which may be called the writ of review, shall hereafter be styled, collectively, State writs.

§ 1992. To be under seal of court.

A State writ must be issued under the seal of the court by which it is awarded. Where it is allowed by a judge out of court, and is returnable before a court of record, it must be issued under the seal of the court before which it is returnable. Where it is returnable before a judge out of court, or before a body or tribunal, other than a court of record, it must be issued under the seal of the supreme court. Where the seal of the supreme court is to be used, as prescribed in this section, it may be the seal of the county wherein the writ is awarded, or wherein it is returnable.

2 R. S. 574, § 74 (2 Edm. 594), am'd.

§ 1993. State writ at the instance of the people.

Where a State writ is required, in an action or special proceeding, civil or criminal, to which the people are a party, or in which they are interested, it may be awarded upon the applica-

tion of the attorney-general, or of the district-attorney having charge of the action or special proceeding; and the indorsement of the allowance thereof must state, that it was issued on such an application.

2 R. S. 574, § 77.

§ 1994. Relator, when joined with people; parties, how styled.

A State writ must be issued in behalf of the people of the State; but where it is awarded upon the application of a private person, it must show that it was issued upon the relation of that person. The officer or other person, against whom the writ is issued, shall be styled the defendant therein.

§ 1995. Parties may appear by attorneys.

The parties to a special proceeding, instituted by State writ, may appear by attorney, with like effect as in an action brought in the supreme court; but a return to such a writ must be made under the hand of the defendant, except in a case where it is otherwise specially prescribed by law, or where the court or judge, for good cause shown by affidavit, otherwise directs. Where the attorney-general or the district-attorney does not appear for the people, the attorney for the relator is deemed also the attorney for the people.

§ 1996. Allowance to be indorsed and signed.

The presiding judge of a court, by which a State writ is awarded, or the judge who allows such a writ out of court, as the case may be, must sign an allowance thereof indorsed thereupon, stating the date of the allowance.

2 R. S. 574, § 76, am'd.

§ 1997. Final order; certain proceedings same as in actions.

The final determination of the rights of the parties to a special proceeding instituted by State writ, is styled a final order. The provisions of this act, relating to amendments, motions, and intermediate orders, in an action, are applicable to similar acts in such a special proceeding; except where special provision is otherwise made therein, or where the proceeding is repugnant to the object of the State writ, or the mode of procedure thereunder.

§ 1998. When writ returnable.

Except where special provision is otherwise made in this act, a State writ may be made returnable forthwith, or on a future day certain, as the case requires.

2 R. S. 574, § 78 (2 Edm. 566).

§ 1999. How served.

Except where special provision is otherwise made in this act, a State writ must be personally served, in like manner as a summons, issued out of the supreme court; and each provision of this act, relating to the personal service of such a summons upon a defendant, applies to the service of a State writ.

§ 2000. [Am'd, 1910.] Habeas corpus, how served; fees and undertaking, when required.

A writ of habeas corpus can be served by any person of the age of twenty-one years and upwards. Where the prisoner is in custody of a sheriff, coroner, constable, or marshal, the service is not complete, unless the person serving the writ tenders to the officer, the fees allowed by law for bringing up the prisoner, and delivers to him an undertaking, with at least one surety, in a sum specified therein, to the effect, that the surety will pay the charges of carrying back the prisoner, if he shall be remanded; and that the prisoner will not escape by the way, either in going to, remaining at, or returning from the place to which he is to be taken. The sum so specified must be, at least, twice the sum for which the prisoner is detained, if he is detained for a specific sum of money; if not, it must be one thousand dollars.

2 R. S. 574, § 78, am'd. Am'd, L. 1910, ch. 120. In effect Sept. 1, 1910. See § 3007, subd. 16, post.

§ 2001. Fees to persons not officers.

A court or a judge, allowing a writ of habeas corpus, directed to any person other than a sheriff, coroner, constable, or marshal, may, in its or his discretion, require the applicant, in order to render the service thereof complete, to pay the charges of bringing up the prisoner. In that case, the amount of the charges, not to exceed the fees allowed by law to a sheriff for a similar service, must be specified in the certificate allowing the writ.

Id., § 84. See § 3007, subd. 16, post.

§ 2002. Last two sections qualified.

The last two sections are not applicable to a case, where the writ is allowed upon the application of the attorney-general or a district-attorney.

Id., § 79, am'd.

§ 2003. Mode of serving writ, when person conceals himself, etc.

A writ of habeas corpus or of certiorari, issued as prescribed in article second or article third of this title, may be served by delivering it to the person to whom it is directed. If he cannot be found, with due diligence, it may be served by leaving it at the jail or other place in which the prisoner is confined, with any under officer, or other person of proper age, having charge, for the time, of the prisoner, and paying or tendering to him the fees or charges for bringing up the prisoner. If the person, upon whom the writ ought to be served, keeps himself concealed, or refuses admittance to the person attempting to serve it, it may be served by affixing it in a conspicuous place, on the outside, either of his dwelling-house, or of the place where the prisoner is confined. In that case, the service is complete, without tendering the fees or charges for bringing up the prisoner.

Id., §§ 80 and 81, am'd.

§ 2004. Person served to obey habeas corpus.

A sheriff, coroner, constable, or marshal, upon whom complete service of a writ of habeas corpus is made, as prescribed in this article, must obey and make return to the writ, according to the exigency thereof, whether it is directed to him or not. Any other

person, upon whom such a writ is served, having the custody of the individual for whose benefit it was issued, must obey and execute it, according to the command thereof, without requiring any bond, or the payment of any charges, except such as are specified in the certificate allowing the writ.

2 R. S. 574, § 82.

§ 2005. Id.; as to certiorari.

A person, upon whom a writ of certiorari, issued as prescribed in this title, is served, must, in like manner, upon payment or tender of the fees allowed by law for making a return to the writ, and for copying the warrant, or other process or proceeding to be annexed thereto, obey and return the writ, according to the exigency thereof.

Id., § 83.

§ 2006. Time of returning habeas corpus.

Where a writ of habeas corpus is returnable on a day certain the return must be made at the time and place specified therein. Where such a writ is returnable forthwith, at a place within twenty miles of the place of service, the return must be made and the prisoner must be produced, within twenty-four hours after service; and the like time must be allowed, for each additional twenty miles.

Id., § 35.

§ 2007. Punishment for non-payment of costs.

For non-payment, upon demand, of the costs awarded by a final order, made in a special proceeding instituted by State writ, except where a peremptory writ of mandamus is awarded after the issuing of an alternative mandamus, the person required to pay the same may be punished for a contempt of the court awarding them, or of which the judge awarding them is a member, as if the final order was a final judgment of the court.

ARTICLE SECOND.

The writ of habeas corpus, to bring up a person to testify.

Sec. 2008. Habeas corpus to testify; when allowed by court or judge.

2009. Id.; when allowed by judge.

2010. Id.; in suit before justice of the peace, etc.

2011. The last three sections qualified.

2012. Application; how made.

2013. Certain prisoners to be remanded.

2014. Officer to obey and return writ.

§ 2008. Habeas corpus to testify; when allowed by court or judge.

A court of record, other than a justices' court of a city, or a judge of such a court, or a justice of the supreme court, has power, upon the application of a party to an action or special proceeding, civil or criminal, pending therein, to issue a writ of habeas corpus, for the purpose of bringing before the court, a prisoner, detained in a jail or prison within the State, to testify as a witness in the action or special proceeding, in behalf of the applicant.

2 R. S. 559, § 1 (2 Edm. 580), am'd. See § 2011, post.

§ 2009. [Am'd, 1895.] Id.; when allowed by judge.

Such a writ may also be issued by a justice of the supreme court, upon the application of a party to a special proceeding, civil or criminal, pending before any officer or body, authorized to examine a witness therein. In a case specified in this section, the writ may also be issued by a county judge or a special county judge, residing within the county where the officer resides, before whom, or the court or other body sits, in or before which, the special proceeding is pending.

Id., § 3; L. 1895, ch. 946.

§ 2010. [Am'd, 1895.] Id.; in suit before justice of the peace, etc.

Such a writ may also be issued by a justice of the supreme court, upon the application of a party to an action, pending before a justice of the peace, or in a justices' court of a city, or a district court of the city of New-York, to bring before the justice or court, to be examined as a witness, a prisoner confined in the jail of the county where the action is to be tried, or an adjoining county. In a case specified in this section, the writ may also be issued by a county judge, or a special county judge, residing within the county where the justice resides, or the court is located, or the prisoner is confined, as the case may be.

Id., § 4, am'd; L. 1895, ch. 946.

§ 2011. [Am'd, 1895.] The last three sections qualified.

A writ shall not be issued, by virtue of either of the last three sections, to bring up a prisoner sentenced to death. Nor shall it be issued to bring up a prisoner confined under any other sentence for a felony; except where the application is made in behalf of the people to bring him up as a witness on the trial of an indictment, and then only by and in the discretion of a justice of the supreme court upon such notice to the district-attorney of the county

wherein the prisoner was convicted, and upon such terms and conditions, and under such regulations, as the judge prescribes.

Substituted for 2 R. S. 559, part of § 1; L. 1896, ch. 946.

§ 2012. Application; how made.

An application for a writ, made as prescribed in either of the foregoing sections of this article, must be verified by affidavit, and must state:

1. The title and nature of the action or special proceeding, in regard to which the testimony of the prisoner is desired; and the court, or body in or before which, or the officer before whom, it is pending.

2. That the testimony of the prisoner is material and necessary to the applicant, on the trial of the action, or the hearing of the special proceeding, as he is advised by counsel and verily believes.

3. The place of confinement of the prisoner.

4. Whether the prisoner is or is not confined under a sentence for a felony.

But where the attorney-general or district-attorney makes the application, he need not swear to the advice of counsel.

Id., § 2.

§ 2013. Certain prisoners to be remanded.

The return to a writ, issued as prescribed in this article, must state for what cause the prisoner is held; and if it appears therefrom, that he is held by virtue of a mandate in a civil action or special proceeding, or by virtue of a commitment upon a criminal charge, he must, after having testified, be remanded, and again committed to the prison, from which he was taken.

Substituted for id., § 5.

§ 2014. Officer to obey and return writ.

Any officer to whom a writ, issued as prescribed in this article, is delivered, must obey the same, according to the exigency thereof, and make a return thereto accordingly. If he refuses or neglects so to do, he forfeits to the people, if the writ was issued upon the application of the attorney-general or a district-attorney, or, in any other case, to the party on whose application the writ was issued, the sum of five hundred dollars. But where the prisoner is confined under a sentence to death, a return to that effect is a sufficient obedience to the writ, without producing him.

Id., § 20, am'd.

ARTICLE THIRD.

The writ of habeas corpus, and the writ of certiorari, to inquire into the cause of detention.

Sec. 2015. Who entitled to prosecute the writs. Habeas corpus may issue on Sunday.

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- 2062. Id.; on appeal to court of appeals.
- 2063. Custody of prisoner until he gives bail.
- 2064. Recognizance valid for adjourned terms.
- 2065. Penalty for refusing copy of process, etc.
- 2066. Application of this article to other writs of habeas corpus.

§ 2015. Who entitled to prosecute the writs. Habeas corpus may issue on Sunday.

A person imprisoned or restrained in his liberty, within the State, for any cause, or upon any pretence, is entitled, except in one of the cases specified in the next section, to a writ of habeas corpus, or a writ of certiorari, as prescribed in this article, for the purpose of inquiring into the cause of the imprisonment or restraint, and, in a case prescribed by law, of delivering him therefrom. A writ of habeas corpus may be issued and served under this section,

on the first day of the week, commonly called Sunday; but it cannot be made returnable on that day.

§ B. S. 563, § 21 (2 Edm. 583), am'd.

§ 2016. When neither writ shall be allowed.

A person is not entitled to either of the writs specified in the last section, in either of the following cases:

1. Where he has been committed, or is detained, by virtue of a mandate, issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court.

2. Where he has been committed, or is detained, by virtue of the final judgment or decree, of a competent tribunal of civil or criminal jurisdiction; or the final order of such a tribunal, made in a special proceeding, instituted for any cause, except to punish him for a contempt; or by virtue of an execution or other process, issued upon such a judgment, decree, or final order.

Id., § 22, am'd.

§ 2017. [Am'd, 1895.] How and to whom application for habeas corpus or certiorari made.

Application for the writ must be made, by a written petition, signed, either by the person for whose relief it is intended, or by some person in his behalf, to either of the following courts or officers:

1. The supreme court, at a special term or the appellate division thereof, where the prisoner is detained within the judicial district within which the term is held.

2. A justice of the supreme court, in any part of the State.

3. An officer authorized to perform the duties of a justice of the supreme court at chambers, being or residing within the county, where the prisoner is detained; or, if there is no such officer within that city or county, capable of acting, or, if all those who are capable of acting and authorized to grant the writ, are absent, or have refused to grant it, then to an officer, authorized to perform those duties, residing in an adjoining county.

Id., § 23, am'd; L. 1895, ch. 946.

§ 2018. Application in another county; proof required.

Where application for either writ is made as prescribed in subdivision third of the last section, without the county where the prisoner is detained, the officer must require proof, by the oath of the person applying, or by other sufficient evidence, of the facts which authorize him to act as therein prescribed; and if a judge in that county, authorized to grant the writ, is said to be incapable of acting, the cause of the incapacity must be specially set forth. If such proof is not produced, the application must be denied.

Id., § 24, am'd.

§ 2019. Contents of petition.

The petition must be verified by the oath of the petitioner, to the effect that he believes it to be true; and must state, in substance:

1. That the person in whose behalf the writ is applied for, is imprisoned, or restrained in his liberty; the place where, unless

it is unknown, and the officer or person by whom, he is so imprisoned or restrained, naming both parties, if their names are known, and describing either party, whose name is unknown.

2. That he has not been committed, and is not detained by virtue of any judgment, decree, final order or process, specified in section 2016 of this act.

3. The cause or pretence of the imprisonment or restraint, according to the best knowledge and belief of the petitioner.

4. If the imprisonment or restraint is by virtue of a mandate, a copy thereof must be annexed to the petition; unless the petitioner avers, either, that by reason of the removal or concealment of the prisoner before the application, a demand of such a copy could not be made, or that such a demand was made, and the legal fees for the copy were tendered to the officer or other person, having the prisoner in his custody, and that the copy was refused.

5. If the imprisonment is alleged to be illegal, the petition must state in what the alleged illegality consists. (See § 2033.)

6. It must specify whether the petitioner applies for the writ of habeas corpus, or for the writ of certiorari.

2 B. S. 563, § 25.

§ 2020. When writ must be granted; penalty for refusing.

A court or a judge, authorized to grant either writ, must grant it without delay, whenever a petition therefor is presented, as prescribed in the foregoing sections of this article unless it appears, from the petition itself, or the documents annexed thereto, that the petitioner is prohibited by law from prosecuting the writ. For a violation of this section, a judge, or, if the application was made to a court, each member of the court, who assents to the violation, forfeits to the prisoner one thousand dollars, to be recovered by an action in his name, or in the name of the petitioner to his use.

Id., §§ 26 and 31.

§ 2021. [Am'd, 1895.] Form of writ of habeas corpus.

The writ of habeas corpus, issued as prescribed in this article, must be substantially in the following form, the blanks being properly filled up:

"The People of the State of New York.

To the Sheriff of," etc. (or "to A. B.")

"We command you, that you have the body of C. D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said C. D. is called or charged, before _____, ("the supreme court, at a special term or term of the appellate division thereof, to be held", or "E. F., justice of the supreme court", or otherwise, as the case may be) "at _____ on _____" [or "immediately after the receipt of this writ"],] "to do and receive what shall then and there be considered, concerning the said C. D. And have you then there this writ.

"Witness, _____, one of the justices" (or "judges") "of the said court", (or "county judge", or otherwise, as the case may be.) "the _____ day of _____, in the year eighteen hundred and _____".

Id., § 27; L. 1895, ch. 946.

§ 2022. [Am'd, 1895.] Form of writ of certiorari.

The writ of certiorari, issued as prescribed in this article, must be substantially in the following form, the blanks being properly filled up:

"The People of the State of New York,
To the Sheriff of," etc. (or "to A. B.")
"We command you, that you certify fully and at large, to _____, ("the supreme court, at a special term or term of the appellate division thereof, to be held", or "E. F., justice of the supreme court", or otherwise, as the case may be,) "at _____, on _____, [or "immediately after the receipt of this writ"], "the day and cause of the imprisonment of C. D., by you detained, as it is said, by whatsoever name the said C. D. is called or charged. And have you then there this writ".
"Witness, _____, one of the justices", (or "judges") "of the said court", (or "county judge," or otherwise, as the case may be,) "the _____ day of _____, in the year eighteen hundred and _____".

2 R. S. 503, § 28; L. 1895, ch. 946.

§ 2023. When writ returnable before another judge.

If application for either writ is made to the supreme court, or to a justice thereof, in a county other than that where the person is imprisoned or confined, the writ may be made returnable, in its or his discretion, before any judge authorized to grant it, in the county of the imprisonment or confinement.

L. 1837, ch. 240, § 1 (4 Edm. 681).

§ 2024. When writ sufficient.

The writ of habeas corpus or the writ of certiorari shall not be disobeyed, for any defect of form, and particularly in either of the following cases:

1. If the person having the custody of the prisoner is designated, either by his name of office, if he has one, or by his own name; or, if both names are unknown or uncertain, by an assumed appellation. Any person upon whom the writ is served, is deemed to be the person to whom it is directed, although it is directed to him by a wrong name or description, or to another person.

2. If the person directed to be produced is designated by name, or otherwise described in any way, so as to be identified as the person intended.

2 R. S. 563, § 29.

§ 2025. When writ to issue without application.

Where a justice of the supreme court, in court or out of court, has evidence, in a judicial proceeding taken before him, that any person is illegally imprisoned or restrained in his liberty, within the State; or where any other judge, authorized by this article to grant the writs, has evidence, in like manner, that any person is thus imprisoned or restrained, within the county where the judge resides; he must issue a writ of habeas corpus or a writ of certiorari, for the relief of that person, although no application therefor has been made.

Id., § 30

§ 2026. Return; its contents.

* The person upon whom either writ has been duly served, must state, plainly and unequivocally, on his return:

1. Whether or not, at the time when the writ was served, or at any time theretofore or thereafter, he had in his custody, or under his power or restraint, the person for whose relief the writ was issued.

2. If he so had that person, when the writ was served, and still has him, the authority and true cause of the imprisonment or restraint, setting it forth at length. If the prisoner is detained by virtue of a mandate or other written authority, a copy thereof must be annexed to the return, and, upon the return of the writ, the original must be produced, and exhibited to the court or judge.

3. If he so had the prisoner at any time, but has transferred the custody or restraint of him to another, the return must conform to the return required by the second subdivision of this section, except that the substance of the mandate or other written authority may be given, if the original is no longer in his hands; and that the return must state particularly to whom, at what time, for what cause, and by what authority, the transfer was made.

The return must be signed by the person making it, and, unless he is a sworn public officer, and makes his return in his official capacity, it must be verified by his oath.

2 R. S. 563, § 32.

§ 2027. Habeas corpus; body of prisoner to be produced, unless, etc.

The person, upon whom a writ of habeas corpus has been duly served, must also bring up the body of the prisoner in his custody, according to the command of the writ; unless he states, in his return, that the prisoner is so sick or infirm, that the production of him would endanger his life or his health.

Id., § 33 and part of § 49.

§ 2028. Proceedings on disobedience of writ.

Where a person, who has been duly served with either writ, refuses or neglects, without sufficient cause shown by him, fully to obey it, as prescribed in the last two sections, the court or judge, before which or whom it is made returnable, upon proof of the due service thereof, must forthwith issue a warrant of attachment, directed generally to the sheriff of any county where the delinquent may be found, or, if the delinquent is a sheriff, to any coroner of his county, or to a particular person specially appointed to execute the warrant, and designated therein; commanding such officer or other person forthwith to apprehend the delinquent, and bring him before the court or judge. Upon the delinquent being so brought up, an order must be made, committing him to close custody in the jail of the county in which the court or judge is; or, if he is a sheriff, in the jail of a county, other than his own, designated in the order; and, in either case, without being allowed the liberties of the jail. The order must direct that he stand committed, until he makes return to the writ, and complies with any order, which may be made by the court or judge, in relation to the person for whose relief the writ was issued.

Id., §§ 34 and 35.

§ 2029. Id.: precept to bring up prisoner.

The court or judge may also, in its or his discretion, at the time when the warrant or attachment is issued, or afterwards,

issue a precept to the sheriff, coroner, or other person, to whom the warrant is directed, commanding him forthwith to bring before the court or judge the person for whose benefit the writ was granted, who must thereafter remain in the custody of the officer or person executing the precept, until discharged, bailed, or remanded, as the court or judge directs.

2 R. S. 563, § 36.

§ 2030. Id.; power of county may be called.

The sheriff, coroner, or other person, to whom a warrant of attachment or precept is directed, as prescribed in either of the last two sections, may, in the execution thereof, call to his aid the power of the county, as the sheriff may do, in the execution of a mandate issued from a court of record.

Id., § 37.

§ 2031. Proceedings on return of habeas corpus.

The court or judge, before which or whom the prisoner is brought by virtue of a writ of habeas corpus, issued as prescribed in this article, must, immediately after the return of the writ, examine into the facts alleged in the return, and into the cause of the imprisonment or restraint of the prisoner; and must make a final order to discharge him therefrom, if no lawful cause for the imprisonment or restraint or for the continuance thereof, is shown; whether the same was upon a commitment for an actual or supposed criminal matter, or for some other cause.

Id., §§ 38 and 39.

§ 2032. [Am'd, 1909.] When prisoner to be remanded.

The court or judge must forthwith make a final order to remand the prisoner, if it appears that he is detained in custody for either of the following causes, and that the time for which he may legally be so detained has not expired:

1. By virtue of a mandate issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction.

2. By virtue of the final judgment or decree of a competent tribunal, of civil or criminal jurisdiction; or the final order of such a tribunal, made in a special proceeding, instituted for any cause, except to punish him for a contempt; or by virtue of an execution or other process, issued upon such a judgment, decree, or final order.

3. For a criminal contempt, defined in section seven hundred and fifty of the judiciary law, and specially and plainly charged in a commitment, made by a court, officer, or body, having authority to commit for the contempt so charged.

Id., § 40. Amended by L. 1909, ch. 65, § 3. See note 67 of notes of Board of Statutory Consolidation at end of code.

§ 2033. When to be discharged in civil cases.

If it appears upon the return, that the prisoner is in custody, by virtue of a mandate in a civil cause, he can be discharged, only in one of the following cases:

1. Where the jurisdiction of the court which, or of the officer who, issued the mandate, has been exceeded, either as to matter, place, sum, or person.

2. Where, although the original imprisonment was lawful, yet by some act, omission, or event, which has taken place afterwards, the prisoner has become entitled to be discharged.

3. Where the mandate is defective in a matter of substance required by law, rendering it void.

4. Where the mandate, although in proper form, was issued in a case not allowed by law.

5. Where the person, having the custody of the prisoner under the mandate, is not the person empowered by law to detain him.

6. Where the mandate is not authorized by a judgment, decree, or order of a court, or by a provision of law.

2 R. S. 563, § 41.

§ 2034. The last section qualified.

But a court or judge, upon the return of a writ issued as prescribed in this article, shall not inquire into the legality or justice of any mandate, judgment, decree, or final order, specified in the last section but one, except as therein stated.

Id., § 42.

§ 2035. Proceedings on irregular commitment.

If it appears that the prisoner has been legally committed for a criminal offence, or if he appears by the testimony offered with the return, or upon the hearing thereof, to be guilty of such an offence, although the commitment is irregular, the court or judge, before which or whom he is brought, must forthwith make a final order, to discharge him upon his giving bail, if the case is bailable; or, if it is not bailable, to remand him. Where bail is given pursuant to an order, made as prescribed in this section, the proceedings are the same as upon the return to a writ of certiorari, where it appears that the prisoner is entitled to be bailed.

Id., § 43.

§ 2036. Id.; when prisoner may be committed to another officer.

Where a prisoner is not entitled to his discharge, and is not bailed, he must be remanded to the custody, or placed under the restraint, from which he was taken, unless the person, in whose custody, or under whose restraint he was, is not lawfully entitled thereto; in which case, the order remanding him must commit him to the custody of the officer or person so entitled.

Id., § 44.

§ 2037. Custody of prisoner pending the proceedings.

Pending the proceedings, and before a final order is made upon the return, the court or judge, before which or whom the prisoner is brought, may either commit him to the custody of the sheriff of the county wherein the proceedings are pending, or place him in such care or custody, as his age and other circumstances require.

Id., § 45.

§ 2038. Notice to person interested in detention.

Where it appears, from the return to either writ, that the prisoner is in custody by virtue of a mandate, an order for his discharge shall not be made, until notice of the time when, and the place where, the writ is returnable, or to which the hearing has been adjourned, as the case may be, has been either personally served, eight days previously, or given in such other manner,

and for such previous length of time, as the court or judge prescribes, as follows.

1. Where the mandate was issued or made in a civil action or special proceeding, to the person who has an interest in continuing the imprisonment or restraint, or his attorney.

2. In every other case, to the district attorney of the county, within which the prisoner was detained, at the time when the writ was served.

For the purpose of an appeal, the person to whom notice is given as prescribed in the first subdivision of this section, becomes a party to the special proceeding.

2 B. S. 563, §§ 46 and 47, am'd by L. 1837, ch. 240, § 2 (4 Edm. 681).

§ 2039. Prisoner may controvert return; proofs thereupon.

A prisoner, produced upon the return of a writ of habeas corpus may, under oath, deny any material allegation of the return, or make any allegation of fact, showing either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. Thereupon the court or judge must proceed, in a summary way, to hear the evidence, produced in support of or against the imprisonment or detention, and to dispose of the prisoner as the justice of the case requires.

Id., § 48.

§ 2040. Proceedings upon sickness, etc., of prisoner.

Where the return to a writ of habeas corpus states that the prisoner is so sick or infirm, that the production of him would endanger his life or health, and the return is otherwise sufficient, the court or judge, if satisfied of the truth of that statement, must decide upon the return, and dispose of the matter, as if a writ of certiorari had been issued.

Id., § 49.

§ 2041. When certiorari to issue on application for habeas corpus.

Where an application is made for a writ of habeas corpus, as prescribed in this article, and it appears to the court or judge, upon the petition and the documents annexed thereto, that the cause or offence, for which the party is imprisoned or detained, is not bailable, a writ of certiorari may be granted, instead of a writ of habeas corpus, as if the application had been made for the former writ.

Id., § 50.

§ 2042. Proceedings upon its return.

Upon the return to such a writ of certiorari, the court or judge, before which or whom it is returnable, must proceed as upon a return to a writ of habeas corpus, and must hear the proofs of the parties, in support of and against the return.

Id., § 51.

§ 2043. [Am'd, 1913.] When discharge to be granted; when proceedings to cease.

If it appears, that the prisoner is unlawfully imprisoned or restrained in his liberty, the court or judge must make a final order, discharging him forthwith. If it appears that he is lawfully imprisoned or detained, and is not entitled to be bailed, the court or judge must make a final order, dismissing the proceedings. A final order made in a proceeding brought on behalf

of a person imprisoned or detained in any of the state hospitals mentioned in section forty of the insanity law or in the Mattewan State Hospital or in the Dannemora hospital for insane convicts, shall be conclusive evidence, upon a hearing of any subsequent proceeding involving the detention of the same person, of all the facts determined by the court, unless such final order shall otherwise specify.

2 B. S. 563, § 52, am'd. Am'd L. 1913, ch. 544. In effect May 16, 1913.

§ 2044. When certiorari does not prevent habeas corpus.

Notwithstanding a writ of certiorari has been issued or returned, as prescribed in this article, the court or judge, before which or whom it is returnable, may issue a writ of habeas corpus, which is, in all respects, subject to the foregoing provisions of this article, relating to the latter writ. If the court or judge refuses a writ of certiorari, or, upon the return thereof, refuses to discharge the prisoner, the latter may claim, and is entitled to, the writ of habeas corpus, as prescribed in this article.

Id., § 53.

§ 2045. Bail on certiorari; when and how ordered.

If, upon the return to a writ of certiorari, issued as prescribed in this article, it appears, that the person imprisoned or detained is entitled to be bailed, the court or judge must make a final order, fixing the sum in which he is to be admitted to bail; specifying the court, and the term thereof, at which he is required to appear; and directing his discharge, upon bail being given accordingly, as required by law. If sufficient bail is immediately offered, the court or judge must take it; otherwise, bail may be given afterwards, as prescribed in the next section.

Id., § 54, am'd.

§ 2046. [Am'd, 1895.] Id.; by whom and how taken.

Upon the production of the order, or, if it was made by a court, of a certified copy thereof, to a justice of the supreme court, or to the county judge or special county judge of the county, where the prisoner is detained, the judge must take the recognizance of the prisoner, with two sureties, in the sum so fixed, conditioned for the appearance of the prisoner, as prescribed in the order. Each person, offering himself as a surety, must show, by his oath, to the satisfaction of the judge, that he is a householder in the county, and worth twice the sum in which he is required to be bound, over and above all demands against him. It is not necessary, that the prisoner should appear in person before the judge, to acknowledge the recognizance; but it may, be acknowledged by the prisoner, and certified, in like manner as a deed to be recorded in the county.

Id., § 55, am'd; L. 1896, ch. 946.

§ 2047. Discharge of prisoner bailed.

The judge must immediately file the recognizance with the clerk of the court, before which the prisoner is bound to appear. He must also make a certificate upon the order, or the certified copy thereof, to the effect that it has been complied with. Upon production of the certificate, the prisoner is entitled to his discharge from imprisonment, for any cause stated in the return to the certiorari.

Id., § 56.

§ 2048. Order substituted for writ of discharge; service and effect thereof.

The writ of discharge is abolished. A final order to discharge a prisoner, made as prescribed in this article, may be served in like manner as an injunction order, and when so served, it may be enforced in the same manner as a final judgment in a civil action, except where special provision for its enforcement is otherwise made in this act. Where such an order directs a discharge, upon giving bail, the service thereof is not complete until service of the certificate, or other proof prescribed by law, showing that bail has been given, as required thereby.

See §§ 610 and 1241, ante.

§ 2049. Enforcing order for discharge; penalty, etc.

Obedience to a final order to discharge a prisoner, made as prescribed in this article, may be enforced by the court which, or the judge who, made the same, by attachment, as for a neglect to make a return to a writ of habeas corpus, and with like effect. A person guilty of such disobedience forfeits, to the prisoner aggrieved, one thousand two hundred and fifty dollars, in addition to the damages which the latter sustains.

Section 57, R. S., am'd. See § 2020, ante, and § 2051, post.

§ 2050. When prisoner discharged not to be re-imprisoned; when he may be.

A prisoner, who has been discharged by a final order, made upon a writ of habeas corpus or certiorari, issued as prescribed in this article, shall not be again imprisoned, restrained, or kept in custody, for the same cause. But it is not deemed to be the same cause, in either of the following cases:

1. Where he has been discharged from a commitment on a criminal charge; and is afterwards committed for the same offence, by the lawful order or other mandate of the court, wherein he was bound by recognizance to appear, or in which he has been indicted or convicted for the same offence.

2. Where he has been discharged, in a criminal cause, for defect of proof, or for a material defect in the commitment; and is afterwards arrested on sufficient proof, and committed by a lawful mandate for the same offence.

3. Where he has been discharged, in a civil action or special proceeding, for an illegality in the judgment, final order, or other mandate, as prescribed in this article; and is afterwards imprisoned by virtue of a lawful judgment, final order, or other mandate, for the same cause of action.

4. Where he has been discharged, in a civil action or special proceeding, from imprisonment by virtue of an order of arrest; and is afterwards taken in execution, or other final process, in the same action or special proceeding, or arrested in another action or special proceeding, after the first was discontinued.

Id., § 59.

§ 2051. Penalty for violating the last section.

If a court, or judge, or any other person, in the execution of a judgment, order, or other mandate, or otherwise, knowingly violates, causes to be violated, or assists in the violation of, the last section, he, or if the act or omission was that of a court, each member of the court assenting thereto, forfeits, to the prisoner aggrieved, one thousand two hundred and fifty dollars. He is also guilty of a misdemeanor; and, upon conviction thereof, shall be

punished by fine, not exceeding one thousand dollars, or by imprisonment, not exceeding six months, or by both in the discretion of the court.

2 R. S. 563, § 60 and part of § 64.

§ 2052. Id.; for concealing prisoner, etc., to avoid writ.

Any one, having in his custody, or under his power, a person entitled to a writ of habeas corpus or a writ of certiorari, as prescribed in this article, or a person for whose relief a writ of habeas corpus or a writ of certiorari has been duly issued, as prescribed in this article, who, with intent to elude the service of the writ, or to avoid the effect thereof, transfers the prisoner to the custody, or places him under the power or control, of another, or conceals him, or changes the place of his confinement, is guilty of a misdemeanor; and, upon conviction thereof, shall be punished as specified in the last section.

Id., §§ 61, 62 and remainder of 64.

§ 2053. Id.; for aiding, etc.

A person who knowingly assists in the violation of the last section, is guilty of a misdemeanor; and, upon conviction thereof, shall be punished as specified in the last section but one.

Id., § 63.

§ 2054. Warrant to bring up prisoner about being removed.

Where it appears, by proof satisfactory to a court or judge, authorized to grant either writ, that a person is held in unlawful confinement or custody, and that there is a good reason to believe, that he will be carried out of the State, or suffer irreparable injury, before he can be relieved by a writ of habeas corpus or a writ of certiorari; the court or judge must issue a warrant, reciting the facts, directed to a particular sheriff, or generally to any sheriff or constable, or to a person specially designated therein; and commanding him to take, and forthwith to bring before the court or judge, the prisoner, to be dealt with according to law. If the warrant is issued by a court, it must be under the seal thereof; if by a judge, it must be under his hand.

Id., § 65.

§ 2055. When offender to be arrested.

Where the proof, specified in the last section, is also sufficient to justify an arrest of the person having the prisoner in his custody, as for a criminal offence, committed in taking or detaining him, the warrant must also contain a direction to arrest that person, for the offence.

Id., § 66.

§ 2056. Execution of warrant; proceedings to relieve prisoner.

The officer or other person, to whom the warrant is directed and delivered, must execute it by bringing the prisoner therein named, and also, if so commanded in the warrant, the person who detains him, before the court or judge issuing it; and thereupon the person detaining the prisoner must make a return, in like manner, and the like proceedings must be taken, as if a writ of habeas corpus had been issued in the first instance.

Id., § 67.

§ 2057. Id.; proceedings to punish offender.

If the person, having the prisoner in his custody, is brought before the court or judge, as for a criminal offence, he is entitled to be examined, and must be committed, bailed, or discharged, by the court or judge, as in any criminal case of the same nature.

2 R. S. 503, § 63.

§ 2058. When appeal may be taken in cases under this article.

An appeal may be taken from an order refusing to grant a writ of habeas corpus, or a writ of certiorari, as prescribed in this article, or from a final order, made upon the return of such a writ, to discharge or remand a prisoner, or to dismiss the proceedings. Where the final order is made, to discharge a prisoner, upon his giving bail, an appeal therefrom may be taken, before bail is given; but where the appeal is taken by the people, the discharge of the prisoner upon bail shall not be stayed thereby. An appeal does not lie, from an order of the court or judge, before which or whom the writ is made returnable, except as prescribed in this section.

Substituted for id., § 69.

§ 2059. Id.; by people.

An appeal from a final order, discharging a prisoner committed upon a criminal accusation, or from the affirmation of such an order, may be taken, in the name of the people, by the attorney-general or the district-attorney.

Substituted for id., §§ 70 and 71. See §§ 1356-1361, ante; § 212, post.

§ 2060. Prisoner who appeals may be admitted to bail.

Where a prisoner, who stands charged, upon a criminal accusation, with a bailable offence, has perfected, or intends to take, an appeal from a final order dismissing the proceedings, remanding him, or otherwise refusing to discharge him, made as prescribed in this article, the court or judge, upon his application, either before or after the final order, must, upon such notice to the district-attorney as the court or judge thinks proper, make an order, fixing the sum in which the applicant shall be admitted to bail, pending the appeal; and thereupon, when his appeal is perfected, he must be admitted to bail accordingly.

L. 1873, ch. 603, part of § 1 (9 Edm. 704).

§ 2061. [Am'd, 1895.] Id.; recognizance, etc.

The recognizance for that purpose must be conditioned, that the prisoner will appear, at a term of the appellate division of the supreme court to be held at a time and place designated in the order, and abide by and perform the judgment of* order of the appellate court. It must be taken and approved by a justice of the supreme court, or by the court or judge from whose order the appeal is taken, or by the county judge of the county in which the order was made. In all other respects, the proceedings are the same as prescribed in this article, where it appears, upon the return of a writ of certiorari, that the prisoner is entitled to be admitted to bail.

Id., part of § 1; L. 1886, ch. 946.

* So in the original.

§ 2062. [Am'd, 1895.] Id.; on appeal to court of appeals.

Where a prisoner, who stands charged with an offence, specified in the last section, has perfected an appeal, to the court of appeals, from a final order of the supreme court, affirming an order refusing his discharge, or reversing an order granting his discharge; the court, from whose order the appeal is taken, or a judge thereof, must, upon his application, admit him to bail, as prescribed in the last section; except that the recognizance must be conditioned to appear, at a term of the appellate division of the supreme court from which the appeal is taken, to abide by and perform its judgment or order, made after the determination of the appeal,

L. 1873, ch. 663, part of § 1, am'd; L. 1895, ch. 946.

§ 2063. Custody of prisoner until he gives bail.

Where the sum, in which a prisoner shall be admitted to bail, has been fixed, as prescribed in either of the last two sections, he must remain in the custody of the sheriff of the county in which he then is, until he is admitted to bail, as therein prescribed; or, if he does not give the requisite bail, until the time to appeal has expired or the appeal is disposed of, and the further direction of the court, made thereupon.

Remainder of same section, am'd.

§ 2064. [Am'd, 1895.] Recognizance valid for adjourned terms.

Where no order or other direction of the court, relating to the disposition of the prisoner, is made at the term specified in a recognizance, given as prescribed in section 2061 or section 2062 of this act, the matter is deemed adjourned, without an order to that effect, to the next term of the appellate division of the supreme court, to be held in the same department; and thereafter to each successive term, until such an order or direction is made. The prisoner is bound to attend at each successive term of the appellate division; and the recognizance is valid for his attendance accordingly, without any notice or other formal proceedings.

L. 1895, ch. 946.

§ 2065. Penalty for refusing copy of process, etc.

An officer or other person, who detains any one by virtue of a mandate, or other written authority, must upon reasonable demand, and tender of his fees, deliver a copy thereof to any person who applies therefor, for the purpose of procuring a writ of habeas corpus or a writ of certiorari, in behalf of the prisoner. If he knowingly refuses so to do, he forfeits two hundred dollars to the prisoner.

Section 72, R. S., am'd.

§ 2066. Application of this article to other writs of habeas corpus.

Except as otherwise expressly prescribed by statute, the provisions of this article apply to and regulate the proceedings upon every common law or statutory writ of habeas corpus, as far as they are applicable; and the authority of a court or a judge, to grant such a writ, or to proceed thereupon, by statute or the common law, must be exercised in conformity to this article, in any case therein provided for.

Sections 73 and 76, R. S.

ARTICLE FOURTH.

The writ of mandamus.

- Sec. 2067. Kinds of writ; how alternative writ granted.
 2068. When writ granted at special term.
 2069. Id.; at term of the appellate division of the supreme court.
 2070. When peremptory mandamus to issue in first instance.
 2071. Alternative writ; how served.
 2072. Writ; how returnable.
 2073. Return or demurrer to first writ.
 2074. Return; how made.
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 2076. Contents of alternative writ; demurrer thereto.
 2077. Form and contents of return.
 2078. Further return cannot be compelled; demurrer to return.
 2079. Issue of fact; when it arises.
 2080. Application of certain provisions of chapter sixth.
 2081. Service of notice of filing return and demurrer.
 2082. Subsequent proceedings: the same as in an action.
 2083. Issue of fact; how triable.
 2084. Id.; where triable.
 2085. Issue of law upon general term mandamus; how and where triable.
 2086. Costs.
 2087. Appeals.
 2088. When relator to recover damages.
 2089. Stay of proceedings; enlargement of time.
 2090. Fine in certain cases.

§ 2067. [Am'd, 1913.] **Kinds of writ; how alternative writ granted.**

A writ of mandamus is either alternative or peremptory. The alternative writ may be granted upon an affidavit, or other written proof, showing a proper case therefor. Previous notice of the application must be given to a judge of the court, or to the corporation board, or other body, officer, or other person to which or to whom it is directed.

Am'd L. 1913, ch. 574. In effect Sept. 1, 1913.

§ 2068. [Am'd, 1895.] **When writ granted at special term.**

Except where special provision therefor is otherwise made in this article, a writ of mandamus can be granted only at a special term of the supreme court, held within the judicial district, embracing the county, wherein an issue of fact, joined upon an alternative writ of mandamus, is triable, as prescribed in this article.

L. 1895, ch. 946.

§ 2069. [Am'd, 1895.] **Id.; at term of the appellate division of the supreme court.**

A writ of mandamus may be granted, at a term of the appellate division of the supreme court only, directed generally to any judge holding, or to hold, a special term of the same court, or directed to one or more judges of the same court named therein, in any case where such a writ may be issued out of the supreme court, directed to any other court, or to a judge thereof. Such a writ can be granted only at a term of the appellate division of the judicial department embracing the county, wherein the action is triable, or the special proceeding is brought, in the course of which the matter sought to be enforced by the mandamus originated, unless that term is not in session; in which case, it may be granted at a term of the appellate division of an adjoining judicial department.

L. 1873, ch. 70, part of § 1 (9 Am. 575); L. 1895, ch. 946.

§ 2070. [Am'd, 1895.] When peremptory mandamus to issue in first instance.

A peremptory writ of mandamus may be issued, in the first instance, where the applicant's right to the mandamus depends only upon questions of law, and notice of the application has been given to a judge of the court, or to the corporation, board, or other body, officer, or other person, to which or to whom it is directed. The notice must be served, at least eight days before the application is heard; unless a shorter time is prescribed by an order to show cause, made, where the application is to the special term, by the court, or a judge thereof; or where the application is to the appellate division, by the appellate division, or a justice of the appellate division of that judicial department. In such a case the application must be founded upon affidavits, or other written proofs, a copy of which must be served with the notice, or order to show cause. Where the court, board or other body to be served, consists of three or more members, the notice or order to show cause, and the papers upon which the application is to be made, may be served, as prescribed in the next section for service of an alternative writ of mandamus. Except as prescribed in this section, or by special provision of law, a peremptory mandamus cannot be issued, until an alternative mandamus has been issued and duly served, and the return day thereof has elapsed.

L. 1895, ch. 946.

§ 2071. Alternative writ; how served.

An alternative writ of mandamus must be served, by showing the original writ, and delivering a copy thereof, to the person to be served. Where it is directed to a court, or to the judge or judges of a court, it must be served, either in term time or in vacation, upon the judge or judges of the court; except that, where the court consists of three or more judges, service upon a majority of them is sufficient. Where it is to be served upon a board or body, other than a corporation, service must be made upon a majority of the members thereof, unless the board or body was created by law, and has a chairman or other presiding officer, appointed pursuant to law; in which case, service upon him is sufficient. Where the writ is to be served upon a corporation, service thereof may be made upon any officer, upon whom a summons, issued out of the supreme court, may be served. Where one or more of the persons, upon whom to make service, as prescribed in this section, cannot, after due diligence, be found, the exhibition of the original writ may be dispensed with, and service may be made upon him or them, as prescribed by law for the service of a summons, issued out of the supreme court.

§ 2072. [Am'd, 1895.] Writ; how returnable.

An alternative writ must be made returnable twenty days after the service thereof, at the office of the clerk of the county, designated therein, in which an issue of fact joined thereupon is triable. A peremptory writ must be made returnable at a special term or a term of the appellate division of the supreme court, designated therein, to which application for the alternative writ might have been made.

L. 1895, ch. 946.

§ 2073. Return or demurrer to first writ.

Where the first writ of mandamus has been duly served, a return must be made to the same, as therein required, unless it is an alternative writ, and a demurrer thereto is taken. In default of a return, the person or persons, upon whom the writ was served, may be punished, upon the application of the people, or of the relator, for a contempt of court.

2 B. S. 586, § 54 (2 Edm. 608), am'd. See § 2076, post.

§ 2074. [Am'd, 1895.] Return, how made.

The return to an alternative writ of mandamus must be annexed to a copy of the writ; and must be filed, in the office of the clerk, where it is returnable, within the time specified in the writ. The return to a peremptory writ of mandamus must be likewise annexed to a copy thereof; and must, before the expiration of the first day of the term at which it is returnable, be either delivered in open court, or filed in the office of the clerk of the county wherein the term is to be held.

L. 1895, ch. 946. See §§ 2072 and 2073, ante.

§ 2075. Motion to set aside writ.

An alternative writ of mandamus cannot be quashed or set aside upon motion, for any matter involving the merits. A motion to set aside such a writ, for any other cause, or to set aside or quash a peremptory writ of mandamus, or to set aside the service of either writ, must be made at a term, whereat the writ might have been granted.

§ 2076. Contents of alternative writ; demurrer thereto.

The statement, contained in an alternative writ of mandamus, of the facts constituting the grievance, to redress which it is issued; the joinder therein of two or more such grievances; and the command of the writ, are subject to the provisions of chapter sixth of this act, respecting the statement, in a complaint, of the facts constituting a cause of action; the joinder therein of two or more causes of action; and the demand of judgment thereupon. The person, upon whom the writ is served, instead of making a return thereto, may file in the office where the writ is returnable, a demurrer to the writ; or he may file a demurrer to a complete statement of facts contained in the writ, as constituting a separate grievance, and make a return to the remainder of the writ. A demurrer may be thus taken, in a case where a defendant may demur to a complaint, or to a cause of action separately stated in a complaint, as prescribed in chapter sixth of this act; and it must be in like form.

§ 2077. Form and contents of return.

The provisions of chapter sixth of this act, relating to the form and contents of an answer, containing denials and allegations of new matter, except those provisions which relate to the verification of an answer, and to a counterclaim contained therein, apply to a return to an alternative writ of mandamus, showing cause against obeying the command of the writ. For the purpose of the application, each complete statement of facts, assigning a cause why the command of the writ ought not to

be obeyed, is regarded as a separate defence, and must be separately stated, and numbered.

See § 498, 499, 500 and 507, ante.

§ 2078. Further return cannot be compelled; demurres to return.

A person, who has made a return to an alternative mandamus, cannot be compelled to make a further return. The people, or the relator, may demur to the return, or to any complete statement of facts, therein separately assigned as a cause for disobeying the command of the writ, on the ground that the same is insufficient in law, upon the face thereof.

§ 2079. Issue of fact; when it arises.

An issue of fact arises upon a denial, contained in the return, of a material allegation of the writ, or upon a material allegation of new matter, contained in a return; unless a demurrer thereto is taken. Where the people or the relator demur to a complete statement of facts, separately assigned as cause for disobeying the command of the writ, an issue of fact arises, with respect to the remainder of the return.

See § 504, ante.

§ 2080. Application of certain provisions of chapter sixth.

Oral pleadings upon a writ of mandamus are abolished, and no pleadings are allowed, except as prescribed in the foregoing sections of this article. The provisions of title second of chapter sixth of this act apply to the writ and the return; except that it is not necessary to serve a copy of either, upon the attorney for the adverse party, or to verify either, and that neither can be amended, without special application to the court, or stricken out as sham.

§ 2081. Service of notice of filing return, and demurrer.

Where a return to an alternative writ of mandamus has been filed, the attorney for the defendant making it must serve, upon the attorney for the people or the relator, a notice of the filing thereof. Where the people or the relator demur to the return, or to a part thereof, a copy of the demurrer must be served upon the attorney for the defendant, within twenty days after the service of such a notice. Where the defendant demurs to the writ, or to a part thereof, a copy of the demurrer must be served upon the attorney for the people or the relator, within the time prescribed by law for filing it.

§ 2082. Subsequent proceedings the same as in an action.

Except as otherwise expressly prescribed in this act, the proceedings after issue is joined, upon the facts or upon the law, are, in all respects, the same as in action; and in each provision of this act, relating to the proceedings in an action, apply thereto. For the purpose of the application, the writ, the return, and the demurrer are deemed to be pleadings in an action; and the final order is deemed to be a final judgment, and may be entered and docketed, and enforced, with respect to such parts thereof as are not enforced by a peremptory mandamus, as a final judgment in an action. But before the final order can be docketed, or an

execution issued thereupon, an enrollment must be filed thereupon, as a judgment-roll in an action. For that purpose, the clerk must attach together and file in his office, a certified copy of the final order; the writ and the return, or copies thereof; together with the same papers, which are required by law to be incorporated into a judgment-roll in an action. Where the final order is in favor of the people or the relator, it must award a peremptory mandamus, to be forthwith issued.

2 R. S. 580, § 55 and part of § 57 (2 Edm. 608); Co. Proc., § 471.

§ 2083. Issue of fact; how triable.

An issue of fact, joined upon an alternative writ of mandamus, must be tried by a jury, as if it was an issue joined in an action specified in section 968 of this act; unless a jury trial is waived, or a reference is directed by consent of parties. Where the writ was issued upon the relation of a private person, the relator or the defendant is entitled to a verdict, report or decision, where he would be entitled thereto, if the issue was joined in an action, brought by the relator against the defendant, to recover damages for making a false return.

§ 2084. [Am'd, 1895.] Id.; where triable.

An issue of fact, joined upon an alternative writ of mandamus, granted at a special term of the supreme court, is triable in the county, wherein it is alleged in the writ, that the material facts took place, unless the court directs it to be tried elsewhere. An issue of fact, joined upon an alternative writ of mandamus, granted at a term of the appellate division of the supreme court, is triable in the county, which determines the judicial department wherein the application for the writ must be made; unless the appellate division directs it to be tried in another county of the same judicial department. Upon the trial of an issue of fact, joined upon an alternative writ of mandamus, the verdict, report or decision must be returned to, and the final order thereupon must be made by, the appellate division or the special term, as the case requires.

L. 1895, ch. 946.

§ 2085. [Am'd, 1895.] Issue of law upon general term* mandamus; how and where triable.

An issue of law, joined upon an alternative writ of mandamus, granted by the appellate division, must be tried, and the final order thereupon must be made, by the appellate division.

L. 1895, ch. 946.

§ 2086. [Am'd, 1899.] Costs.

Where an alternative writ of mandamus has been issued, costs may be awarded, as in an action; except that, upon making a final order, the costs are in the discretion of the court. Where an application for a peremptory writ of mandamus is granted or denied, without a previous alternative mandamus, costs not exceeding fifty dollars and disbursements, may be awarded to either party, as upon a motion.

L. 1899, ch. 271, § 6 (4 Edm. 619); L. 1894, ch. 270, § 8 (4 Edm. 602); L. 1890, ch. 237. In effect Sept. 1, 1899.

§ 2087. [Am'd, 1895, 1913.] Appeals.

An appeal from an order granting a peremptory writ of mandamus, where an alternative writ of mandamus was not pre-

* So in original.

viously issued, and an appeal from an order granting or denying an application for an alternative writ of mandamus, must be taken as from a final order made in a special proceeding. An appeal from a final order made upon an alternative mandamus, must be taken as an appeal from a judgment; and each provision of law, relating to an appeal from a judgment, either to the appellate division or to the court of appeals, is applicable thereto. But where an appeal is taken, as prescribed in this section, from an order of the appellate division, granting a peremptory mandamus, made upon an original application, or from a final order, made upon an alternative mandamus, granted at the appellate division, the execution of the order appealed from shall not be stayed, except by the order of the same appellate division, made upon such terms, as to security or otherwise, as justice requires.

L. 1859, ch. 174, § 3 (4 Edm. 683); L. 1854, ch. 270, § 1 (4 Edm. 682), am'd; L. 1895, ch. 946; L. 1913, ch. 574. In effect Sept. 1, 1913.

§ 2088. [Am'd, 1913.] When relator to recover damages.

Where a return has been made to an alternative writ of mandamus, issued upon the relation of a private person, the court, upon making a final order for a peremptory mandamus, must also, except where said writ is directed to a state officer or officers, or an officer or officers of a municipal or private corporation, if the relator so elects, award to the relator, against the defendant who made the return, the same damages, if any, which the relator might recover, in an action against that defendant, for a false return. The relator may require his damages where entitled thereto as aforesaid, to be assessed upon the trial of an issue of fact, if the verdict, report, or decision is in his favor. Such an assessment of damages bars an action for a false return.

2 R. S. 587, §§ 57 and 58 (2 Edm. 608), am'd; L. 1913, ch. 574. In effect Sept. 1, 1913.

§ 2089. [Am'd, 1895.] Stay to proceedings; enlargement of time.

The proceedings upon a writ of mandamus, granted at a special term, may be stayed, and the time for making a return, or for doing any other act thereupon, as prescribed in this article, may be enlarged, as in an action, by an order made by a judge of the court, but not by any other officer. Where the writ was granted at a term of the appellate division, an order staying the proceedings, or enlarging the time to make a return, can be made only by a justice of the appellate division of the same department; and where notice has been given of an application for a mandamus at a term of the appellate division of the supreme court, or an order has been made to show cause, at such term, why a mandamus should not issue, a stay of proceedings shall not be granted, before the hearing, by any court or judge.

Id., § 59, am'd. See L. of 1873, § 3; L. 1895, ch. 946.

§ 2090. Fine in certain cases.

Where a final order awards a peremptory mandamus, directed to a public officer, board or other body, commanding him or them to perform a public duty, enjoined upon him or them by a special

provision of law, if it appears to the court, that the officer, or one or more members of the board or body, have, without just excuse, refused or neglected to perform the duty so enjoined, the court, besides awarding to the relator his damages and costs, as prescribed in this article, may, in the same order, impose a fine, not exceeding two hundred and fifty dollars, upon the officer, or upon each member of the board, who has so refused or neglected. The fine, when collected, must be paid into the treasury of the State; and the payment thereof bars any action for a penalty, incurred by the person so fined, by reason of his refusal or neglect to perform the duty so enjoined.

2 R. S. 587, § 60, am'd.

ARTICLE FIFTH

The writ of prohibition

- Sec. 2091.** Kinds of writ; how granted.
2092. When writ granted at special term.
2093. Id.; by the appellate division of the supreme court.
2094. Alternative writ must issue first; its contents.
2095. Id.; when returnable; how served.
2096. Absolute writ issues, unless return made.
2097. Legal objections, how taken; motion to quash or set aside writ.
2098. Return by party; proceedings when he adopts judge's return.
2099. Proceedings after return; trial by jury.
2100. Final order; costs.
2101. Appeals.
2102. Stay of proceedings; enlargement of time

§ 2091. [Am'd, 1913.] Kinds of writ; how granted.

A writ of prohibition is either alternative or absolute. The alternative writ may be granted upon an affidavit, or other written proof, showing a proper case therefor. Previous notice of the application must be given to a judge of the court, or to the corporation board, or other body, officer, or other person to which or to whom it is directed.

2 R. S. 587, § 61 (2 Edm. 609), am'd. See § 2067, ante. Am'd, L. 1913, ch. 573. In effect Sept. 1, 1913.

§ 2092. When writ granted at special term.

Except where special provision therefor is otherwise made in this article, an alternative writ of prohibition can be granted only at a special term of the court. In the supreme court, the special term must be one held within the judicial district, embracing the county, wherein the action is triable, or the special proceeding is brought, in the course of which the matter, sought to be prohibited by the writ, originated.

L. 1873, ch. 70, § 1; see § 2068, ante.

§ 2093. [Am'd, 1895.] Id.; by the appellate division of the supreme court.

An alternative writ of prohibition may be granted at a term of the appellate division of the supreme court only, directed generally to any judge holding, or to hold, a special term of the same court, or directed to one or more judges of the same court, named therein, in any case where such a writ may be issued out of the supreme court, directed to any other court, or to a judge thereof. Such a writ can be granted only at the term of the appellate division of the judicial department, embracing the county, wherein the action is triable, or the special proceeding is brought, in the course of which the matter, sought to be prohibited by the writ, originated, unless a term of the appellate division of said department is not in session; in which case, it may be granted at a term of the appellate division in an adjoining judicial department.

L. 1873, ch. 70, § 1, am'd; L. 1895, ch. 946. See § 2069, ante.

§ 2094. Alternative writ must issue first; its contents.

Except as otherwise specially prescribed by law, an absolute writ of prohibition cannot be issued, until an alternative writ has been issued and duly served, and the return day thereof has elapsed. The alternative writ must be directed to the court in

which, or to the judge before whom, and also to the party in whose favor, the proceedings to be restrained were taken, or are about to be taken. It must command the court or judge, and also the party, to desist and refrain from any further proceedings in the action or special proceeding, or with respect to the particular matter or thing described therein, as the case may be, until the further direction of the court issuing the writ; and also to show cause, at the time when, and the place where, the writ is made returnable, why they should not be absolutely restrained from any further proceedings in that action, special proceeding, or matter. The writ need not contain any statement of the facts or legal objections, upon which the relator founds his claim to relief.

L. 1873, ch. 70, § 61, in part. See § 2076, ante.

§ 2095. [Am'd, 1895.] Id.; when returnable; how served.

The writ must be made returnable, either forthwith or at a day certain, before the term which granted it, or upon the first day of a future term, therein specified, at which application for the writ might have been made. Where it is granted at a term of the appellate division in a judicial department, adjoining that wherein the matter originated, it may, in the discretion of the court, be made returnable at a term of the appellate division of either department. The writ must be served on the court or judge, and also upon the party, as prescribed by law for the service of an alternative writ of mandamus. A copy of the papers, upon which it was granted, must be delivered with each copy of the writ.

See *Id.*, § 61, and L. 1873, ch. 70, § 1, and part of § 4; § 2071, ante; L. 1895, ch. 946.

§ 2096. [Am'd, 1895.] Absolute writ issues, unless return made.

Where the alternative writ has been duly served upon the court or judge, and upon the party, the relator is entitled to an absolute writ, unless a return is made by the court or judge, and by the party, according to the exigency of the alternative writ, or within such further time as may be granted for the purpose. The return must be annexed to a copy of the writ; and it must be either delivered in open court, or filed in the office of the clerk of the county where the writ is returnable. Where the party makes a return, the court or judge must also make a return. In default thereof, the judge, or the members of the court, may be punished, upon the application of the people or of the relator, for a contempt of the court issuing the writ. A return to an alternative writ of prohibition cannot be compelled in any other case.

L. 1895, ch. 946.

§ 2097. Legal objections, how taken; motion to quash or set aside writ.

An alternative writ of prohibition cannot be quashed or set aside, upon motion, for any matter involving the merits. An objection to the legal sufficiency of the papers, upon which the writ was granted, may be taken in the return. A motion to quash an absolute writ of prohibition, or to set aside an alternative writ, for any matter not involving the merits, must be made at a term where the writ might have been granted.

See § 2075, ante.

§ 2098. Return by party; proceedings when he adopts judge's return.

A return to an alternative writ, when made by a party, must be verified by his affidavit, as required for the verification of a pleading in a court of record; unless it consists only of objections to the legal sufficiency of the papers upon which the writ was granted. Where the party unites with the court or judge in a return, or annexes, to the court's or the judge's return, an instrument in writing, subscribed by him, to the effect that he adopts it, and relies upon the matters therein contained, as sufficient cause why the court or judge should not be restrained, as mentioned in the writ, he is thenceforth deemed the sole defendant in the special proceeding; except that where a final order is made, awarding an absolute writ of prohibition, such a writ must be directed to the party, and also to the court or the judge.

Section 63, R. S., am See § 2083, ante.

§ 2099. [Am'd, 1895.] Proceedings after return; trial by jury.

Pleadings are not allowed upon a writ of prohibition. Where an alternative writ has been issued, the cause may be disposed of without further notice, at the term at which the writ is returnable. If it is not then disposed of, it may be brought to a hearing, upon notice, at a subsequent term. It must be heard at a term of the appellate division in the same judicial department, or at a special term held in the same judicial district, as the case may be. The relator may controvert, by affidavit, any allegation of new matter contained in the return. The court may direct the trial of any question of fact by a jury, in like manner and with like effect, as where an order is made for the trial, by a jury, of issues of fact, joined in an action triable by the court. Where such a direction is given, the proceedings must be the same, as upon the trial of issues so joined in an action.

Section 64, R. S., am'd; L. 1895, ch. 946.

§ 2100. Final order; costs.

Where a final order is made in favor of the relator, it must award an absolute writ of prohibition; and it may also direct that all proceedings, or any specified proceeding, theretofore taken in the action, special proceeding, or matter, as to which the prohibition absolute issues, be vacated and annulled. The writ of consultation is abolished. Where a final order is made against the relator, it must authorize the court or judge, and the adverse party, to proceed in the action, special proceeding, or matter, as if the alternative writ had not been issued. Costs, not exceeding fifty dollars and disbursements, may be awarded to either party, as upon a motion.

Sections 63, 64, 65, R. S., am'd.

§ 2101. [Am'd, 1895, 1913.] Appeals.

An order granting or denying an application for an alternative writ of prohibition, and a final order, made as prescribed in the last section, can be reviewed only by appeal. Where the order was made by the appellate division, the execution of the order

appealed from shall not be stayed, except by an order, made at a term of the appellate division in the same department upon such terms, as to security or otherwise, as justice requires.

See L. 1873, ch. 70, § 3; also, § 2087, ante; L. 1895, ch. 946; L. 1913, ch. 573. In effect Sept. 1, 1913.

§ 2102. [Am'd, 1895.] Stay of proceedings; enlargement of time.

The proceedings upon a writ of prohibition, granted at a special term, may be stayed, and the time for making a return, or for doing any other act thereupon, as prescribed in this article, may be enlarged, as in an action, by an order made by the judge of the court, but not by any other officer. Where the writ was granted at a term of the appellate division, an order staying the proceedings, or enlarging the time to make a return, can be made only by a justice of the appellate division of the judicial department within which the writ is returnable; and where notice has been given of an application for a prohibition at a term of the appellate division, or an order has been made to show cause at such term, why a prohibition should not issue, a stay of proceedings shall not be granted, before the hearing, by any court or judge.

See § 2089, ante, and act of 1873; L. 1895, ch. 946.

ARTICLE SIXTH.

The writ of assessment of damages.

- Sec. 2106. Writ defined.
2104. Application therefor.
2105. When made by attorney-general or district-attorney.
2106. Writ; to whom directed.
2107. Contents of writ.
2108. Notice of execution.
2109. Jury; how procured.
2110. Jury to be sworn.
2111. Jury to make inquisition.
2112. Notice of application to court thereupon.
2113. Court may set aside inquisition.
2114. Order on confirming inquisition.
2115. State treasurer to pay damages, etc., to governor.
2116. Governor to pay damages into court.
2117. Investment of money so paid.
2118. How obtained by claimant.
2119. Taking lands by the United States.

§ 2103. Writ defined.

The writ, heretofore known as the writ of ad quod damnum, shall hereafter be styled the writ of assessment of damages.

§ 2104. Application therefor.

Whenever the governor of the State is authorized by law, to take possession of any real property within the State, for the use of the people of the State, and he cannot agree with the owner or owners thereof for its purchase, he may cause application to be made to the supreme court, at a special term thereof, for a writ of assessment of damages, which must be granted accordingly.

2 R. S. 536, § 66 (3 Edm. 610).

§ 2105. When made by attorney-general or district-attorney.

The attorney-general, or district-attorney of the county in which the real property is situated, must, when the governor so directs, make the application, in the name of the governor; and must conduct the subsequent proceedings, under the governor's direction.

§ 2106. Writ; to whom directed.

The writ must be directed to the sheriff of the county in which the real property to be taken is situated, unless the court directs the damages for the taking to be assessed by a jury of another county; in which case the writ must be issued to the sheriff of the county, from which the jury is directed to be taken.

Id., part of § 66, am'd. See §§ 1070 and 1071, ante

§ 2107. Contents of writ.

The writ must describe the real property to be taken, with the like certainty as is required in a complaint in an action of ejectment. It must command the sheriff, to whom it is directed, to inquire, by the oaths of twelve men of his county, qualified to act as trial jurors in a court of record, whether the owner or owners of the real property, or any of them, will sustain any

damages by the taking thereof, for the use of the people of the State; and, if so, the amount thereof; and that he return the writ to the supreme court, without delay, with the finding of the jury thereupon.

2 R. S. 588, § 67.

§ 2108. Notice of execution.

The sheriff, immediately after the delivery of the writ to him, must give notice of the time when, and the place where, the writ will be executed, by publishing the notice, once in each week, for at least three successive weeks, in a newspaper printed in his county.

Id., § 68.

§ 2109. [Am'd, 1895.] Jury; how procured.

The sheriff must notify twelve men of his county, qualified to act as trial jurors in a court of record, to attend at the time and place, and for the purpose, specified in the notice. Each juror must be notified, as a juror is notified to attend a trial term of the supreme court. Upon his failure to attend, when duly notified, his attendance may be compelled by attachment, and proceedings may be taken against him, and he may be punished thereupon, by the supreme court, as where a juror duly notified, fails to attend at a trial term thereof. The sheriff may require the attendance of a talesman, in place of a juror notified and not appearing; or he may adjourn the proceedings, for the purpose of punishing the defaulting juror, or compelling his attendance.

Id., part of § 69; L. 1895, ch. 946.

§ 2110. Juror to be sworn.

When a jury has been procured, the sheriff must, before the jurors proceed to the inquiry commanded by the writ, administer to each of them an oath, that he will diligently inquire concerning the matters specified in the writ, and will give a true verdict, according to the best of his judgment, without favor or partiality.

Remainder of Id., § 69.

§ 2111. Jury to make inquisition.

After being sworn as prescribed in the last section, the jury must view all the real property described in the writ, and consider the value thereof. They may, in the discretion of a majority of them, hear such testimony as may be offered by any person appearing, respecting the value. They must thereupon assess the damages, which the owner or owners of the real property will sustain, by being deprived thereof. When the real property consists of two or more distinct parcels, owned, or claimed to be owned, by different persons, the jury must assess separately the value of each distinct parcel, if the writ requires them so to do, or if a majority of them think proper so to do. If they cannot agree, after a reasonable time, the sheriff may discharge them, and publish a new notice, and procure a new jury. When the jurors have agreed, they must make an inquisition, stating the sum to be paid, by the people of the State, for taking each distinct parcel, or the whole, as the case requires. The inquisition must be signed by each juror, and by the sheriff; and the sheriff must immediately thereafter

file the inquisition and the writ, with his return to the writ, in the office of the clerk of the county in which the real property is situated.

2 R. S. 568, § 70.

§ 2112. Notice of application to court thereupon.

Within three months after the writ, and the return thereto, with the inquisition thereupon, have been filed, as prescribed in the last section, the attorney-general, or district-attorney, having charge of the proceeding, must cause to be published, a notice, directed, generally, to all the owners and persons interested in the real property; describing the property, in general concise terms; stating when and where the writ, return, and inquisition were filed, and requiring the persons notified to show cause, at a special term of the supreme court, to be held at a time and at a place specified in the notice, why the inquisition should not be confirmed; or, if the governor so directs, why the inquisition should not be set aside. The notice must be published, at least once in each week, for three successive weeks, in a newspaper printed in the county, and also in the newspaper printed at Albany, in which legal notices are required to be published.

§ 2113. Court may set aside inquisition.

At the time and place specified in the notice, the court must examine into the inquisition, and hear such allegations, and affidavits, or other written proofs, as may be presented in behalf of the people, or any owner, or person interested. If the court then, or at the time and place to which the matter is adjourned, determines that the inquisition is, in any respect, excessive, unjust or otherwise materially defective, it may set aside the whole or any part thereof; and may direct that another writ issue, or another inquisition be taken, to supply the defects.

2 R. S. 568, § 71, am'd.

§ 2114. Order on confirming inquisition.

If it appears to the court, that the writ has been duly executed, an order must be made, and entered in the office of the clerk of the county, in which the real property to be taken is situated, declaring that the people of the State, upon paying into court the amount of the damages assessed by the inquisition, shall be entitled to an absolute estate in the real property described in the writ, and in the appurtenances belonging thereto.

Id., § 72, am'd. See § 2116, post.

§ 2115. State treasurer to pay damages, etc., to governor.

The State treasurer, on the warrant of the comptroller, must pay to the governor, out of any money in the treasury, appropriated for that purpose, sufficient money to pay the damages assessed, pursuant to the foregoing provisions of this article, and the costs and expenses of the proceedings.

Id., § 73, am'd; 1 R. S. 170, 177, § 1 (1 Edm. 170, 177)

§ 2116. Governor to pay damages into court.

Immediately after the receipt by the governor, as prescribed in the last section, of sufficient money to pay the damages, he must pay it into court; and thereupon the absolute title to the real property so to be taken, vests in the people of the State.

See id., § 72.

§ 2117. [Am'd, 1895.] Investment of money so paid.

If an application for the money paid into court is not made, as prescribed in the next section, within sixty days after the payment into court, the appellate division of the supreme court in that judicial department, may provide, by order, for the investment, under the direction of the court, of the money, and of the interest to arise therefrom, in permanent securities, for the benefit of the owners.

2 R. S. 588, § 74, am'd; L. 1895, ch. 946.

§ 2118. [Am'd, 1895.] How obtained by claimant.

A person claiming to have been an owner of or interested in, the property, when it was so taken, may present to the appellate division of the supreme court, at a term thereof, held in the judicial department embracing the county, wherein the property is situated, a petition, praying for the payment to him of the whole or any part of the money so paid into court, or of the income remaining uninvested, or both; or for the transfer to him of the whole or any part of the securities, in which it has been invested. The court must thereupon take such measures, as it deems proper, to ascertain the rights and interests of the petitioner, and of all other persons, who were owners of or interested in the property, or who are personal representatives, or heirs, of owners or persons so interested, and to cause notice of the application to be given to those persons; and it must cause the money to be paid, or the securities to be transferred, to the several persons entitled thereto, in accordance with the rights and interests thus ascertained.

Id., § 75 and part of § 74, am'd and consolidated; L. 1895, ch. 946.

§ 2119. Taking lands by the United States.

When the legislature of the State consents to the taking of any real property within the State, for the use of the people of the United States, a writ of assessment of damages may be issued; and the proceedings thereupon must be in accordance with the provisions of this article; except that the application for the writ must be made, and the subsequent proceedings must be conducted, by the attorney of the United States, for the district embracing the county wherein the real property is situated.

Id., § 76, am'd.

ARTICLE SEVENTH.

The writ of certiorari, to review the determination of an inferior tribunal.

- Sec. 2120. Cases where writ may issue.
 2121. 2122. Cases where it cannot issue.
 2123. When issued from supreme court.
 2124. When from another court.
 2125. Limitation of time for review.
 2126. Id.; in case of disability.
 2127. Application for writ; where and how made.
 2128. When notice necessary; service thereof.
 2129. To whom writ directed.
 2130. Mode of service.
 2131. Stay of proceedings.
 2132. When and where writ returnable.
 2133. Subsequent proceedings as in an action.
 2134. Return; when and how made.
 2135. Id.; how compelled; fees for making.
 2136. Id.; after term of office expired.
 2137. When third person may be brought in.
 2138. Hearing upon return.
 2139. Id.; upon affidavits.
 2140. Questions to be determined.
 2141. Final order upon the hearing.
 2142. Restitution may be awarded.
 2143. Costs.
 2144. Entry and enrollment of final order.
 2145. Effect thereof.
 2146. "Body or officer"; "determination"; what they include.
 2147. Application of this article to certain special cases.
 2148. Id.; to civil cases only.

§ 2120. Cases where writ may issue.

The writ of certiorari regulated in this article, except the writ specified in section 2124 of this act, is issued to review the determination of a body or officer. It can be issued in one of the following cases only:

1. Where the right to the writ is expressly conferred, or the issue thereof is expressly authorized, by a statute.
2. Where the writ may be issued at common law, by a court of general jurisdiction, and the right to the writ, or the power of the court to issue it, is not expressly taken away by a statute.

§ 2121. Cases where it cannot issue.

A writ of certiorari cannot be issued, to review a determination, made, after this article takes effect, in a civil action or special proceeding, by a court of record, or a judge of a court of record.

See §§ 1356 and 1357, also § 2, ante.

§ 2122. The same.

Except as otherwise expressly prescribed by a statute, a writ of certiorari cannot be issued, in either of the following cases:

1. To review a determination, which does not finally determine the rights of the parties, with respect to the matter to be reviewed.
2. Where the determination can be adequately reviewed, by an appeal to a court, or to some other body or officer.
3. Where the body or officer, making the determination, is expressly authorized, by statute, to rehear the matter, upon the relator's application; unless the determination to be reviewed

was made upon a rehearing, or the time within which the relator can procure a rehearing has elapsed.

§ 2123. [Am'd, 1895.] When issued from supreme court.

A writ of certiorari can be issued only out of the supreme court, except in a case where another court is expressly authorized by statute to issue it.

L. 1895, ch. 946.

§ 2124. When from another court.

Any court of record, exercising jurisdiction of an appellate nature, may issue a writ of certiorari, requiring the body or officer whose proceedings are under review, to make a return to the court issuing the writ, at a time and place, fixed by the court, and designated in the writ, for the purpose of supplying any diminution, variance or other defect, in the record or other papers, before the court issuing the writ, in any case where justice requires that the defect should be supplied, and adequate relief cannot be obtained by means of an order.

2 R. S. 599, § 45 (2 Edm. 621). See § 1215, ante.

§ 2125. Limitation of time for review.

Subject to the provisions of the next section, a writ of certiorari to review a determination must be granted and served, within four calendar months after the determination to be reviewed becomes final and binding, upon the relator, or the person whom he represents, either in law or in fact.

§ 2126. [Am'd, 1895.] Id.; in case of disability.

The appellate division of the supreme court may grant the writ, at any time within twenty months after the expiration of the time limited in the last section, where the relator, or the person whom he represents, was at the time when the determination to be reviewed became final and binding upon him, either

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life.

L. 1895, ch. 946. See § 2091, ante.

§ 2127. [Am'd, 1895.] Application for writ; where, and how made.

An application for the writ must be made by, or in behalf of, a person aggrieved by the determination to be reviewed; must be founded upon an affidavit, or a verified petition, which may be accompanied by other written proof; and must show a proper case for the issuing of the writ. It can be granted only at the term of the appellate division of the supreme court or at special term: and the granting or refusal thereof is discretionary with the court.

L. 1847, ch. 280, § 17 (4 Edm. 561); L. 1895, ch. 946.

§ 2128. When notice necessary; service thereof.

Until provision is made, in the general rules of practice, for requiring, or dispensing with notice of the application for the writ, the court to which the application for the writ is made, may, in its discretion, require or dispense with notice. A notice, when it is necessary, must be served, with copies of the

papers upon which the application is to be made, upon the body or officer, whose determination is to be reviewed, or upon such other person as the court directs, as prescribed in this article for the service of a writ of certiorari. The service must be made, at least eight days before the application, unless the court, by an order to show cause, prescribes a shorter time. Where notice is given, the person served may produce affidavits or other written proofs, upon the merits, in opposition to the application.

§ 2129. To whom writ directed.

The writ must be directed to the body or officer, whose determination is to be reviewed; or to any other person having the custody of the record or other papers to be certified; or to both, if necessary. Where it is brought to review, the determination of a board or body, other than a court, if an action would lie against the board or body, in its associate or official name, it must be directed to the board or body, by that name; otherwise it must be directed to the members thereof, by their names.

§ 2130. Mode of service.

A writ of certiorari must be served as follows, except where different directions, respecting the mode of service thereof, are given by the court granting it:

1. Where it is directed to a person or persons by name, or by his or their official title or titles, or to a municipal corporation, it must be served, upon each officer or other person, to whom it is so directed, or upon the corporation, in the same manner as a summons in an action brought in the supreme court, except as prescribed in the next two subdivisions of this section.

2. Where it is directed to a court, or to the judges of a court, having a clerk appointed pursuant to law, service upon the court, or the judges thereof, may be made by filing the writ with the clerk.

3. Where it is to be served upon any other board or body, or upon the members thereof, it may be served as prescribed in section 2071 of this act, for service, upon a like board or body, of an alternative writ of mandamus.

See § 2071, ante; 2 R. S. 602, § 68 (2 Edm. 625), and 2 R. S. 599, § 45 (2 Edm. 621).

§ 2131. Stay of proceedings.

Except as prescribed in this section, a writ of certiorari does not stay the execution of the determination to be reviewed, or affect the power of the body or officer, to which or to whom it is addressed. The court, which grants the writ, may in its discretion, and upon such terms, as to the security or otherwise, as justice requires, direct by a clause in the writ, or by a separate order, that the execution of the determination be stayed, pending the certiorari, and until the further direction of the court. A bond, undertaking, or other security, given to procure such a stay, is valid and effectual, according to its terms, in favor of a person beneficially interested in upholding the determination to be reviewed, who is admitted as a party to the special proceeding, as prescribed in section 2137 of this act.

§ 2132. When and where writ returnable.

A writ of certiorari must be made returnable, within twenty days after the service thereof, at the office of the clerk of the

court. If it was issued from the supreme court, it must be made returnable at the office of the clerk of the county, designated therein, wherein the determination to be reviewed was made; and if the county, designated in the writ, is not the proper county, the court, upon motion, may amend the writ accordingly. Thereupon all papers on file must be transferred to the clerk of the county, where the writ is made returnable by the amendment.

See § 2138, post.

§ 2133. Subsequent proceedings as in an action.

After a writ of certiorari has been issued, the time to make a return thereto may be enlarged, or any other order may be made, or proceeding taken, in the cause, in relation to any matter not provided for in this article, as a similar proceeding may be taken in an action, brought in the same court, and triable in the county where the writ is returnable.

§ 2134. Return; when and how made.

The clerk, with whom a writ of certiorari is filed, and each person, upon whom a writ of certiorari is served as prescribed in section 2130 of this act, must make and annex to the writ, or to the copy thereof served upon him, a return, with a transcript annexed, and certified by him, of the record or proceedings, and a statement of the other matter, specified in and required by the writ. The return must be filed in the office where the writ is returnable, according to the command thereof.

2 R. S. 599, §§ 45 and 46 (2 Edm. 621).

§ 2135. Id.; how compelled; fees for making.

If a return is defective, the court may direct a further return. An omission to make a return, as required by a writ of certiorari, or by an order for a further return, may be punished, as a contempt of the court. But a judge or clerk shall not be thus punished, unless the relator, before the time when the return is required, pays him, for his return, the sum of two dollars, and, in addition, ten cents for each folio of the copies of papers required to be returned.

See 2 R. S. 576, § 88 (2 Edm. 596), and § 2005, ante.

§ 2136. Id.; after term of office expired.

A writ of certiorari may be issued to, and a return to a writ of certiorari may be made by, an officer, whose term of office has expired. Such an officer may be punished for a failure to make a return to the writ, as required thereby; or to make a further return, as required by an order for that purpose.

§ 2137. [Am'd, 1895.] When third person may be brought in.

Upon the application of a person, specially and beneficially interested in upholding the determination to be reviewed, the court may, in its discretion, admit him as a party defendant in the special proceedings, upon such terms as justice requires. And a term of the appellate division of the supreme court, at which the cause is noticed for hearing, and is placed upon the calendar, may, in a proper case, direct that notice of the pendency of the special proceeding be given to any person, in such a manner as it thinks

proper; and may suspend the hearing until notice is given accordingly.

L. 1895, ch. 946.

§ 2138. [Am'd, 1895.] Hearing upon return.

The cause must be heard at a term of the appellate division of the supreme court, held within the judicial department, embracing the county where the writ was returnable. Either party may notice it for hearing, at any time after the return is complete. Except as prescribed in the next section, it must be heard upon the writ and return, and the papers upon which the writ was granted.

L. 1895, ch. 946.

§ 2139. Id.; upon affidavits.

If the officer or other person, whose duty it is to make a return, dies, absconds, removes from the State, or becomes insane, after the writ is issued, and before making a return, or after making an insufficient return; and it appears that there is no other officer or person, from whom a sufficient return can be procured by means of a new certiorari; the court may, in its discretion, permit affidavits, or other written proofs, relating to the matters not sufficiently returned, to be produced, and may hear the cause accordingly. The court may also, in its discretion, permit either party to produce affidavits, or other written proofs, relating to any alleged error of fact, or any other question of fact, which is essential to the jurisdiction of the body or officer, to make the determination to be reviewed, where the facts, in relation thereto, are not sufficiently stated in the return, and the court is satisfied that they cannot be made to appear, by means of an order for a further return.

2 R. S. 271, § 261 (2 Edm. 260); Co. Proc., § 363.

§ 2140. Questions to be determined.

The questions, involving the merits, to be determined by the court upon the hearing, are the following, only:

1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.

2. Whether the authority, conferred upon the body or officer, in relation to that subject-matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination.

3. Whether, in making the determination, any rule of law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator,

4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination.

5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court, triable by a jury, would be set aside by the court, as against the weight of evidence.

§ 2141. Final order upon the hearing.

The court, upon the hearing, may make a final order, annulling or confirming, wholly or partly, or modifying, the determination reviewed, as to any or all of the parties.

L. 1868, ch. 828, § 5.

§ 2142. Restitution may be awarded.

Where the determination reviewed is annulled or modified, the court may order and enforce restitution, in like manner, with like effect and subject to the same conditions, as where a judgment is reversed upon appeal.

See § 1902, ante.

§ 2143. Costs.

Costs, not exceeding fifty dollars and disbursements, may be awarded by the final order, in favor of or against either party, in the discretion of the court,

See §§ 2086 and 2100, ante; also, § 2007, ante.

§ 2144. Entry and enrollment of final order.

The final order of the court upon the certiorari must be entered in the office of the clerk where the writ was returnable. But before it can be enforced, an enrollment thereof must be filed. For that purpose, the clerk must attach together, and file in his office, the papers upon which the cause was heard; a certified copy of the final order; and a certified copy of each order, which in any way involves the merits, or necessarily affects the final order.

See §§ 1237, 1345, and 1354, ante.

§ 2145. Effect thereof.

The filing of the enrollment in the office of the clerk where the final order is entered, as prescribed in the last section, is a sufficient authority for any proceeding, by or before the body which, or the officer who, made the determination reviewed, which the final order of the court directs or permits. But where the execution of the final order is stayed by an appeal to the court of appeals, the proceedings below are stayed in like manner.

See § 1345, ante.

§ 2146. "Body or officer"; "determination"; what they include.

The expression, "body or officer", as used in this article, includes every court, tribunal, board, corporation, or other person, or aggregation of persons, whose determination may be reviewed by a writ of certiorari; and the word, "determination", as used in this article, includes every judgment, order, decision, adjudication, or other act of such a body or officer, which is subject to be so reviewed.

§ 2147. Application of this article to certain special cases.

Where the right to a writ of certiorari is expressly conferred, or the issuing thereof is expressly authorized, by a statute, passed before, and remaining in force after, this article takes effect, this article does not vary, or affect in any manner, any provision of the former statute, which expressly prescribes a different regulation, with respect to any of the proceedings upon the certiorari to be issued thereunder.

§ 2148. Id.; to civil cases only.

This article is not applicable to a writ of certiorari, brought to review a determination made in any criminal matter, except a criminal contempt of court.

CHAPTER XVII.

Certain Special Proceedings Instituted Without Writ.

- TITLE I.**—Proceedings Relating to Insolvent Debtors and to Prisoners.
- TITLE II.**—Summary Proceedings to Recover the Possession of Real Property.
- TITLE III.**—Proceedings to Punish a Contempt of Court, other than a Criminal Contempt.
- TITLE IV.**—Proceedings to Collect a Fine.
- TITLE V.**—Proceedings to Discover the Death of a Tenant for Life.
- TITLE VI.**—Proceedings for the Appointment of a Committee of the Person and of the Property of a Lunatic, Idiot, or a Habitual Drunkard; General Powers and Duties of the Committee.
- TITLE VII.**—Proceedings for the Disposition of the Real Property of an Infant, Lunatic, Idiot, or Habitual Drunkard.
- TITLE VIII.**—Arbitrations.
- TITLE IX.**—Proceedings to Foreclose a Mortgage by Advertisement.
- TITLE X.**—Proceedings to Change the Name of an Individual.
- TITLE XI.**—Proceedings for the Voluntary Dissolution of a Corporation.
- TITLE XII.**—Proceedings Supplementary to an Execution Against Property.

TITLE I

Proceedings relating to insolvent debtors and to prisoners.

- Article 1.** Discharge of an insolvent from his debts.
2. Exemption from arrest, or discharge from imprisonment, of an insolvent debtor.
 3. Discharge of an imprisoned judgment debtor from imprisonment.
 4. Care of the property of a person confined for crime.

ARTICLE FIRST.

Discharge of an insolvent from his debts.

- Sec. 2149.** Who may be discharged.
- 2150.** To what court application to be made.
- 2151.** Contents of petition.
- 2152.** Consent of creditors to be annexed.
- 2153.** Consent of executor, administrator, receiver, etc.
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§ 2231. When tenant may be removed.

In either of the following cases, a tenant or lessee at will, or at sufferance, or for part of a year, or for one or more years, of real property, including a specific or undivided portion of a house, or other dwelling, and his assigns, undertenants, or legal representatives, may be removed therefrom, as prescribed in this title:

1. [Am'd, 1894.] Where he holds over and continues in possession of the demised premises, or any portion thereof, after the expiration of his term, without the permission of the landlord; including, elsewhere than in the city of New York and Brooklyn, a case where the person to be removed became the occupant of the premises as a servant or employee and the relation of master and servant or employer and employee has been lawfully terminated or the time fixed for such occupancy by the agreement between the parties, has expired; but if by such agreement the servant was to be permitted to occupy such premises for a period beyond the term of employment such removal shall not be had under this subdivision unless such period so permitted for occupancy has expired, or the relation of master and servant or employer and employee was lawfully terminated before the expiration of such term of employment; but nothing in this subdivision contained shall be construed as

preventing the removal of such occupant in any other lawful manner.

L. 1804, ch. 333.

2. Where he holds over, without the like permission, after a default in the payment of rent, pursuant to the agreement under which the demised premises are held, and a demand of the rent has been made, or at least three days' notice in writing, requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served, in behalf of the person entitled to the rent, upon the person owing it, as prescribed in this title for the service of a precept.

3. Where in any city in this State he holds over and continues in possession of the demised premises, or any portion thereof, after default in the payment, for sixty days after the same shall be payable, of any taxes or assessments levied on such demised premises which he has agreed in writing to pay pursuant to the agreement under which the demised premises are held, and a demand for the payment of such taxes or assessments has been made, or at least three days' notice in writing, requiring, in the alternative, the payment thereof and of any interest and penalty thereon, or the possession of the premises, has been served, in behalf of the landlord, upon the lessee, as prescribed in this title for the service of a precept. An acceptance of any rent by the lessor or his legal representatives shall not be construed as a waiver of the agreement of the lessee to pay taxes or assessments, so as to preclude the lessor from the benefits of this chapter.

4. Where he, being in possession under a lease for a term of three years or less, has, during the term, taken the benefit of an insolvent act, or has been adjudicated a bankrupt, under a bankrupt law of the United States.

5. [Am'd, 1913.] Where the demised premises, or any part thereof, are used or occupied as a bawdy-house or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business.

L. 1913, ch. 448. In effect Sept. 1, 1913.

2 R. S. 512, § 28 (2 Edm. 529), am'd; L. 1849, ch. 193; also, § 55, added by L. 1868, ch. 764, § 1 (7 Edm. 335), and L. 1873, ch. 588, § 1 (9 Edm. 653), consolidated and am'd.

§ 2232. Person holding over land sold, etc., may be removed.

In either of the following cases, a person, who holds over and continues in possession of real property, after notice to quit the same has been given, as prescribed in section 2236 of this act, and his assigns, tenants, or legal representatives, may be removed therefrom, as prescribed in this title:

1. Where the property has been sold by virtue of an execution against him, or a person under whom he claims, and a title under the sale has been perfected.

2. Where the property has been duly sold, upon the foreclosure, by proceedings taken as prescribed in title ninth of this chapter, of a mortgage, executed by him, or a person under whom he claims, and the title under the foreclosure has been duly perfected.

3. Where he occupies or holds the property, under an agreement with the owner to occupy and cultivate it upon shares, or for a share of the crops, and the time, fixed in the agreement for his occupancy, has expired.

4. [Am'd, 1894.] Where he, or the person to whom he has succeeded, has intruded into, or squatted upon, any real property, without the permission of the person entitled to the possession thereof, and the occupancy, thus commenced, has continued without permission from the latter; or, after a permission given by him has been revoked, and notice of the revocation given to the person or persons to be removed.

Subd. 4 of § 28, R. S., am'd; L. 1874, ch. 208, and § 81, R. S.; L. 1894, ch. 232.

§ 2233. Id.; in case of forcible entry or detainer.

An entry shall not be made into real property, but in a case where entry is given by law; and, in such a case, only in a peaceable manner, not with strong hand, nor with multitude of people. A person who makes a forcible entry forbidden by this section, or who, having peaceably entered upon real property, holds the possession thereof by force, and his assigns, under-tenants, and legal representatives, may be removed therefrom, as prescribed in this title.

2 R. S. 507, §§ 1 and 2 (2 Edm. 523).

§ 2234. [Am'd, 1895.] Application; to whom made.

Application for removal of a person from real property, as prescribed in this title, may be made to the county judge or special county judge of the county or a justice of the peace of the city or town or the mayor or recorder of the city wherein the real property, or a portion thereof, is situated. Application may also be made, if the property, or a portion thereof, be situated in the city of New York to a judge of the city court of the city of New York or the district court of the district within which the property, or a portion thereof, is situated, or if the judge of such court be for any reason disqualified, to the district court of an adjoining district; if in the city of Brooklyn, to a police justice of that city; if in the city of Albany, or in the city of Troy, to a justice of the justices' court of that city; if in the city of Yonkers, to the city judge of that city; if in the cities of Syracuse, Rochester or Buffalo, to a judge of the municipal court of said cities. Where the property is situated in an incorporated village, the boundaries of which embrace portions of two or more towns, application may be made to a justice of the peace of either town, who keeps an office in the village.

Section 28, R. S., am'd; L. 1849, ch. 193 (2 Edm. 529); Const., art. 6, § 15; Const. 1846, art. 6, § 15; L. 1849, ch. 300; L. 1851, ch. 108; Const. 1869, art. 6, § 16; L. 1850, ch. 205, § 3; L. 1878, ch. 259, § 1; L. 1852, ch. 324, § 1; L. 1857, ch. 344, § 77, subd. 2; L. 1863, ch. 189 (6 Edm. 86); Co. Proc., § 66, am'd; L. 1870, ch. 741, § 4 (7 Edm. 774); L. 1877, ch. 187; L. 1870, ch. 386; L. 1821, ch. 47, § 1; L. 1834, ch. 271, §§ 1 and 19; L. 1872, ch. 866, § 1; L. 1873, ch. 61, § 2; L. 1878, ch. 186, § 7; L. 1876, ch. 196, §§ 5 and 16; L. 1849, ch. 125, § 26; L. 1870, ch. 470, § 13; L. 1854, ch. 96, § 26; L. 1857, ch. 361, § 6; L. 1895, ch. 946.

§ 2235. [Am'd, 1913.] Who can maintain proceedings; contents of petition.

The application may be made by the landlord or lessor of the demise premises; the purchaser, upon the execution or foreclosure sale; the person forcibly put out or kept out; the person with whom, as owner, the agreement was made, or the owner of the property occupied under an agreement, to cultivate the property upon shares, or for a share of the crops; or the person lawfully entitled to the possession of the property intruded into

or squatted upon, as the case requires; or by the legal representative, agent, or assignee of the landlord, purchaser, or other person, so entitled to apply, or by the person or corporation authorized to proceed under section twenty-two hundred and thirty-seven of this act. The applicant must present to the judge or justice, a written petition, verified in like manner as a verified complaint in an action brought in the supreme court; describing the premises of which the possession is claimed, and the interest therein of the petitioner, or the person whom he represents; stating the facts, which, according to the provisions of this title, authorize the application by the petitioner, and the removal of the person in possession; naming, or otherwise intelligibly designating the person or persons against whom the special proceeding is instituted, and, if there are two or more such persons, and some are undertenants or assigns, specifying who are principals or tenants, and who are undertenants or assigns; and praying for a final order to remove him or them accordingly.

Sections 2, 3, and 29, R. S., am'd and consolidated. See 1 T. & C. 533. Am'd L. 1913, ch. 448. In effect Sept. 1, 1913.

§ 2236. Notice to be given in certain cases.

Where the person to be removed is a tenant at will, or at sufferance, the petition must state the facts, showing that the tenancy has been terminated, by giving notice, as required by law. Where the application is made in a case specified in section 2232 of this act, the petition must state that a notice, in behalf of the applicant, requiring all persons occupying the property to quit the same, by a day specified, has been either served personally upon the person or persons to be removed, or affixed conspicuously upon the property, at least ten days before the day specified therein.

Section 31, R. S., and L. 1857, ch. 396, §§ 2 and 3 (4 Edm. 617).

§ 2237. [Am'd, 1913.] Petition in case of bawdy-houses, etc.

An owner or tenant, including a tenant of one or more rooms of an apartment house or tenement house, of any premises within two hundred feet from other demised real property used or occupied in whole or in part, as a bawdy-house, or house, or place of assignation for lewd persons, or for purposes of prostitution, or any domestic corporation organized for the suppression of vice, subject to or which submits to visitation by the state board of charities, and possesses a certificate from such board of such fact and of conformity with its regulations, may serve personally upon the owner or landlord of the premises, so used or occupied, or upon his agent, a written notice, requiring the owner or landlord to make an application for the removal of the person so using or occupying the same. If the owner or landlord, or his agent, does not make such application, within five days thereafter; or, having made it, does not in good faith diligently prosecute it; the person or corporation giving the notice may make an application for such removal on a petition stating the jurisdictional facts, which application shall have the same effect, except as otherwise expressly prescribed in this title, as though the applicant were the owner or landlord of the premises, and shall have precedence over any similar application thereafter made by such owner or landlord or to one theretofore made by him and not prosecuted diligently and in good faith. Proof of

the ill repute of the demised premises or of the inmates thereof or of those resorting thereto shall constitute presumptive evidence of the unlawful use of the demised premises, required to be stated in the petition for removal.

Sections 56 and 61, R. S.; L. 1868, ch. 764 (7 Edm. 335). Am'd, L. 1913, ch. 448. In effect Sept. 1, 1913.

§ 2238. Precept.

The judge or justice, to whom a petition is presented, as prescribed in either of the foregoing sections of this title, must thereupon issue a precept, directed to the person or persons designated in the petition, as being in possession of the property, and requiring him or them forthwith to remove from the property, describing it, or to show cause, before him, at a time and place specified in the precept, why possession of the property should not be delivered to the petitioner, or, in the case specified in the last section, to the owner or landlord. The precept must be returnable, not less than three nor more than five days after it is issued; except that, where the proceeding is taken, upon the ground that a tenant continues in possession of demised premises after the expiration of his term, without the permission of his landlord, and the application is made on the day of the expiration of the lease, or on the next day thereafter, the precept may, in the discretion of the judge or justice, be made returnable on the day on which it is issued, at any time after twelve o'clock, noon, and before six o'clock in the afternoon.

Section 30, R. S., am'd; L. 1851, ch. 460; L. 1868, ch. 828, § 1 (7 Edm. 355).

§ 2239. Id.; in New-York city.

In the city of New-York, where the application is made to a district court, the petition must be filed with, and the precept must be issued by, the clerk of the court; and the precept must be made returnable before the court, at the place designated, pursuant to law, for holding the court; and all subsequent proceedings in the cause must be had at that place, except as otherwise prescribed in section 2246 of this act. If, upon the return of the precept, or upon an adjourned day, the justice is unable, by reason of absence from the court room or sickness, to hear the cause, or it is shown by affidavit that he is for any reason disqualified to sit in the cause, or is a necessary and material witness for either party, a justice of any other district court of the city may act in his place at the same court room.

L. 1863, ch. 189, (6 Edm. 86); Co. Proc., § 66; L. 1876, ch. 356, § 1; L. 1877, ch. 187, § 1. See § 3208, post.

§ 2240. [Am'd, 1913.] Id.; how served.

The precept must be served as follows:

1. By delivering, to the person to whom it is directed, or, if it is directed to a corporation, to an officer of the corporation, upon whom a summons, issued out of the supreme court, in an action against the corporation, might be served, a copy of the precept, together with a copy of the petition, and at the same time showing him the original precept.

2. If the person, to whom the precept is directed, resides in the city or town in which the property is situated, but is absent from his dwelling-house, service may be made by delivering a copy thereof, together with a copy of the petition, at his

dwelling-house, to a person of suitable age and discretion, who resides there; or, if no such person can, with reasonable diligence, be found there, upon whom to make service, then by delivering a copy of the precept and petition, at the property sought to be recovered, either to some person of suitable age and discretion residing there, or if no such person can be found there, to any person of suitable age and discretion employed there.

3. Where service cannot, with reasonable diligence, be made, as prescribed in either of the foregoing subdivisions of this section, by affixing a copy of the precept and petition upon a conspicuous part of the property.

If the precept is returnable on the day on which it is issued, it must be served at least two hours before the hour at which it is returnable; in every other case, it must be served at least two days before the day on which it is returnable.

Section 32, R. S.; L. 1857, ch. 684, and L. 1868, ch. 828 (7 Edm. 356). Am'd by L. 1913, ch. 277. In effect Sept. 1, 1913.

§ 2241. Duty of person to whom copy of precept is delivered.

A person, to whom a copy of a precept, directed to another, is delivered, as prescribed in this title, must, without any avoidable delay, deliver it to the person to whom it is directed, if he can be found within the same town or city; or, if he cannot be so found, to his agent therein; and if neither can be so found, after the exercise of reasonable diligence, before the time when the precept is returnable, to the judge or justice who issued the same, at the time of the return thereof, with a written statement indorsed thereupon, that he has been unable, after the exercise of reasonable diligence, to find the person to whom the precept is directed, or his agent, within the town or city. A person, who wilfully violates any provisions of this section, is guilty of a misdemeanor; and, if he is a tenant upon the property, forfeits to his landlord the value of three years' rent of the premises occupied by him. A copy of this section must be indorsed upon each copy of a precept, served otherwise than personally upon the person to whom it is directed.

L. 1868, ch. 828, § 3 (7 Edm. 356); and 1 E. S. 748, § 27 (1 Edm. 699).

§ 2242. When precept to be served on landlord of bawdy-house, etc.

Where the case is within section 2237 of this act, the precept must be directed to and served upon the owner or landlord, or his agent, and also upon the tenant or occupant of the property. Either or both of them may, upon the return day, appear and show cause why the tenant or occupant should not be removed from the property.

Parts of §§ 63 and 64; L. 1868, ch. 764 (7 Edm. 336).

§ 2243. Proof of service of precept.

At the time when the precept is returnable, the petitioner must, unless the adverse party appears, make due proof of the service thereof, showing the time, and the place and manner of service; and, unless service was made personally upon the adverse party, or by affixing a copy of the precept, the name of the person to whom a copy of the precept was delivered, if his name can be ascertained with reasonable diligence. Where serv-

ice is made by a sheriff, constable, or marshal, it may be proved by his certificate, stating the facts.

Section 32, R. S., also § 32, am'd; L. 1868, ch. 828 (7 Edm. 328).

§ 2244. [Am'd, 1898.] **Answer.**

At the time when the precept is returnable without waiting as prescribed in an action before a justice of the peace, or in a district court in the city of New York, the person to whom it is directed or his landlord, or any person in possession or claiming possession of the premises, or a part thereof, may file with the judge or justice who issued the precept, or with the clerk of the court, a written answer, verified in like manner as a verified answer in an action in the supreme court, denying generally the allegations, or specifically any material allegation of the petition, or setting forth a statement of any new matter constituting a legal or equitable defence, or counterclaim. Such defence or counterclaim may be set up and established in like manner as though the claim for rent in such proceeding was the subject of an action.

L. 1893, ch. 705.

§ 2245. **Issues upon forcible entry or detainer.**

Where the application is founded upon an allegation of forcible entry or forcible holding out, the petitioner must allege and prove that he was peaceably in actual possession of the property, at the time of a forcible entry, or in constructive possession, at the time of a forcible holding out; and the adverse party must either deny the forcible entry, or the forcible holding out, or allege, in his defence, that he, or his ancestor, or those whose interest he claims, had been in quiet possession of the property, for three years together next before the alleged forcible entry or detainer; and that his interest is not ended or determined, at the time of the trial.

Id.; §§ 6 and 11, am'd.

§ 2246. **In N. Y. district court, cause may be transferred to another court for trial.**

In a district court of the city of New-York, at the time of joining issue, the justice sitting in the cause may, in his discretion, upon motion of either party, or, if no justice is present, the clerk may, by consent of both parties, make an order transferring the cause for trial, to a district court of an adjoining district, which thereupon has the same jurisdiction and power at its own court house, as if the property was situate within its district.

L. 1877, ch. 187, § 2, am'd.

§ 2247. [Am'd, 1881 and 1882.] **Trial.**

The issues joined by the petition and answer must be tried by the judge or justice, unless either party to such proceedings shall, at the time designated in such precept for showing cause, demand a jury and at the time of such demand pay to such judge or justice the necessary costs and expenses of obtaining such jury. If a jury be demanded and such costs and expenses be paid, the judge or justice with whom such petition shall be filed shall nominate twelve reputable persons qualified to serve as jurors in courts of record, and shall issue his precept directed to the sheriff or one of the constables of the county, or any constable or marshal of the city or town, commanding him to sum-

mon the persons so nominated to appear before such judge or justice at such time or place as he shall therein appoint, not more than three days from the date thereof, for the purpose of trying the said matters in difference. Six of the persons so summoned shall be drawn in like manner as jurors in justices' courts, and shall be sworn by such judge or justice well and truly to hear, try and determine the matters in difference between the parties. After hearing the allegations and proofs of the parties, the said jury shall be kept together until they agree on their verdict, by the sheriff or one of his deputies, or a constable, or by some proper person appointed by the judge or justice for that purpose, who shall be sworn to keep such jury as is usual in like cases of courts of record. If such jury cannot agree after being kept together for such time as such judge or justice shall deem reasonable, he may discharge them and nominate a new jury, and issue a new precept in manner aforesaid.

R. S. § 34.

§ 2248. Adjournment.

At the time when issue is joined, the judge or justice may, in his discretion, at the request of either party, and upon proof to his satisfaction, by affidavit or orally, that an adjournment is necessary, to enable the applicant to procure his necessary witnesses, or by consent of all the parties who appear, adjourn the trial of the issue, but not more than ten days; except by consent of all parties.

R. S. § 41.

§ 2249. Final order upon trial.

If sufficient cause is not shown upon the return of the precept; or if the verdict of the jury, or the decision of the judge or justice, upon a trial without a jury, is in favor of the petitioner; the judge or justice must make a final order, awarding to the petitioner the delivery of the possession of the property; except that, where the case is within section 2237 of this act, the final order must direct the removal of the occupant. In either case, the final order must award to the petitioner the costs of the special proceeding. If the verdict or decision is in favor of the person answering, the judge or justice must make a final order accordingly, and awarding to him the costs of the special proceeding.

Id., §§ 83, 39 and 51. See L. 1849, ch. 193 (2 Edm. 533).

§ 2250. [Am'd, 1882.] Amount of costs; how collected.

Costs, when allowed, and the fees of officers, except where a fee is specially given in chapter twenty-one of this act, must be at the rate allowed by law in an action in a justice's court, and are limited in like manner; unless the application is founded upon an allegation of forcible entry or forcible holding out; in which case, the judge or justice may award to the successful party a fixed sum as costs, not exceeding fifty dollars, in addition to his disbursements. If the final order is made by a county judge, or a special county judge, or by a mayor or recorder, an execution to collect the costs may be issued thereupon as if it was a judgment of a justice of the peace of the same city or county; and for that purpose the officer takes the place of a jus-

tice of the peace. In every other case an execution may be issued to collect the costs awarded thereby as if the final order was a judgment, rendered in the court, of which the judge or justice is the presiding officer.

Id., §§ 12, 13, 22 and part of § 51, am'd and consolidated. Am'd L. 1882, ch. 399.

§ 2251. [Am'd, 1882.] Warrant to dispossess defendant.

Where the final order is in favor of the petitioner, the judge or justice must thereupon issue a warrant, under his hand, directed to the sheriff of the county, or to any constable or marshal of the city or town, in which the property, or a portion thereof, is situated, or if it is not situated in a city, to any constable of any town in the county, describing the property, and commanding the officer to remove all persons therefrom, and also, except where the case is within section 2237 of this act, to put the petitioner into the full possession thereof.

Id., §§ 13, 33 and 39. See L. 1857, ch. 684; also, §§ 58, 59, 63, 64, and L. 1868, ch. 764 (7 Edm. 335).

§ 2252. Execution of warrant.

The officer, to whom the warrant is directed and delivered, must execute it, according to the command thereof, between the hours of sunrise and sunset.

R. S., § 40.

§ 2253. When warrant cancels lease; exception.

The issuing of a warrant for the removal of a tenant from demised premises, cancels the agreement for the use of the premises, if any, under which the person removed held them; and annuls accordingly the relation of landlord and tenant, except that it does not prevent a landlord from recovering, by action, any sum of money, which was, at the time when the precept was issued, payable by the terms of the agreement, as rent for the premises; or the reasonable value of the use and occupation thereof, to the time when the warrant was issued, for any period of time, with respect to which the agreement does not make any special provision for payment of rent.

Id., § 43, also, § 60; L. 1868, ch. 764 (7 Edm. 336).

§ 2254. [Am'd, 1885.] Warrant; when and how stayed.

The party, against whom a final order is made, requiring the delivery of possession to the petitioner, may, at any time before a warrant is issued, stay the issuing thereof; and also stay an execution to collect the costs, as follows:

1. Where the final order establishes that a lessee or tenant holds over, after a default in the payment of rent, or of taxes or assessments, he may effect a stay, by payment of the rent due, or of such taxes or assessments, and interest and penalty, if any thereon due, and the costs of the special proceeding; or by delivering to the judge or justice, or the clerk of the court, his undertaking to the petitioner, in such sum and with such sureties as the judge or justice approves, to the effect that he will pay the rent, or such taxes or assessments, and interest and penalty and costs, within ten days, at the expiration of which time a warrant may issue, unless he produces to the judge or justice satisfactory evidence of the payment.

2. Where the final order establishes that a lessee or tenant has taken the benefit of an insolvent act, or has been adjudicated a

bankrupt, he may effect a stay by paying the costs of the special proceeding, and by delivering to the judge or justice, or the clerk of the court, his undertaking to the petitioner, in such a sum and with such sureties as the judge or justice approves, to the effect, that he will pay the rent of the premises, as it has become, or thereafter becomes due.

3. Where the final order establishes that the person against whom it is made, continues in possession of real property, which has been sold by virtue of an execution against his property, he may effect a stay, by paying the costs of the special proceeding, and delivering to the judge or justice, or the clerk of the court, an affidavit, that he claims the possession of the property, by virtue of a right or title, acquired after the sale, or as guardian or trustee for another; together with his undertaking to the petitioner, in such a sum and with such sureties as the judge or justice approves, to the effect, that he will pay any costs and damages, which may be recovered against him, in an action of ejectment to recover the property, brought against him by the petitioner within six months thereafter; and that he will not commit any waste upon or injury to the property, during his occupation thereof.

R. S., § 44, am'd by L. 1857, ch. 684; and §§ 45 and 46.

§ 2255. Undertaking; how disposed of.

Where an undertaking is given, in a case specified in subdivision first of the last section, the judge or justice must deliver it to the person against whom the final order was made, upon his producing the evidence of payment, mentioned in that subdivision. If he does not produce such evidence within ten days, the judge or justice must deliver it to the petitioner. In every other case specified in the last section, the judge or justice must deliver the undertaking to the petitioner, immediately after his approval thereof.

§ 2256. Redemption by lessee.

Where the special proceeding is founded upon an allegation that a lessee holds over, after a default in the payment of rent, and the unexpired term of the lease, under which the premises are held, exceeds five years, at the time when the warrant is issued; the lessee, his executor, administrator, or assignee, may, at any time within one year after the execution of the warrant, pay or tender to the petitioner, his heir, executor, administrator, or assignee, or if, within five days before the expiration of the year, he cannot, with reasonable diligence, be found within the city or town, wherein the property, or a portion thereof, is situated, then to the judge or justice who issued the warrant, or his successor in office, all rent in arrear at the time of the payment or tender, with interest thereupon, and the costs and charges incurred by the petitioner. Thereupon the person making the payment or tender, shall be entitled to the possession of the demised premises, under the lease, and may hold and enjoy the same, according to the terms of the original demise, except as otherwise prescribed in the next section but one.

L. 1842, ch. 240, § 1 (4 Edm. 661), am'd.

§ 2257. Id., by creditor of lessee.

In a case specified in the last section, a judgment creditor of the lessee, whose judgment was docketed in the county, before the precept was issued, or a mortgagee of the lease, whose mortgage was duly recorded, in the county, before the precept was issued, may, at any time before the expiration of one year after the execution of the warrant, unless a redemption has been made as prescribed in the last section, file with the judge or justice who issued the warrant, or with his successor in office, a notice, specifying his interest and the sum due to him; describing the premises; and stating that it is his intention to redeem as prescribed in this section. If a redemption is not made by the lessee, his executor, administrator, or assignee, within a year after the execution of the warrant, the person so filing a notice, or, if two or more persons have filed such notices, the one who holds the first lien, may, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding the last day of the year, redeem for his own benefit, in like manner as the lessee, his executor, administrator, or assignee might have so redeemed. Where two or more judgment creditors or mortgagees have filed such notices, the holder of the second lien may so redeem, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding that in which the holder of the first lien might have redeemed; and the holder of the third and each subsequent lien, may redeem, in like manner, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding that in which his predecessor might have redeemed. But a second or subsequent redemption is not valid, unless the person redeeming pays or tenders to each of his predecessors who has redeemed, the sum paid by him to redeem, and also the sum due upon his judgment or mortgage; or deposits those sums with the judge or justice, for the benefit of his predecessor or predecessors.

L. 1842, ch. 240, § 1 (4 Edm. 461).

§ 2258. The last two sections qualified.

Where a redemption is made, as prescribed in either of the last two sections, the rights of the person redeeming are subject to a lease, if any, executed by the petitioner, since the warrant was issued, so far that the new lessee, his assigns, undertenants, or other representatives, may, upon complying with the terms of the lease, hold the premises so leased until twelve o'clock, noon, of the first day of May, next succeeding the redemption. And, in all other respects, the person so redeeming, his assigns and representatives, succeed to all the rights and liabilities of the petitioner, under such a lease.

§ 2259. Order to be made thereupon; liability of person redeeming.

The person redeeming, as prescribed in the last three sections, or the owner of the property so redeemed, may present to the judge or justice who issued the warrant, or to his successor in office, a petition, duly verified, setting forth the facts of the redemption, and praying for an order, establishing the rights and liabilities of the parties upon the redemption. Whereupon the judge or justice must make an order requiring the other party

to the redemption to show cause before him, at a time and place therein specified, why the prayer of the petition should not be granted. The order to show cause must be made returnable, not less than two nor more than ten days, after it is granted; and it must be served at least two days before it is returnable. Upon the return thereof, the judge or justice must hear the allegations and proofs of the parties, and must make such a final order as justice requires. The costs and expenses must be paid by the petitioner. The final order, or a certified copy thereof, may be recorded in like manner as a deed. A person, other than the lessee, who redeems as prescribed in the last three sections; succeeds to all the duties and liabilities of the lessee, accruing after the redemption, as if he was named as lessee in the lease.

§ 2260. Appeal.

An appeal may be taken from a final order, made as prescribed in this title, to the same court, within the same time, and in the same manner, as where an appeal is taken from a judgment rendered in the court, of which the judge or justice is the presiding officer, and with like effect; except as otherwise prescribed in the next two sections.

Substituted for § 47, R. S., am'd; L. 1868, ch. 828 (7 Edm. 357), § 52; L. 1849, ch. 193 (2 Edm. 534).

§ 2261. [Am'd, 1895.] Effect of appeal limited in certain cases.

The issuing or execution of the warrant can not be stayed by such an appeal, or by the giving of an undertaking thereupon, otherwise than as prescribed in the next section. An appeal can not be taken to the court of appeals, from a final determination of the appellate division of the supreme court, upon such an appeal, unless the latter court, by an order, made at the term of the appellate division where the final order is made, or the next term thereafter, allows it to be taken.

L. 1895, ch. 946.

§ 2262. [Am'd, 1895.] Warrants; how stayed on appeal.

Where an appeal is taken from a final order, awarding delivery of possession to the petitioner, which establishes that a lessee or tenant holds over, after a default in payment of rent or from an order or judgment affirming such final order, the issuing and execution of the warrant may be stayed by the order of the county judge, and in the city and county of New York by a justice of the supreme court, upon the appellant's giving the security required to perfect the appeal, and to stay the execution of the order appealed from and also an undertaking to the petitioner in a sum and with sureties approved by the county judge or in the city and county of New York by a justice of the supreme court to the effect that if, upon the appeal, a final determination is rendered against the appellant he will pay all rents accruing or to accrue upon the premises, or if there is no lease thereof the value of the use and occupation of the premises subsequent to the institution of the special proceedings.

L. 1895, ch. 946.

4. [Am'd, 1894.] Where he, or the person to whom he has succeeded, has intruded into, or squatted upon, any real property, without the permission of the person entitled to the possession thereof, and the occupancy, thus commenced, has continued without permission from the latter; or, after a permission given by him has been revoked, and notice of the revocation given to the person or persons to be removed.

Subd. 4 of § 28, R. S., am'd; L. 1874, ch. 206, and § 81, R. S.; L. 1894, ch. 232.

§ 2233. Id.; in case of forcible entry or detainer.

An entry shall not be made into real property, but in a case where entry is given by law; and, in such a case, only in a peaceable manner, not with strong hand, nor with multitude of people. A person who makes a forcible entry forbidden by this section, or who, having peaceably entered upon real property, holds the possession thereof by force, and his assigns, under-tenants, and legal representatives, may be removed therefrom, as prescribed in this title.

2 R. S. 507, §§ 1 and 2 (2 Edm. 523).

§ 2234. [Am'd, 1895.] Application; to whom made.

Application for removal of a person from real property, as prescribed in this title, may be made to the county judge or special county judge of the county or a justice of the peace of the city or town or the mayor or recorder of the city wherein the real property, or a portion thereof, is situated. Application may also be made, if the property, or a portion thereof, be situated in the city of New York to a judge of the city court of the city of New York or the district court of the district within which the property, or a portion thereof, is situated, or if the judge of such court be for any reason disqualified, to the district court of an adjoining district; if in the city of Brooklyn, to a police justice of that city; if in the city of Albany, or in the city of Troy, to a justice of the justices' court of that city; if in the city of Yonkers, to the city judge of that city; if in the cities of Syracuse, Rochester or Buffalo, to a judge of the municipal court of said cities. Where the property is situated in an incorporated village, the boundaries of which embrace portions of two or more towns, application may be made to a justice of the peace of either town, who keeps an office in the village.

Section 28, R. S., am'd; L. 1849, ch. 193 (2 Edm. 529); Const., art. 6, § 15; Const. 1846, art. 6, § 15; L. 1849, ch. 306; L. 1851, ch. 108; Const. 1869, art. 6, § 16; L. 1869, ch. 306, § 3; L. 1876, ch. 259, § 1; L. 1882, ch. 824, § 1; L. 1887, ch. 844, § 77, subd. 2; L. 1893, ch. 189 (6 Edm. 86); Co. Proc., § 66, am'd; L. 1870, ch. 741, § 4 (7 Edm. 774); L. 1877, ch. 187; L. 1870, ch. 336; L. 1881, ch. 47, § 1; L. 1834, ch. 271, §§ 1 and 19; L. 1872, ch. 802, § 1; L. 1873, ch. 61, § 2; L. 1878, ch. 186, § 7; L. 1876, ch. 190, §§ 5 and 16; L. 1849, ch. 125, § 20; L. 1870, ch. 470, § 12; L. 1854, ch. 96, § 25; L. 1857, ch. 341, § 6; L. 1895, ch. 944.

§ 2235. [Am'd, 1913.] Who can maintain proceedings; contents of petition.

The application may be made by the landlord or lessor of the demised premises; the purchaser, upon the execution or foreclosure sale; the person forcibly put out or kept out; the person with whom, as owner, the agreement was made, or the owner of the property occupied under an agreement, to cultivate the property upon shares, or for a share of the crops; or the person lawfully entitled to the possession of the property intruded into

or squatted upon, as the case requires; or by the legal representative, agent, or assignee of the landlord, purchaser, or other person, so entitled to apply, or by the person or corporation authorized to proceed under section twenty-two hundred and thirty-seven of this act. The applicant must present to the judge or justice, a written petition, verified in like manner as a verified complaint in an action brought in the supreme court; describing the premises of which the possession is claimed, and the interest therein of the petitioner, or the person whom he represents; stating the facts, which, according to the provisions of this title, authorize the application by the petitioner, and the removal of the person in possession; naming, or otherwise intelligibly designating the person or persons against whom the special proceeding is instituted, and, if there are two or more such persons, and some are undertenants or assigns, specifying who are principals or tenants, and who are undertenants or assigns; and praying for a final order to remove him or them accordingly.

Sections 2, 3, and 29, B. S., am'd and consolidated. See 1 T. & C. 533. Am'd L. 1918, ch. 448. In effect Sept. 1, 1913.

§ 2236. Notice to be given in certain cases.

Where the person to be removed is a tenant at will, or at sufferance, the petition must state the facts, showing that the tenancy has been terminated, by giving notice, as required by law. Where the application is made in a case specified in section 2232 of this act, the petition must state that a notice, in behalf of the applicant, requiring all persons occupying the property to quit the same, by a day specified, has been either served personally upon the person or persons to be removed, or affixed conspicuously upon the property, at least ten days before the day specified therein.

Section 31, B. S., and L. 1857, ch. 396, §§ 2 and 3 (4 Edm. 617).

§ 2237. [Am'd, 1913.] Petition in case of bawdy-houses, etc.

An owner or tenant, including a tenant of one or more rooms of an apartment house or tenement house, of any premises within two hundred feet from other demised real property used or occupied in whole or in part, as a bawdy-house, or house, or place of assignation for lewd persons, or for purposes of prostitution, or any domestic corporation organized for the suppression of vice, subject to or which submits to visitation by the state board of charities, and possesses a certificate from such board of such fact and of conformity with its regulations, may serve personally upon the owner or landlord of the premises, so used or occupied, or upon his agent, a written notice, requiring the owner or landlord to make an application for the removal of the person so using or occupying the same. If the owner or landlord, or his agent, does not make such application, within five days thereafter; or, having made it, does not in good faith diligently prosecute it; the person or corporation giving the notice may make an application for such removal on a petition stating the jurisdictional facts, which application shall have the same effect, except as otherwise expressly prescribed in this title, as though the applicant were the owner or landlord of the premises, and shall have precedence over any similar application thereafter made by such owner or landlord or to one theretofore made by him and not prosecuted diligently and in good faith. Proof of

the ill repute of the demised premises or of the inmates thereof or of those resorting thereto shall constitute presumptive evidence of the unlawful use of the demised premises, required to be stated in the petition for removal.

Sections 56 and 61, R. S.; L. 1868, ch. 764 (7 Edm. 335). Am'd, L. 1913, ch. 448. In effect Sept. 1, 1913.

§ 2238. Precept.

The judge or justice, to whom a petition is presented, as prescribed in either of the foregoing sections of this title, must thereupon issue a precept, directed to the person or persons designated in the petition, as being in possession of the property, and requiring him or them forthwith to remove from the property, describing it, or to show cause, before him, at a time and place specified in the precept, why possession of the property should not be delivered to the petitioner, or, in the case specified in the last section, to the owner or landlord. The precept must be returnable, not less than three nor more than five days after it is issued; except that, where the proceeding is taken, upon the ground that a tenant continues in possession of demised premises after the expiration of his term, without the permission of his landlord, and the application is made on the day of the expiration of the lease, or on the next day thereafter, the precept may, in the discretion of the judge or justice, be made returnable on the day on which it is issued, at any time after twelve o'clock, noon, and before six o'clock in the afternoon.

Section 30, R. S., am'd; L. 1851, ch. 460; L. 1868, ch. 828, § 1 (7 Edm. 355).

§ 2239. Id.; in New-York city.

In the city of New-York, where the application is made to a district court, the petition must be filed with, and the precept must be issued by, the clerk of the court; and the precept must be made returnable before the court, at the place designated, pursuant to law, for holding the court; and all subsequent proceedings in the cause must be had at that place, except as otherwise prescribed in section 2246 of this act. If, upon the return of the precept, or upon an adjourned day, the justice is unable, by reason of absence from the court room or sickness, to hear the cause, or it is shown by affidavit that he is for any reason disqualified to sit in the cause, or is a necessary and material witness for either party, a justice of any other district court of the city may act in his place at the same court room.

L. 1863, ch. 189, (6 Edm. 86); Co. Proc., § 66; L. 1876, ch. 356, § 1; L. 1877, ch. 187, § 1. See § 3208, post.

§ 2240. [Am'd, 1913.] Id.; how served.

The precept must be served as follows:

1. By delivering, to the person to whom it is directed, or, if it is directed to a corporation, to an officer of the corporation, upon whom a summons, issued out of the supreme court, in an action against the corporation, might be served, a copy of the precept, together with a copy of the petition, and at the same time showing him the original precept.

2. If the person, to whom the precept is directed, resides in the city or town in which the property is situated, but is absent from his dwelling-house, service may be made by delivering a copy thereof, together with a copy of the petition, at his

dwelling-house, to a person of suitable age and discretion, who resides there; or, if no such person can, with reasonable diligence, be found there, upon whom to make service, then by delivering a copy of the precept and petition, at the property sought to be recovered, either to some person of suitable age and discretion residing there, or if no such person can be found there, to any person of suitable age and discretion employed there.

3. Where service cannot, with reasonable diligence, be made, as prescribed in either of the foregoing subdivisions of this section, by affixing a copy of the precept and petition upon a conspicuous part of the property.

If the precept is returnable on the day on which it is issued, it must be served at least two hours before the hour at which it is returnable; in every other case, it must be served at least two days before the day on which it is returnable.

Section 32, R. S.; L. 1857, ch. 684, and L. 1868, ch. 828 (7 Edm. 356). Am'd by L. 1913, ch. 277. In effect Sept. 1, 1913.

§ 2241. Duty of person to whom copy of precept is delivered.

A person, to whom a copy of a precept, directed to another, is delivered, as prescribed in this title, must, without any avoidable delay, deliver it to the person to whom it is directed, if he can be found within the same town or city; or, if he cannot be so found, to his agent therein; and if neither can be so found, after the exercise of reasonable diligence, before the time when the precept is returnable, to the judge or justice who issued the same, at the time of the return thereof, with a written statement indorsed thereupon, that he has been unable, after the exercise of reasonable diligence, to find the person to whom the precept is directed, or his agent, within the town or city. A person, who wilfully violates any provisions of this section, is guilty of a misdemeanor; and, if he is a tenant upon the property, forfeits to his landlord the value of three years' rent of the premises occupied by him. A copy of this section must be indorsed upon each copy of a precept, served otherwise than personally upon the person to whom it is directed.

L. 1868, ch. 828, § 3 (7 Edm. 356); and 1 R. S. 748, § 27 (1 Edm. 699).

§ 2242. When precept to be served on landlord of bawdy-house, etc.

Where the case is within section 2237 of this act, the precept must be directed to and served upon the owner or landlord, or his agent, and also upon the tenant or occupant of the property. Either or both of them may, upon the return day, appear and show cause why the tenant or occupant should not be removed from the property.

Parts of §§ 63 and 64; L. 1868, ch. 764 (7 Edm. 336).

§ 2243. Proof of service of precept.

At the time when the present is returnable, the petitioner must, unless the adverse party appears, make due proof of the service thereof, showing the time, and the place and manner of service; and, unless service was made personally upon the adverse party, or by affixing a copy of the precept, the name of the person to whom a copy of the precept was delivered, if his name can be ascertained with reasonable diligence. Where serv-

ice is made by a sheriff, constable, or marshal, it may be proved by his certificate, stating the facts.

Section 32, R. S., also § 32, am'd; L. 1868, ch. 822 (7 Edm. 326).

§ 2244. [Am'd, 1898.] Answer.

At the time when the precept is returnable without waiting as prescribed in an action before a justice of the peace, or in a district court in the city of New York, the person to whom it is directed or his landlord, or any person in possession or claiming possession of the premises, or a part thereof, may file with the judge or justice who issued the precept, or with the clerk of the court, a written answer, verified in like manner as a verified answer in an action in the supreme court, denying generally the allegations, or specifically any material allegation of the petition, or setting forth a statement of any new matter constituting a legal or equitable defence, or counterclaim. Such defence or counterclaim may be set up and established in like manner as though the claim for rent in such proceeding was the subject of an action.

L. 1893, ch. 705.

§ 2245. Issues upon forcible entry or detainer.

Where the application is founded upon an allegation of forcible entry or forcible holding out, the petitioner must allege and prove that he was peaceably in actual possession of the property, at the time of a forcible entry, or in constructive possession, at the time of a forcible holding out; and the adverse party must either deny the forcible entry, or the forcible holding out, or allege, in his defence, that he, or his ancestor, or those whose interest he claims, had been in quiet possession of the property, for three years together next before the alleged forcible entry or detainer; and that his interest is not ended or determined, at the time of the trial.

Id.; §§ 6 and 11, am'd.

§ 2246. In N. Y. district court, cause may be transferred to another court for trial.

In a district court of the city of New-York, at the time of joining issue, the justice sitting in the cause may, in his discretion, upon motion of either party, or, if no justice is present, the clerk may, by consent of both parties, make an order transferring the cause for trial, to a district court of an adjoining district, which thereupon has the same jurisdiction and power at its own court house, as if the property was situate within its district.

L. 1877, ch. 187, § 2, am'd.

§ 2247. [Am'd, 1881 and 1882.] Trial.

The issues joined by the petition and answer must be tried by the judge or justice, unless either party to such proceedings shall, at the time designated in such precept for showing cause, demand a jury and at the time of such demand pay to such judge or justice the necessary costs and expenses of obtaining such jury. If a jury be demanded and such costs and expenses be paid, the judge or justice with whom such petition shall be filed shall nominate twelve reputable persons qualified to serve as jurors in courts of record, and shall issue his precept directed to the sheriff or one of the constables of the county, or any constable or marshal of the city or town, commanding him to sum-

mon the persons so nominated to appear before such judge or justice at such time or place as he shall therein appoint, not more than three days from the date thereof, for the purpose of trying the said matters in difference. Six of the persons so summoned shall be drawn in like manner as jurors in justices' courts, and shall be sworn by such judge or justice well and truly to hear, try and determine the matters in difference between the parties. After hearing the allegations and proofs of the parties, the said jury shall be kept together until they agree on their verdict, by the sheriff or one of his deputies, or a constable, or by some proper person appointed by the judge or justice for that purpose, who shall be sworn to keep such jury as is usual in like cases of courts of record. If such jury cannot agree after being kept together for such time as such judge or justice shall deem reasonable, he may discharge them and nominate a new jury, and issue a new precept in manner aforesaid.

R. S. § 34.

§ 2248. Adjournment.

At the time when issue is joined, the judge or justice may, in his discretion, at the request of either party, and upon proof to his satisfaction, by affidavit or orally, that an adjournment is necessary, to enable the applicant to procure his necessary witnesses, or by consent of all the parties who appear, adjourn the trial of the issue, but not more than ten days; except by consent of all parties.

R. S., § 41.

§ 2249. Final order upon trial.

If sufficient cause is not shown upon the return of the precept; or if the verdict of the jury, or the decision of the judge or justice, upon a trial without a jury, is in favor of the petitioner; the judge or justice must make a final order, awarding to the petitioner the delivery of the possession of the property; except that, where the case is within section 2237 of this act, the final order must direct the removal of the occupant. In either case, the final order must award to the petitioner the costs of the special proceeding. If the verdict or decision is in favor of the person answering, the judge or justice must make a final order accordingly, and awarding to him the costs of the special proceeding.

Id., §§ 33, 39 and 51. See L. 1849, ch. 193 (2 Edm. 533).

§ 2250. [Am'd, 1882.] Amount of costs; how collected.

Costs, when allowed, and the fees of officers, except where a fee is specially given in chapter twenty-one of this act, must be at the rate allowed by law in an action in a justice's court, and are limited in like manner; unless the application is founded upon an allegation of forcible entry or forcible holding out; in which case, the judge or justice may award to the successful party a fixed sum as costs, not exceeding fifty dollars, in addition to his disbursements. If the final order is made by a county judge, or a special county judge, or by a mayor or recorder, an execution to collect the costs may be issued thereupon as if it was a judgment of a justice of the peace of the same city or county; and for that purpose the officer takes the place of a jus-

tice of the peace. In every other case an execution may be issued to collect the costs awarded thereby as if the final order was a judgment, rendered in the court, of which the judge or justice is the presiding officer.

Id., §§ 12, 13, 22 and part of § 51, am'd and consolidated. Am'd L. 1882. ch. 399.

§ 2251. [Am'd, 1882.] Warrant to dispossess defendant.

Where the final order is in favor of the petitioner, the judge or justice must thereupon issue a warrant, under his hand, directed to the sheriff of the county, or to any constable or marshal of the city or town, in which the property, or a portion thereof, is situated, or if it is not situated in a city, to any constable of any town in the county, describing the property, and commanding the officer to remove all persons therefrom, and also, except where the case is within section 2237 of this act, to put the petitioner into the full possession thereof.

Id., §§ 13, 33 and 39. See L. 1857, ch. 684; also, §§ 58, 59, 63, 64, and L. 1868, ch. 764 (7 Edm. 335).

§ 2252. Execution of warrant.

The officer, to whom the warrant is directed and delivered, must execute it, according to the command thereof, between the hours of sunrise and sunset.

R. S., § 40.

§ 2253. When warrant cancels lease; exception.

The issuing of a warrant for the removal of a tenant from demised premises, cancels the agreement for the use of the premises, if any, under which the person removed held them; and annuls accordingly the relation of landlord and tenant, except that it does not prevent a landlord from recovering, by action, any sum of money, which was, at the time when the precept was issued, payable by the terms of the agreement, as rent for the premises; or the reasonable value of the use and occupation thereof, to the time when the warrant was issued, for any period of time, with respect to which the agreement does not make any special provision for payment of rent.

Id., § 43, also, § 60; L. 1868, ch. 764 (7 Edm. 336).

§ 2254. [Am'd, 1885.] Warrant; when and how stayed.

The party, against whom a final order is made, requiring the delivery of possession to the petitioner, may, at any time before a warrant is issued, stay the issuing thereof; and also stay an execution to collect the costs, as follows:

1. Where the final order establishes that a lessee or tenant holds over, after a default in the payment of rent, or of taxes or assessments, he may effect a stay, by payment of the rent due, or of such taxes or assessments, and interest and penalty, if any thereon due, and the costs of the special proceeding; or by delivering to the judge or justice, or the clerk of the court, his undertaking to the petitioner, in such sum and with such sureties as the judge or justice approves, to the effect that he will pay the rent, or such taxes or assessments, and interest and penalty and costs, within ten days, at the expiration of which time a warrant may issue, unless he produces to the judge or justice satisfactory evidence of the payment.

2. Where the final order establishes that a lessee or tenant has taken the benefit of an insolvent act, or has been adjudicated a

bankrupt, he may effect a stay by paying the costs of the special proceeding, and by delivering to the judge or justice, or the clerk of the court, his undertaking to the petitioner, in such a sum and with such sureties as the judge or justice approves, to the effect, that he will pay the rent of the premises, as it has become, or thereafter becomes due.

3. Where the final order establishes that the person against whom it is made, continues in possession of real property, which has been sold by virtue of an execution against his property, he may effect a stay, by paying the costs of the special proceeding, and delivering to the judge or justice, or the clerk of the court, an affidavit, that he claims the possession of the property, by virtue of a right or title, acquired after the sale, or as guardian or trustee for another; together with his undertaking to the petitioner, in such a sum and with such sureties as the judge or justice approves, to the effect, that he will pay any costs and damages, which may be recovered against him, in an action of ejectment to recover the property, brought against him by the petitioner within six months thereafter; and that he will not commit any waste upon or injury to the property, during his occupation thereof.

R. S., § 44, am'd by L. 1857, ch. 684; and §§ 45 and 46.

§ 2255. Undertaking; how disposed of.

Where an undertaking is given, in a case specified in subdivision first of the last section, the judge or justice must deliver it to the person against whom the final order was made, upon his producing the evidence of payment, mentioned in that subdivision. If he does not produce such evidence within ten days, the judge or justice must deliver it to the petitioner. In every other case specified in the last section, the judge or justice must deliver the undertaking to the petitioner, immediately after his approval thereof.

§ 2256. Redemption by lessee.

Where the special proceeding is founded upon an allegation that a lessee holds over, after a default in the payment of rent, and the unexpired term of the lease, under which the premises are held, exceeds five years, at the time when the warrant is issued; the lessee, his executor, administrator, or assignee, may, at any time within one year after the execution of the warrant, pay or tender to the petitioner, his heir, executor, administrator, or assignee, or if, within five days before the expiration of the year, he cannot, with reasonable diligence, be found within the city or town, wherein the property, or a portion thereof, is situated, then to the judge or justice who issued the warrant, or his successor in office, all rent in arrear at the time of the payment or tender, with interest thereupon, and the costs and charges incurred by the petitioner. Thereupon the person making the payment or tender, shall be entitled to the possession of the demised premises, under the lease, and may hold and enjoy the same, according to the terms of the original demise, except as otherwise prescribed in the next section but one.

L. 1842, ch. 240, § 1 (4 Edm. 661), am'd.

§ 2257. Id.; by creditor of lessee.

In a case specified in the last section, a judgment creditor of the lessee, whose judgment was docketed in the county, before the precept was issued, or a mortgagee of the lease, whose mortgage was duly recorded, in the county, before the precept was issued, may, at any time before the expiration of one year after the execution of the warrant, unless a redemption has been made as prescribed in the last section, file with the judge or justice who issued the warrant, or with his successor in office, a notice, specifying his interest and the sum due to him; describing the premises; and stating that it is his intention to redeem as prescribed in this section. If a redemption is not made by the lessee, his executor, administrator, or assignee, within a year after the execution of the warrant, the person so filing a notice, or, if two or more persons have filed such notices, the one who holds the first lien, may, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding the last day of the year, redeem for his own benefit, in like manner as the lessee, his executor, administrator, or assignee might have so redeemed. Where two or more judgment creditors or mortgagees have filed such notices, the holder of the second lien may so redeem, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding that in which the holder of the first lien might have redeemed; and the holder of the third and each subsequent lien, may redeem, in like manner, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding that in which his predecessor might have redeemed. But a second or subsequent redemption is not valid, unless the person redeeming pays or tenders to each of his predecessors who has redeemed, the sum paid by him to redeem, and also the sum due upon his judgment or mortgage; or deposits those sums with the judge or justice, for the benefit of his predecessor or predecessors.

L. 1842, ch. 240, § 1 (4 Edm. 461).

§ 2258. The last two sections qualified.

Where a redemption is made, as prescribed in either of the last two sections, the rights of the person redeeming are subject to a lease, if any, executed by the petitioner, since the warrant was issued, so far that the new lessee, his assigns, undertenants, or other representatives, may, upon complying with the terms of the lease, hold the premises so leased until twelve o'clock, noon, of the first day of May, next succeeding the redemption. And, in all other respects, the person so redeeming, his assigns and representatives, succeed to all the rights and liabilities of the petitioner, under such a lease.

§ 2259. Order to be made thereupon; liability of person redeeming.

The person redeeming, as prescribed in the last three sections, or the owner of the property so redeemed, may present to the judge or justice who issued the warrant, or to his successor in office, a petition, duly verified, setting forth the facts of the redemption, and praying for an order, establishing the rights and liabilities of the parties upon the redemption. Whereupon the judge or justice must make an order requiring the other party

to the redemption to show cause before him, at a time and place therein specified, why the prayer of the petition should not be granted. The order to show cause must be made returnable, not less than two nor more than ten days, after it is granted; and it must be served at least two days before it is returnable. Upon the return thereof, the judge or justice must hear the allegations and proofs of the parties, and must make such a final order as justice requires. The costs and expenses must be paid by the petitioner. The final order, or a certified copy thereof, may be recorded in like manner as a deed. A person, other than the lessee, who redeems as prescribed in the last three sections, succeeds to all the duties and liabilities of the lessee, accruing after the redemption, as if he was named as lessee in the lease.

§ 2260. Appeal.

An appeal may be taken from a final order, made as prescribed in this title, to the same court, within the same time, and in the same manner, as where an appeal is taken from a judgment rendered in the court, of which the judge or justice is the presiding officer, and with like effect; except as otherwise prescribed in the next two sections.

Substituted for § 47, R. S., am'd; L. 1868, ch. 828 (7 Edm. 357), § 52; L. 1849, ch. 193 (2 Edm. 534).

§ 2261. [Am'd, 1895.] Effect of appeal limited in certain cases.

The issuing or execution of the warrant can not be stayed by such an appeal, or by the giving of an undertaking thereupon, otherwise than as prescribed in the next section. An appeal can not be taken to the court of appeals, from a final determination of the appellate division of the supreme court, upon such an appeal, unless the latter court, by an order, made at the term of the appellate division where the final order is made, or the next term thereafter, allows it to be taken.

L. 1895, ch. 246.

§ 2262. [Am'd, 1895.] Warrants; how stayed on appeal.

Where an appeal is taken from a final order, awarding delivery of possession to the petitioner, which establishes that a lessee or tenant holds over, after a default in payment of rent or from an order or judgment affirming such final order, the issuing and execution of the warrant may be stayed by the order of the county judge, and in the city and county of New York by a justice of the supreme court, upon the appellant's giving the security required to perfect the appeal, and to stay the execution of the order appealed from and also an undertaking to the petitioner in a sum and with sureties approved by the county judge or in the city and county of New York by a justice of the supreme court to the effect that if, upon the appeal, a final determination is rendered against the appellant he will pay all rents accruing or to accrue upon the premises, or if there is no lease thereof the value of the use and occupation of the premises subsequent to the institution of the special proceedings.

L. 1895, ch. 946.

§ 2263. Appellate court may award restitution; action for damages.

If the final order is reversed upon the appeal, the appellate court may award restitution to the party injured, with costs; and it may make an order, or issue any other mandate, necessary to carry its determination into effect. The person dispossessed may also maintain an action, to recover the damages which he has sustained by the dispossession.

Sections 48 and 49, R. S.

§ 2264. Application of this title; effect of final order.

This title does not impair the rights of a landlord, lessor, or tenant, in a case not therein provided for. Where a special statutory provision confers a right to take proceedings, in the manner heretofore prescribed by law, for the summary removal of a person in possession of real property, the proceedings thereunder must be taken as prescribed in this title. A final order, made in a special proceeding, taken as prescribed in this title, is not a bar to an action of ejectment, to recover the property affected thereby.

Id., § 50.

§ 2265. How proceedings under this title to be stayed.

Where a petition is presented, as prescribed in this title, the proceedings thereupon before the final order, and if the final order awards delivery of the possession to the petitioner, the issuing or execution of the warrant thereupon, cannot be stayed or suspended by any court or judge, except in one of the following methods:

1. By an order made, or an undertaking filed, upon an appeal, in a case and in the manner specially prescribed for that purpose in this title.

2. By an injunction order, granted in an action against the petitioner. Such an injunction shall not be granted before the final order in the special proceeding, except in a case where an injunction would be granted to stay the proceedings, in an action of ejectment, brought by the petitioner, and upon the like terms: or after the final order, except in a case where an injunction would be granted to stay the execution of the final judgment in such an action, and upon the like terms.

R. S., § 47.

TITLE III.**Proceedings to punish a contempt of court, other than a criminal contempt.**

- Sec. 2266.** Cases to which this title applies.
2267. When punishment may be summary.
2268. When warrant to commit may issue without notice.
2269. Order to show cause, or warrant to attach offender.
2270. Notice to delinquent officer to show cause.
2271. Order or warrant; when granted out of court.
2272. Id.; when contempt was committed before a referee.
2273. Effect of order to show cause, and of warrant.
2274. Copy affidavit, etc., to be served with warrant.
2275. Indorsement upon warrant.
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2278. When habeas corpus may issue.
2279. Sheriff to file undertaking with return.
2280. Interrogatories and proofs.
2281. When and how accused to be punished.
2282. Id.; upon return of habeas corpus.
2283. Id.; upon return of order to show cause.
2284. Amount of fine.
2285. Length of imprisonment.
2286. When court may release offender.
2287. Offender liable to indictment.
2288. Proceedings when accused does not appear.
2289. Undertaking; when prosecuted by person aggrieved
2290. Id.; by attorney-general, etc.
2291. Sheriff liable for taking insufficient sureties.
2292. Punishment of misconduct at trial term.

§§ 2266-2292. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 754-781.]

TITLE IV.

Proceedings to collect a fine.

- Sec. 2293. Clerk to make schedule of fines imposed.
 2294. Warrant to be issued by him.
 2295. Id.; when delinquent resides in another county.
 2296. Execution of warrant.
 2297. Return thereof.
 2298. Proceedings if fine not collected.
 2299. Who to be included in schedule.
 2300. Liability of sheriff.
 2301. Application of this title.

§§ 2293-2301. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, §§ 790-797.]

TITLE V.

Proceedings to discover the death of a tenant for life.

- Sec. 2302.** Petition for production of tenant for life.
2303. Contents of petition.
2304. Service of petition and notice.
2305. Proceedings upon presentation of petition.
2306. Service of order; powers, etc., of referees.
2307. Habeas corpus.
2308. Report of referees.
2309. Dismissal of petition when order complied with.
2310. When life-tenant deemed dead, and petitioner let into possession.
2311. Commission to be issued if life-tenant is without the State.
2312. General provisions respecting the commission.
2313. Petitioner to give notice of its execution.
2314. Execution thereof.
2315. Proceedings on return of commission.
2316. Costs.
2317. Property; when restored.
2318. Remedy of person evicted for profits, etc.
2319. Order not conclusive in ejectment.

§ 2302. Petition for production of tenant for life.

A person entitled to claim real property, after the death of another who has a prior estate therein, may, not oftener than once in each calendar year, apply by petition to the supreme court, at a special term thereof, held within the judicial district, wherein the property, or a part thereof, is situated, for an order, directing the production of the tenant for life, as prescribed in this title, by a person, named in the petition, against whom an action of ejectment to recover the real property can be maintained, if the tenant for life is dead; or, where there is no such person, by the guardian, husband, trustee, or other person, who has, or is entitled to, the custody of the person of the tenant for life, or the care of his estate.

2 R. S. 342, § 1 (2 Edm. 354).

§ 2303. Contents of petition.

The petition must be in writing, and verified by the affidavit of the petitioner, to the effect, that the matters of fact therein set forth are true. It must contain:

1. A description of the real property, and a statement of the petitioner's interest therein, and of such other facts as show that the case is within the provisions of the last section.

2. An averment that the petitioner believes that the person, upon whose life the prior estate depends, is dead, together with a statement of the grounds upon which the petitioner's belief is founded.

Id., § 2 and part of § 3.

§ 2304. Service of petition and notice.

A copy of the petition, including the affidavit, together with notice of the time and place at which the petition will be presented, must be personally served, at least fourteen days before its presentation, upon the person required, by the prayer thereof, to produce the tenant for life.

Remainder of § 3.

§ 2305. Proceedings upon presentation of petition.

Upon the presentation of the petition and affidavit, with due proof, by affidavit, of service of a copy thereof, and of the notice,

if sufficient cause to the contrary is not shown by the adverse party, the court must either issue a commission, as prescribed in the following sections of this title; or make an order, directing the adverse party, at a time and place therein specified, before the court, or a referee therein designated, to produce the person upon whose life the prior estate depends, or, in default thereof, to prove that he is living.

Id. § 4.

§ 2306. Service of order; powers, etc., of referee.

Where an order, requiring the production of the tenant for life, or proof that he is living, is made as prescribed in the last section, a certified copy thereof must be served, at least fourteen days before the time therein specified, upon the person required to make the production of the proof, or upon his attorney. Upon presentation of proof of service, by affidavit, the court or the referee must, at the time and place specified in the order, or at the time and place to which the hearing may be adjourned, hear the allegations and proofs of the parties, respecting the identity of any person produced, with the person whose death is in question; or, if the latter person is not produced, respecting the reasons for the failure to produce him, and whether he is living. Where a referee is appointed, he has the same powers, and is entitled to the same compensation, as a referee appointed for the trial of an issue in an action.

Id., § 5.

§ 2307. Habeas corpus.

If it appears, by affidavit, to the satisfaction of the court, that the person required to be produced is imprisoned within the State, for any cause, except upon a sentence for a felony, or is kept or detained, within the State, by any person, the court may, either before or after making the order for production, issue a writ of habeas corpus to bring him before it, or before the referee, as the case requires. The writ must be served and executed, and disobedience thereto may be punished, as where a writ of habeas corpus is issued, to inquire into the cause of the detention of a prisoner.

Id., § 7.

§ 2308. Report of referee.

The referee must deliver his report to the petitioner, or file it with the clerk, within ten days after the case is closed. He must state therein, whether any person was or was not produced before him, as being the person whose death is in question. He must append thereto, in the form of depositions, the proofs, if any, respecting the identity of any person so produced, with the person whose death is in question; or if no one is so produced, upon the question whether the latter person is living. He must also state, in his report, his conclusions upon the questions controverted before him.

Id., § 8.

§ 2309. Dismissal of petition when order complied with.

If it appears, to the satisfaction of the court, upon the referee's report, and the proofs thereto appended; or, where a referee is not appointed, upon the allegations and proofs of the parties before the court; that the party, required to produce the tenant

for life, or to prove his existence, has fully complied with the order, the court must make an order dismissing the petition, and requiring the petitioner to pay the costs of the proceedings.

3 E. S. 242, § 9.

§ 2310. When life-tenant deemed dead, and petitioner let into possession.

If it appears, from the referee's report, or upon the hearing before the court, that the person, upon whose life the prior estate depends, was not produced; and if the party required to produce him, or to prove his existence, has not proved, to the satisfaction of the court, that he is living; a final order must be made, declaring that he is presumed to be dead, for the purpose of the proceedings, and directing that the petitioner be forthwith let into possession of the real property, as if that person was actually dead.

Id., § 10.

§ 2311. Commission to be issued if life-tenant is without the State.

If before or at the time of the presentation of the referee's report to the court, or, where a referee is not appointed, at any time before the final order is made, the party, upon whom the petition and notice are served, presents to the court presumptive proof, by affidavit, that the person, whose death was in question, is, or lately was, at a place certain, without the State, the court must make an order, requiring the petitioner to take out a commission, directed to one or more persons, residing at or near that place, either designated in the order, or to be appointed upon a subsequent application for the commission for the purpose of obtaining a view of the person, whose death is in question, and of taking such testimony respecting his identity, as the parties produce. The order must also direct that the proceedings upon the petition be stayed, until the return of the commission; and that the petition be dismissed with costs, unless the petitioner takes out the commission within a time specified in the order, and diligently procures it to be executed and returned, at his own expense.

Id., § 11.

§ 2312. General provisions respecting the commission.

It is not necessary, unless the court specially so directs, that the witnesses to be examined should be named in the commission, or that interrogatories should be annexed thereto. The commission must be executed and returned, and the deposition taken must be filed and used, as prescribed for those purposes in article second of title third of chapter ninth of this act, except as otherwise specially prescribed in this title.

§ 2313. Petitioner to give notice of its execution.

The petitioner must give to the adverse party, or his attorney, written notice of the time when, and the place where, the commissioner or commissioners will attend, for the purpose of executing the commission, as follows:

1. If the place, where the commission is to be executed, is within the United States, or the dominion of Canada, he must give at least two months' notice.

2. If it is within either of the West India islands, he must give at least three months' notice.

3. In every other case, he must give at least four months' time.

Notice may be given, as required by this section, by serving it as prescribed in this act for the service of a paper upon an attorney, in an action in the supreme court.

2 R. S. 343, § 12.

§ 2314. Execution thereof.

The commissioner or commissioners possess the same powers, and must proceed in the same manner, as a referee, appointed by an order requiring the production of the tenant for life, or proof of his existence; except that they cannot proceed, unless a person is produced before them, as being the person whose death is in question. The return to the commission must expressly state whether any person was or was not so produced. The testimony, respecting the identity of a person so produced, must be taken, unless otherwise specially directed by the court, as prescribed in chapter ninth of this act, for taking the deposition of a witness upon oral interrogatories; except that it is not necessary to give any other notice of the time and place of examination, than that prescribed in the last section.

Id., part of § 13.

§ 2315. Proceedings on return of commission.

Upon the return of the commission, the proceedings are the same as upon the report of a referee, as prescribed in sections 2309 and 2310 of this act; but the court may, in its discretion, receive additional proofs from either party.

Substituted for §§ 13, 14, 15 and 16.

§ 2316. Costs.

Where costs of a special proceeding, taken as prescribed in this title, are awarded, they must be fixed by the court at a gross sum, not exceeding fifty dollars, in addition to disbursements. Where provision is not specially made in this title for the award of costs, they must be denied, or awarded to or against either party, as justice requires.

Id., § 18.

§ 2317. Property; when restored.

The possession of real property, which has been awarded to the petitioner; as prescribed in this title, upon the presumption of the death of the person, upon whose life the prior estate depends, must be restored, by the order of the court, to the person evicted, or to his heirs or legal representatives, upon the petition of the latter, and proof, to the satisfaction of the court, that the person presumed to be dead is living. The proceedings upon such an application are the same, as prescribed in this title, upon the application of the person to whom possession is awarded.

Id., § 19.

§ 2318. Remedy of person evicted for profits, etc.

A person evicted, as prescribed in this title, may, if the presumption, upon which he is evicted, is erroneous, maintain an action against the person who has occupied the property, or his executor or administrator, to recover the rents and profits of

the property, during the occupation, while the person, upon whose life the prior estate depends, is or was living.

2 R. S. 843, § 20.

§ 2319. Order not conclusive in ejectment.

A final order, made as prescribed in this title, awarding to the petitioner the possession of real property is presumptive evidence only, in an action of ejectment, brought against him by a person evicted, or in an action brought as prescribed in this section, of the life or death of the person, upon whose life the prior estate depends.

TITLE VI.**Proceedings for the appointment of a committee of the person, and of the property, of a lunatic, idiot, or habitual drunkard; general powers and duties of the committee.****Sec. 2320. Jurisdiction; concurrent jurisdiction.**

2321. Duty of court having jurisdiction.

2322. Committee may be appointed.

2323. Application for committee; by whom made.

2323a. Application when incompetent person is in a State institution; petition, by whom made; contents and proceedings upon presentation thereof.

2323b. Costs of proceeding.

2324. Duty of certain officers to apply.

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2325a. Notice to be filed, recorded and indexed.

2326. When foreign committee may be appointed.

2327. Order for commission, or for trial by jury in court.

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2329. Commissioners to be sworn; vacancies, how filled.

2330. Jury to be procured. Proceedings thereupon.

2331. Proceedings upon the hearing.

2332. Return of inquisition and commission.

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2334. Proceedings upon trial by jury in court.

2335. Subject of inquiry in cases of lunacy.

2336. Proceedings upon verdict, or return of commission.

2336a. Sections of this title not applicable when application for committee is made under authority of this State.

2337. Security to be given by committee.

2338. Compensation of committee.

2339. Committee under control of court; limitation of powers.

2340. Committee of property may maintain actions, etc.

2341. Committee of property; to file inventory and account.

2342. Id.; may be compelled to file the same, or render an additional account, etc.

2343. Property, when to be restored.

2344. Id.; disposition in case of death.

2344a. Court may compel performance of contract made by incompetent person in certain cases.

§ 2320. [Am'd, 1895.] Jurisdiction; concurrent jurisdiction.

The jurisdiction of the supreme court extends to the custody of the person and the care of the property, of a person incompetent to manage himself or his affairs, in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding, or other cause. Where a county court has jurisdiction of those matters, concurrent with that of the supreme court, the jurisdiction of the court first exercising it, as prescribed in this title, is exclusive of that of the others, with respect to any matter within its jurisdiction, for which provision is made in this title. In all proceedings under this title for the appointment of a committee of such a person, he shall be designated "an alleged incompetent person;" and after the appointment of a committee of such person, in all subsequent proceedings the lunatic, idiot, habitual drunkard or imbecile shall be designated "an incompetent person."

L. 1895, ch. 946.

§ 2321. Duty of court having jurisdiction.

The court exercising jurisdiction over the property of either of the incompetent persons, specified in the last section, must preserve his property from waste or destruction; and, out of the proceeds thereof, must provide for the payment of his debts.

and for the safe keeping and maintenance, and the education, when required, of the incompetent person and his family.

L. 1874, ch. 446, part of § 1.

§ 2322. Committee may be appointed.

The jurisdiction, specified in the last two sections, must be exercised by means of a committee of the person, or a committee of the property, or of a particular portion of the property, of the incompetent person, appointed as prescribed in this title. The committee of the person and the committee of the property may be the same individual, or different individuals, in the discretion of the court.

§ 2323. [Am'd, 1895.] Application for committee; by whom made.

An application for the appointment of such a committee must be made by petition, which may be presented by any person. Except as provided in the next section, where the application is made to the supreme court, the petition must be presented at a special term held within the judicial district, or to a justice of said court within such judicial district at chambers, where the person alleged to be incompetent resides; or if he is not a resident of the State, or the place of his residence cannot be ascertained, where some of his property is situated, or the State institution is situated of which he is an inmate.

L. 1895, ch. 824.

§ 2323-a. [Added, 1895; am'd, 1897, 1904, 1912.] Application when incompetent person is in a state institution; petition, by whom made; contents and proceedings upon presentation thereof.

Where an incompetent person has been committed to a state institution in any manner provided by law, and is an inmate thereof, the petition may be presented on behalf of the state by a state officer having special jurisdiction over the institution where the incompetent person is confined or the superintendent or acting superintendent of said institution; the petition must be in writing and verified by the affidavit of the petitioner or his attorney, to the effect that the matters therein stated are true to the best of his information or belief; it must show that the person for whose person or property, or both, a committee is asked has been legally committed to a state institution over which the petitioner has special jurisdiction, or of which he is superintendent or acting superintendent, and is at the time an inmate thereof; it must also state the institution in which he is an inmate, the date of his admission, his last known place of residence, the name and residence of the husband or wife, if any, of such person, if known to the petitioner, and if there be none known to the petitioner, the name and residence of the next of kin of such person living in this state so far as known to the petitioner; the nature, extent and income of his property, so far as the same is known to the petitioner, or can with reasonable diligence be ascertained by him. The petition may be presented to the supreme court at any special term thereof, held either in the judicial district in which such incompetent person last resided, or in the district in which the state institution in which he is committed is situated, or to a justice of the supreme court at chambers within such judicial district, or to the county court of the county in which the incompetent person resided at the time of such commitment, or of the county in which said institution is situated. Notice of the presentation of such petition shall be personally given to such person, and also to the husband or wife, if known to the petitioner, or if none is known to the peti-

tioner, to the next of kin named in the petition, and to the officer in charge of the institution in which such person is an inmate unless sufficient reasons for dispensing therewith are set forth in the petition or shown by affidavit. When notice is required, it may be given in any manner which the court deems proper. Upon the presentation of such petition, and proof of the service of such notice, the court or justice may, if satisfied of the truth of the facts required to be stated in such petition, immediately appoint a committee of the person or property, or both, of such incompetent person or may require any further proof which it or he may deem necessary before making such appointment.

L. 1896, ch. 824; L. 1897, ch. 149; L. 1904, ch. 509; L. 1912, ch. 98, in effect Sept. 1, 1912.

§ 2323b (b). [Added, 1895.] Costs of proceeding.

Upon the presentation of a petition and the appointment of a committee, as provided in section two thousand three hundred and twenty-three (a), the court or justice may award costs of the proceeding, not exceeding twenty-five dollars in addition to necessary disbursements, to the petitioner, payable from the estate of the incompetent person, and upon denial of an application to set the same aside, costs as of a motion.

L. 1896, ch. 824.

§ 2324. Duty of certain officers to apply.

Where the incompetent person has property, which may be endangered in consequence of his incompetency, and no relative or other person applies for the appointment of a committee of his property, the overseer or superintendent of the poor of the town, district, county, or city, in which he resides, or, where there is no such officer, the officer or officers performing corresponding functions under another official title, must apply to the proper court, for the appointment of such a committee. The expenses of conducting the proceedings thereupon must be audited and allowed, in the same manner as other official expenses of those officers are audited and allowed.

2 R. S. 52, 53 §§ 2-7 (2 Edm. 53).

§ 2325. [Am'd, 1801.] Contents, etc., of petition; proceedings upon presentation thereof.

The petition must be in writing, and verified by the affidavit of the petitioner, or his attorney, to the effect that the matters of fact therein stated are true. It must be accompanied with proof, by affidavit, that the case is one of those specified in this title. It must set forth the names and residences of the husband or wife, if any, and of the next of kin and heirs, of the person alleged to be incompetent, as far as the same are known to the petitioner, or can, with reasonable diligence, be ascertained by him, and also the probable value of the property possessed and owned by the alleged incompetent person, and what property has been conveyed during said alleged incompetency and to whom, and its value and what consideration was paid for it, if any, or was agreed to be paid. The court must, unless sufficient reasons for dispensing therewith are set forth, in the petition or accompanying affidavit, require notice of the presentation of the petition to be given to the husband or wife, if any, or to one or more relatives of the person alleged to be incompetent, or to an officer specified in the last section. Where notice is required, it may be given in any manner, which the court deems proper; and for that purpose, the hearing may be adjourned to a subsequent day, or to another term, at which the petition might have been presented.

L. 1801, ch. 263.

§ 2325a. [Added, 1913.] Notice to be filed, recorded and indexed.

In all proceedings taken under this title, if real property or any interest therein is intended to be affected, the petitioner shall file in the clerk's office of each county where the property is situated, a notice of the pendency of such proceeding, which shall set forth the general nature and object of the proceeding and a brief description of the real property in that county to be affected thereby, and which notice must be filed with the petition or any time thereafter and before any final adjudication in the proceeding. The clerk shall index such notice against the name of the alleged incompetent. The pendency of the proceeding is constructive notice from the time of so filing the notice only to a purchaser or incumbrancer of the property affected thereby from or against the alleged incompetent with respect to whom the notice is directed to be indexed as aforesaid. A person whose conveyance or incumbrance is subsequently executed or subsequently recorded is bound by all proceedings taken after the filing of the notice to the same extent as if he was a party to the proceeding. But this provision shall not prevent a jury in a proper proceeding, on sufficient proof, from rendering a verdict that shall over-reach any conveyance or incumbrance theretofore executed by the alleged incompetent, so as to make such conveyance or incumbrance prima facie void.

Added by L. 1913, ch. 69. In effect Sept. 1, 1913.

§ 2326. [Am'd, 1898.] When foreign committee may be appointed.

Where the person alleged to be incompetent resides without the state, and a committee, curator or guardian of his property, by whatever name such officer may be designated, has been duly appointed pursuant to the laws of any other state, territory or country where he resides, the court may, in its discretion, make an order appointing the foreign committee, curator or guardian, the committee of all or of a particular portion of the property of the incompetent person, within the state, on his giving such security for the discharge of his trust as the court thinks proper.

L. 1898, ch. 294. In effect Sept. 1, 1898.

§ 2327. [Am'd, 1895.] Order for commission, or for trial by jury in courts.

Unless an order is made, as prescribed in the last section, if it presumptively appears, to the satisfaction of the court, from the petition and the proofs accompanying it, that the case is one of those specified in this title; and that a committee ought, in the exercise of a sound discretion, to be appointed; the court must make an order, directing, either

1. That a commission issue, as prescribed in the next section, to one or more fit persons, designated in the order; or

2. That the question of fact, arising upon the competency of the person, with respect to whom the petition prays for the appointment of a committee, be tried by a jury, at a trial term of the court.

3. When it satisfactorily appears from the petition and accompanying affidavits that any person or persons having acquired from the alleged incompetent person, real or personal property

during the time of such alleged incompetency, without adequate consideration, the court may issue an order, with or without security, restraining such person or persons from selling, assigning, disposing of or incumbering said property, or confessing judgment which shall become a lien upon said property, during the pendency of the proceeding for the appointment of a committee, and said order may in the discretion of the court be continued for ten days after the appointment of such committee. Notice of the execution of the commission shall be given to the person or persons enjoined in such manner as the court may direct.

L. 1895, ch. 946.

§ 2328. Contents of commission.

The commission must direct the commissioners to cause the sheriff of a county, specified therein, to procure a jury; and that they inquire, by the jury, into the matters set forth in the petition; and also into the value of the real and personal property of the person alleged to be incompetent, and the amount of his income. It may contain such other directions, with respect to the subjects of inquiry, or the manner of executing the commission, as the court directs to be inserted therein.

§ 2329. Commissioners to be sworn; vacancies, how filled.

Each commissioner, before entering upon the execution of his duties, must subscribe and take, before one of the officers specified in section 842 of this act, and file with the clerk, an oath faithfully, honestly, and impartially to discharge the trust committed to him. If a commissioner becomes incompetent, or neglects or refuses to serve, or removes from the State, the court may remove him. The court may, from time to time, fill any vacancy created by death, removal or resignation.

§ 2330. [Am'd, 1895.] Jury to be procured; proceedings thereupon.

The commissioners, or a majority of them, must immediately issue a precept to the sheriff, designated in the commission, requiring him to notify, not less than twelve nor more than twenty-four indifferent persons, qualified to serve, and not exempt from serving, as trial jurors in the same court, to appear before the commissioners, at a specified time and place, within the county, to make inquiry, as commanded by the commission. The sheriff must notify the jurors accordingly; and must return the precept, and the names of the persons notified, to the commissioners at the time and place specified in the precept. The commissioners, or a majority of them, must determine a challenge made to a juror. Upon the failure to attend, of a person who has been duly notified, his attendance may be compelled; and he may be punished by the court for a contempt, as where a juror, duly notified, fails to attend at a trial term of the court. The commissioners may require the sheriff to cause a talesman to attend, in place of a juror notified, and not attending, or who is excused or discharged; or they may adjourn the proceedings, for the purpose of punishing the defaulting juror, or compelling his attendance. But it is not necessary to cause any talesman to attend, if at least twelve of the persons, notified by the sheriff, appear and are sworn.

L. 1895, ch. 946.

§ 2331. Proceedings upon the hearing.

All the commissioners must attend and preside at the hearing; and they, or a majority of them, have, with respect to the proceedings upon the hearing, all the power and authority of a judge of the court, holding a trial term, subject to the directions contained in the commission. Either of the commissioners may administer the usual oath to the jurors. At least twelve jurors must concur in a finding. If twelve do not concur, the jurors must report their disagreement to the commissioners, who must thereupon discharge them, and issue a new precept to the sheriff, to procure another jury.

§ 2332. Return of inquisition and commission.

The inquisition must be signed by the jurors concurring therein, and by the commissioners, or a majority of them, and annexed to the commission. The commission and inquisition must be returned by the commissioners, and filed with the clerk.

§ 2333. Expenses of commission.

The commissioners are entitled to such compensation for their services, as the court directs. The jurors are entitled to the same compensation, as jurors upon the trial of an issue in an action in the same court. The petitioner must pay the compensation of the commissioners, sheriff and jurors.

§ 2334. [Am'd, 1895.] Proceedings upon trial by jury in court.

Where an order is made, directing the trial, by a jury, at a trial term, of the questions of fact, arising upon the competency of the person, with respect to whom the petition prays for the appointment of a committee, the order must state, distinctly and plainly, the questions of fact to be tried; which may be settled as where an order for a similar trial is made in an action. The court may, in that or in a subsequent order, direct that notice of the trial be given to such persons, and in such a manner as is deemed proper. The trial must be reviewed in the same manner, with like effect, and, except as otherwise directed in the order, the proceedings thereupon are, in all respects, the same as where questions of fact are tried, pursuant to an order for that purpose. The court may make inquiry by means of a reference or otherwise, as it thinks proper, with respect to any matter, not involved in the questions tried by the jury, the determination of which is necessary in the course of the proceedings. The expenses of the trial, and of such an inquiry, must be paid by the petitioner.

L. 1895, ch. 946.

§ 2335. [Am'd, 1895.] Subject of inquiry in cases of lunacy.

Where the petition alleges, that the person, with respect to whom it prays for the appointment of a committee, is incompetent, by reason of lunacy, the inquiry with respect to his competency, upon the execution of a commission, or the trial at a trial term, as prescribed in this title, must be confined to the question, whether he is so incompetent, at the time of the inquiry; and testimony, respecting any thing said or done by him,

or his demeanor or state of mind, more than two years before the hearing or trial, shall not be received as proof of lunacy, unless the court otherwise specially directs, in the order granting the commission, or directing the trial by jury.

L. 1874, ch. 446, § 2, am'd; L. 1895, ch. 946.

§ 2336. Proceedings upon verdict, or return of commission.

Upon the return of the commission, with the inquisition taken thereunder, or the rendering of the verdict of the jury, upon the question submitted to it by the order for a trial by a jury, the court must either direct a new trial or hearing, or make such a final order upon the petition as justice requires. Where a final order is made, dismissing a petition, the court may, in its discretion, award in the order a fixed sum as costs, not exceeding fifty dollars and disbursements, to be paid by the petitioner to the adverse party. Where a committee of the property is appointed, the court must direct the payment by him, out of the funds in his hands, of the necessary disbursements of the petitioner, and of such a sum, for his costs and counsel fees, as it thinks reasonable; and it may, in its discretion, direct the committee to pay a sum, not exceeding fifty dollars and disbursements, to the attorney for any adverse party.

§ 2336 (a). [Added, 1895.] Sections of this title not applicable when application for committee is made under authority of this State.

Sections two thousand three hundred and twenty-five to two thousand three hundred and thirty-six, both inclusive, of this title shall not apply to applications for the appointment of a committee made by it on behalf of the State to secure reimbursement, in whole or in part, for maintenance and support in a State institution.

L. 1895, ch. 824.

§ 2337. [Am'd, 1887.] Security to be given by committee.

The provisions of article first of title seven and section two thousand five hundred and ninety-five of article fifth of title second of chapter eighteenth of this act, respecting the security to be given by the guardian of the person or of the property of an infant, appointed by a surrogate's court, apply to a committee of the person or of the property, appointed as prescribed in this article. A committee of the property cannot enter upon the execution of his duties, until security is given, as prescribed by the court. A committee of the person cannot enter upon the execution of his duties, until security is given, if required by the court.

L. 1887, ch. 681. See §§ 2820-2831, post.

§ 2338. [Am'd, 1895.] Compensation of committee.

A committee of the property is entitled to the same compensation as an executor or administrator. But in a special case, where his services exceed those of an executor or administrator, the supreme court or a county court within the county may allow him such an additional compensation for such additional services, as it deems just. The compensation of a com-

mittee of the person must be fixed by the court, and paid by the committee of the property, if any, out of the funds in his hands. The additional compensation authorized by this section may be allowed to the committee upon any judicial settlement made by him, and shall be for such additional services up to and including such settlement.

See L. 1890, ch. 516; L. 1893, ch. 697; L. 1895, ch. 946.

§ 2339. Committee under control of court; limitation of powers.

A committee, either of the person or of the property, is subject to the direction and control of the court by which he was appointed, with respect to the execution of his duties; and he may be suspended, removed, or allowed to resign, in the discretion of the court. A vacancy created by death, removal, or resignation may be filled by the court. But a committee of the property cannot alien, mortgage, or otherwise dispose of, real property, except to lease it for a term not exceeding five years, without the special direction of the court, obtained upon proceedings taken for that purpose, as prescribed in title seventh of this chapter.

§ 2340. Committee of property may maintain actions, etc.

A committee of the property, appointed as prescribed in this title, may maintain, in his own name, adding his official title, any action or special proceeding, which the person, with respect to whom he is appointed, might have maintained, if the appointment had not been made.

Part of § 5 of act of 1874, am'd. See ante, § 429; § 426, subd. 2; §§ 427-8, 1755.

§ 2341. [Am'd, 1894, 1906.] Committee of property; to file inventory and account.

The provisions of article two of title seven of chapter eighteen of this act, requiring the general guardian of an infant's property, appointed by a surrogate's court, to file in the month of January in each year an inventory, account and affidavit, and prescribing the form of the papers so to be filed, apply to a committee of the property appointed, as prescribed in this title. For the purpose of making that application the committee is deemed a general guardian of the property; the person with respect to whom he is appointed, is deemed a ward and the papers must be filed in the office of the clerk of the court by which the committee was appointed, or if he was appointed by the supreme court, in the clerk's office where the order appointing him is entered, and, if the incompetent person for whom such committee is appointed has been committed to a state institution, and is an inmate thereof, a duplicate of such inventory, account, and affidavit, shall be filed also by said committee with the superintendent or officer having special jurisdiction over the institution where the incompetent person is confined. In every case where a committee has used or employed the services of an incompetent person, with respect to whom he has been appointed a committee, or where moneys have been earned by or received on behalf of such incompetent person, the committee must account for any moneys so earned or derived from such services, the same as for other property or assets of the incompetent person.

L. 1894, ch. 51; L. 1906, ch. 181. In effect Sept. 1, 1906.

Am'd L. 1415

ch. 344

Am'd L.

1915 ch.

535

§ 2342. [Am'd, 1895, 1899.] Id.; may be compelled to file the same, or render an additional account, etc.

In the month of February of each year, the presiding judge of the court, by which the committee of the property was appointed, or if he was appointed by the supreme court, the county judge of the county where the order appointing him is entered, must examine, or cause to be examined under his direction, all accounts and inventories filed by committees of the person and property, since the first day of February of the preceding year. If it appears, upon the examination, that a committee, appointed as prescribed in this title, has omitted to file his annual inventory or accounting, or the affidavit relating thereto, as prescribed in the last section; or if the judge is of the opinion that the interest of the person, with respect to whom the committee was appointed, requires that he should enter a more full or satisfactory inventory or account, the judge must make an order requiring the committee to supply the deficiency, and also, in his discretion, personally to pay the expense of serving the order upon him. An order so made may be entered and enforced, and the failure to obey it may be punished, as if it were made by the court. Where the committee fails to comply with the order, within three months after it is made, or, where the judge has reason to believe that sufficient cause exists for the removal of the committee, the judge may, in his discretion, appoint a fit person special guardian of the incompetent person with respect to whom the committee was appointed, for the purpose of filing a petition in his behalf for the removal of the committee and prosecuting the necessary proceedings for that purpose. The committee may be compelled in the discretion of the court, to pay personally the costs of the proceedings so instituted. The committee of the property of an incompetent person appointed as prescribed in this title, may at any time in the discretion of the court making such appointment, render to such court an intermediate judicial account of all his proceedings affecting the property of the incompetent person to the date of the filing thereof; and said account shall be then judicially adjusted, determined and filed; and the same shall be in all respects a final judicial account of the proceedings of said committee affecting said property to that time. Notice of the application for such intermediate accounting shall be given in the manner in which and to the persons to whom notice of application for the appointment of a committee of the person or property of an alleged lunatic, idiot or habitual drunkard is required to be given by title six of chapter seventeen of the code of civil procedure. The court shall have power and it shall be its duty to appoint a suitable person as special guardian of the incompetent person for the protection of his rights and interests in said proceeding.

L. 1874, ch. 446, § 4, am'd. See § 2844, post; L. 1895, ch. 746, superseding amendment in ch. 946; L. 1899, ch. 350. In effect Sept. 1, 1899.

§ 2343. Property, when to be restored.

Where a person, with respect to whom a committee is appointed, as prescribed in this title, becomes competent to manage himself or his affairs, the court must make an order, discharging the committee of his property, or the committee of his person, or both, as the case requires, and requiring the former committee

to restore to him the property, remaining in the committee's hands. Thereupon the property must be restored accordingly.

Id., § 28, am'd.

§ 2344. [Am'd, 1908.] Id.; disposition in case of death.

Where a person, of whose property a committee has been appointed, as prescribed in this title, dies during his incompetency, the power of the committee ceases; and the property of the decedent must be administered and disposed of, as if a committee had not been appointed. The committee may, in such case render to the court by which he was appointed, a final account of his proceedings, touching the property of the incompetent. Such account shall contain an inventory in the form prescribed by subdivision one of section twenty-eight hundred and forty-two of this act and a full and true account in form of debtor and creditor of all his receipts and disbursements; and there shall be appended thereto an affidavit of the committee in the form prescribed by section twenty-eight hundred and forty-three of this act and there shall be filed therewith a voucher for every payment except in one of the cases specified in section twenty-seven hundred and twenty-nine of this act. Notice of the application for settlement of such account shall be given in such manner as the court may direct, to the sureties on the official bond of the committee or the legal representatives of such sureties, and to the executor or administrator of the decedent, if any; and, if there be no executor or administrator, to the decedent's husband or wife, and heirs and next of kin, or if any of those persons shall have died, to his executor or administrator. And such account shall be judicially settled, adjusted and determined.

Id., § 29 and § 25, am'd by L. 1865, ch. 724 (6 Edm. 581). Am'd by L. 1908, ch. 271. In effect Sept. 1, 1908.

§ 2344a. [Added, 1909.] Court may compel performance of contract made by incompetent person in certain cases.

The supreme court shall have authority to decree and compel the specific performance of any bargain, contract or agreement which may have been made by any idiot, lunatic or habitua drunkard, while such person was capable to contract; and of any contract in relation to lands made by the ancestor of such person from whom such person inherits or takes as devisee or otherwise; and to direct the committee of such person to do and execute all necessary conveyances and acts for that purpose; and in case the person entitled to such conveyance is the committee of such incompetent person, the said court may, upon the petition of said committee, appoint some suitable and proper person to execute the said conveyance in the name of such incompetent person, upon payment by the vendee of any sum remaining due to such person upon said contract, or upon the fulfillment of the contract on the part of the party who contracted with the person represented by said committee.

Added by L. 1909, ch. 65. Derivation — R. S., pt. 2, ch. 5, tit. 2, § 22, as amended by L. 1880, ch. 423, § 1. See note 15a of notes of Board of Statutory Consolidation at end of code.

TITLE VII.

Proceedings for the disposition of the real property of an infant, lunatic, idiot, or habitual drunkard.

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§ 2345. Action to compel conveyance.

In either of the following cases, an action may be maintained against an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy, or habitual drunkenness, to procure a judgment, directing a conveyance of real property, or of an interest in real property:

1. Where the infant or incompetent person is seized or possessed of the real property, or interest in real property, by way of mortgage, or only in trust for another.
2. Where a valid contract for the sale or conveyance of the real property, or interest in real property, has been made; but a conveyance thereof cannot be made, by reason of the infancy or incompetency of the person in whom the title is vested.

2 R. S. 55, §§ 21, 22 (2 Edm. 56); L. 1874, ch. 446, §§ 9, 23-25 (9 Edm. 931, 933), am'd; L. 1875, ch. 5/4, §§ 7 and 8; 2 R. S. 194, ch. 1, §§ 167, 169 (2 Edm. 2.2).

§ 2346. [Am'd, 1882.] Who may maintain action.

An action may be maintained, in a case specified in the last section, by a person entitled to the conveyance; and, also, in a case specified in subdivision second of that section, by the executor or administrator of the person who made the contract, or of a person who died seized or possessed of the real property, or interest in real property, or by an heir or devisee of either of those persons, to whom the real property has descended, or was devised. The action may be maintained by the committee of the lunatic or other incompetent person; but in that case the court must appoint a special guardian for the incompetent person as prescribed by law, where an infant is defendant, and the proceedings are the same as in a like action against an infant.

Id., R. S., and laws as above.

§ 2347. Judgment; effect thereof.

A judgment, directing such conveyance, shall not be rendered unless the court, after hearing the parties, is satisfied that the

conveyance ought to be made. Upon rendering final judgment to that effect, the court has power to direct the guardian of the infant's property, or the committee of the property of the lunatic or other incompetent person, or a special guardian appointed in the action, to execute any conveyance, or to do any other act, which is necessary, in order to carry the judgment into effect.

2 R. S. 194, § 160, and 2 R. S. 55, ch. 5, § 19 (2 Edm. 56).

§ 2348. [Am'd, 1893, 1903, 1907.] Application to dispose of real property or an interest therein.

In either of the following cases real property or a term, estate or other interest in real property of an infant in being or the contingent interest therein of an infant not in being or of a person incompetent to manage his affairs by reason of lunacy, idiocy or habitual drunkenness, or an inchoate right of dower in real property belonging to an infant or an incompetent person or the possibility that upon breach of a condition a right of re-entry will vest in or real property will revert to an infant or an incompetent person or his heirs solely or in common with others may be sold, conveyed, mortgaged, released or leased as prescribed in the following sections of this title:

1. Where the personal property, and the income of the real property, of the infant or incompetent person, are, together, insufficient for the payment of his debts, or for the maintenance and necessary education of himself and his family.

2. [Am'd, 1903.] Where the interest of the infant in being or the contingent interest of an infant not in being, or the interest of an incompetent person require or will be substantially promoted by such disposition, on account of the real property or term, or estate, or other interest in real property being exposed to waste or dilapidation; or being wholly unproductive, or for the purpose of raising funds to preserve or to improve the same, or for other peculiar reasons, or on account of other peculiar circumstances.

3. Where an action might be maintained against the infant or incompetent person, to procure a judgment, directing the conveyance of the real property, or interest in real property, as prescribed in sections twenty-three hundred and forty-five and twenty-three hundred and forty-six of this act.

4. [Added, 1907.] Where the interest of the infant or incompetent person will be substantially promoted by releasing or joining with others in releasing for a valuable consideration the possibility that upon breach of a condition a right of re-entry will vest in or real property will revert to the infant or incompetent person or his heirs solely or in common with others. Such possibility is referred to in the following sections of this title as a possibility of reverter.

2 R. S. 194, 195, §§ 167, 170, 175 (2 Edm. 202, 203); 2 R. S. 53-55, §§ 11, 16, 19, and 22 (2 Edm. 55 and 56); L. 1864, ch. 417, §§ 1 and 5 (6 Edm. 291); L. 1869, ch. 627 (7 Edm. 463); L. 1870, ch. 37 (7 Edm. 584); also, L. 1874, ch. 446, § 38, and *id.*, §§ 6, 9, 17 and 23 (9 Edm. 929, 933), *am'd*; L. 1875, ch. 574, § 6, and L. 1878, ch. 267, § 2; L. 1893, ch. 639; L. 1903, ch. 154. See L. 1903, ch. 432. *Am'd* by L. 1907, ch. 49. In effect April 3, 1907. See Rules 55-59.

§ 2349. [Am'd, 1905.] Id.; by whom; notice when incompetent.

An application, in either of the cases prescribed, in the last section, must be made by the petition of the general guardian, or the guardian of the property of the infant; or by the committee of the property of the lunatic, or other incompetent person; or by any relative, or other person, in behalf of either. Where the application is in behalf of an infant of the age of fourteen years or upwards, the infant must join therein. Where the application is made to the supreme court, the petition must be presented at a term held within the judicial district, in which the property, or a part thereof, is situated. Where such application affects the interest of an incompetent person who has been committed to a state institution and is an inmate thereof, notice of such application must be given to the superintendent, acting superintendent, or state officer having special jurisdiction over the institution where the incompetent person is confined.

Id., R. S., and laws as in last section; L. 1905, ch. 434. In effect Sept. 1, 1905.

§ 2350. [Am'd, 1893, 1910.] Contents of petition.

The petition must be verified in like manner as a verified pleading in an action in the supreme court. It must set forth the grounds of the application; and in a case specified in subdivisions first and second of the last section but one, other than a case where the application is made for the sale of an undivided interest of the infant or incompetent person in one or more parcels of land in order to avoid an action of partition on the part of his cotenants, or for the dower of a widow therein, it must also state the particulars and value of the real and personal property, and the amount of the income of the infant or incompetent person; the disposition which has been made of his personal property, and an account of the debts or demands, if any, existing against his estate. In the case above specified where the application is made for the sale of an undivided interest of the infant or incompetent person, the petition must state the particulars and value of the real property in respect to which a sale is desired.

L. 1893, ch. 311. See Rule 55. Am'd by L. 1910, ch. 285. In effect Sept. 1, 1910.

in 2^d ch. **§ 2351. [Am'd, 1893, 1903, 1907.] Bond of committee of lunatic, et cetera.**

An application to sell, mortgage, release or lease real property, or an interest in real property, of a lunatic, idiot or habitual drunkard, cannot be granted, unless a committee of his property has been appointed. Upon such an application, if it is made by the committee, the court must make an order, directing him to file with the clerk, a bond, in such a form, in such an amount, and with such sureties, as it directs, conditioned for the faithful discharge of his trust; for the paying over and investing of, and accounting for, all moneys received by him in the special proceeding, according to the direction of any court having authority to

give directions in the premises; and for the observance of the directions of the court, in relation to the trust. If the application is made by any other person, an order must be made thereupon, requiring the committee to show cause why he should not file such a bond. If, after hearing the committee, the court is of the opinion, that there is a probable cause for granting the application, it may make an order, requiring the committee to file such a bond; or, if the committee so elects, or fails to file the bond as directed in the order, it may appoint a suitable person to be the special guardian of the incompetent person, with respect to the proceedings; who must thereupon file such a bond. Where an application is made to release an inchoate right of dower, application must be made by the husband of the lunatic, idiot or habitual drunkard and may be made before or after a committee has been appointed, except that application may be made by the committee of the property of the lunatic, idiot, or habitual drunkard in any case where, at the time of the application, the property to which the inchoate right of dower attaches has already been sold by the husband and the wife has not joined in the conveyance or otherwise released her inchoate right of dower. When the application is made by the husband, the court may appoint him special guardian, and he must file a bond as herein provided.

L. 1893, ch. 639; L. 1903, ch. 368; L. 1907, ch. 49. In effect April 3, 1907.

§ 2352. [Am'd, 1893, 1907.] Id.; of guardian of infant.

Upon an application to sell, mortgage release or lease real property or an interest in real property of an infant, the court must appoint a suitable person to be the special guardian of the infant with respect to the proceedings, who must thereupon file with the clerk a bond as prescribed in the last section. Any trust company authorized by the laws of this state to act as general guardian of the estate of an infant without giving security may be appointed such special guardian and in such case the court in the order of appointment may dispense with the giving and filing of any such bond.

L. 1893, ch. 268; L. 1907, ch. 49. In effect April 3, 1907. See § 475.

§ 2353. Bond; how prosecuted.

Upon a breach of the condition of a bond, given as prescribed in either of the last two sections, the court must direct it to be prosecuted for the benefit of the person injured.

§ 2354. [Am'd, 1893.] Reference to inquire into the application.

Upon the presentation of the petition, and the filing of the bond, where the filing of such a bond shall be necessary, the court must make an order appointing a suitable person a referee to inquire into the merits of the application. The referee must examine into the truth of the allegations of the petition; hear the allegations and proofs of all persons interested in the property, or

otherwise interested in the application; and report his opinion thereupon, together with the testimony, with all convenient speed.

L. 1898, ch. 263. See Rule 56.

§ 2355. [Am'd, 1893, 1907.] Final order.

Upon the filing of the referee's report, and after examining into the matter, the court must make a final order upon the application. In a proper case a final order, confirming the referee's report, must direct that the real property or term, estate, possibility of reverter or other interest in real property or a part thereof of an inchoate right of dower therein, as is necessary, or as justice requires, be mortgaged, let for a term of years, sold, released or conveyed by the special guardian, appointed as prescribed in this title, or by the committee of the property of the lunatic or other incompetent person. The final order must also contain such directions, respecting the time, manner and conditions of the sale, release or conveyance directed thereby, as the court thinks proper to insert therein.

L. 1893, ch. 639; L. 1907, ch. 49. In effect April 8, 1907.

§ 2356. [Am'd, 1893.] Report of sale, etc.

Before a sale, mortgage, release, or lease can be made pursuant to the final order, the special guardian or the committee must enter into an agreement therefor, subject to the approval of the court; and must report the agreement to the court under oath. Upon the confirmation thereof by the order of the court, he must execute, as directed by the court, a deed, mortgage, release or lease. Where the final order directs the execution of a conveyance in the first instance, for the purpose of fulfilling a contract, or because the property is held by way of mortgage, or in trust only, the guardian or committee, executing the conveyance, must report the conveyance to the court, under oath.

L. 1893, ch. 639.

§ 2357. Certain sales, etc., prohibited.

Real property, or an interest in real property, shall not be sold, leased, or mortgaged, as prescribed in this title, contrary to the provisions of a will, by which it was devised, or of a conveyance or other instrument, by which it was transferred, to the infant or incompetent person.

§ 2358. [Am'd, 1893, 1906, 1907.] Effect of conveyance, etc.

A deed, mortgage, release, or lease, made in good faith, as prescribed in this title, either upon an application in behalf of the infant or an incompetent person, or pursuant to the directions contained in a judgment rendered against him, has the same validity and effect, as if executed by the person in whose behalf it was executed, and as if the infant was of full age or the lunatic, idiot, or habitual drunkard was of sound mind and competent

to manage his or her affairs. And the same shall be valid and effectual to vest in any purchaser or purchasers any interest therein of any infant not in being, at the time of the said sale, and any mortgage so executed shall be a valid lien and charge upon the contingent interest of any infant not in being, at the time of the execution and delivery of the same. And a release of an inchoate right of dower as authorized by this title shall have the same effect as if the wife had joined with the husband in a deed or conveyance of the property affected thereby and had duly acknowledged the same in the manner required by law to pass the estate of married women.

L. 1893, ch. 639; L. 1906, ch. 127; L. 1907, ch. 49. In effect April 3, 1907.

§ 2359. [Am'd, 1892, 1907.] Proceeds of sale deemed real property.

A sale of real property, or of an interest in real property, other than a possibility of reverter of an infant or incompetent person, made as prescribed in this title, does not give to the infant or incompetent person, any other or greater interest in the proceeds of the sale, than he or she had in the property or interest sold. Those proceeds are deemed property of the same nature, as the estate or interest sold, until the infant arrives at full age, or the incompetency is removed. The proceeds of the release of a possibility of reverter shall be deemed and treated as if they were proceeds of real property of which the infant was seized and possessed. If the infant should die before arriving at full age, or the incompetent person should die before the incompetency is removed not leaving any personal property, or not leaving sufficient personal property to pay funeral expenses and expenses that may be necessary or necessarily incurred, then in either or each case the proceeds are to be deemed personal property so far as may be necessary to pay the funeral and other necessary expenses. The proceeds are to be paid upon order of the surrogate's court or court having jurisdiction of the estate of the deceased, to an administrator appointed by the surrogate to administer upon decedent's estate, and after paying all funeral expenses and expenses of administration and any indebtedness, the remainder, if any there be, shall, upon the order of the surrogate, be paid into the hands of the trustee who held the same, to be distributed as the law directs. This act is to include the said proceeds of any infant or incompetent person that has died prior to this amendment, the proceeds now remaining in the hands of a trustee.

L. 1892, ch. 523; L. 1907, ch. 49. In effect April 3, 1907.

§ 2360. Infant deemed a ward of court.

From the time of the filing of a petition, by or in behalf of an infant, praying for an order directing a conveyance, or a sale, mortgage, or lease of his real property, or of an interest in real property, the infant is considered a ward of the court, with respect to that real property or interest, and the income and proceeds thereof.

am. L. 1915
ch. 624

§ 2361. [Am'd, 1893, 1903, 1906, 1907.] Disposition of proceeds; accounting.

The court must, by order, direct the disposition of the proceeds of such a sale, mortgage, release or lease. It must direct the investment of any portion thereof belonging to the infant or incompetent person, which is not needed for the payment of debts or the safe keeping, of the immediate maintenance and education, of himself or his family, or for the preservation or improvement of his real property or his interest in real property. It must require a report, under oath, of the disposition and investment thereof, to be made as soon as practicable, and must compel periodical accounts to be rendered thereafter by each person, who is intrusted with the proceeds, or any part thereof. Where an inchoate right of dower is released as prescribed in this title and such release is to accompany a sale by the husband of the property to which the inchoate right of dower attaches, the court shall make an order requiring one-third of the amount realized on the sale of the property to which the inchoate right of dower attached to be invested by the special guardian, or paid into the court to be held for the benefit of the husband during his life and upon his death for the benefit of the wife during her life, or the court may direct said amounts to be paid to the husband upon his giving a bond in the penalty of at least double the amount so received for such release, with at least two sureties, who shall justify in double the amount of such penalty, conditioned for the repayment as the court shall direct by his executors or administrators of such amount upon the death of the husband. Where an inchoate right of dower is released as prescribed in this title, and, at the time of the application, the property to which the inchoate right of dower attaches has already been sold by the husband, and the wife has not joined in the conveyance or otherwise released her inchoate right of dower, the court shall make an order that, as the consideration for the release, or as part of the consideration therefor, there be paid to the special guardian or into the court an amount to be fixed by the court as equal to one-third of the fair market value of the property, to be invested by the special guardian or held by the court for the benefit of the person making such payment during the life of the husband, and upon his death for the benefit of the wife during her life, and upon her death to be returned to the person making such payment or to his executors, administrators or assigns; or in lieu of such payment the court may allow a bond to be given in the penalty of at least double the amount so fixed as equal to one-third of the fair market value of the property, with at least two sureties, who shall justify in double the amount of such penalty, conditioned for the payment as the court shall direct, upon the death of the husband leaving the wife surviving, of the said sum so fixed as equal to one-third of the fair value of the property, to be held for the benefit of the wife during her life and upon her death to be returned to the person giving such bond or to his executors,

administrators or assigns. In case by any contingency, infants not in being may thereafter become possessed of any interest in said premises so sold, mortgaged or leased, the court, in case of a sale, shall cause the proceeds of the sale, after paying the costs and expenses of the same, to be placed at interest for the benefit of the persons who are, or who may ultimately be entitled to the same, and shall not authorize the distribution of the same in advance of said contingency, except upon a petition of some person entitled thereto, and upon filing a bond in such penalty as the court shall direct, with two or more sureties approved by the court, and conditioned that in case of any contingency by which any infant not then in being shall thereafter become entitled to any of the proceeds of the sale, that said petitioner will pay to said person or persons his or their proportionate share of the money so paid over to said petitioner; and in the case of the mortgaging of said real estate the proceeds of the same, after paying costs and expenses, shall be paid out and disbursed under the direction of the court only for the purpose of paying lawful charges thereon or repairing, improving, building upon or otherwise enhancing in value any real estate so mortgaged as aforesaid.

L. 1893, ch. 639; L. 1903, ch. 368; L. 1906, ch. 127; L. 1907, ch. 49. In effect April 3, 1907.

§ 2362. Particular estates; when included in sale.

Where the real property, or the estate, term or other interest in real property, directed to be sold, is subject, absolutely or contingently, to a right of dower, or an estate for life, or is subject to an estate for years, in the whole or any part thereof, the person, having the prior right or estate, may manifest in writing his consent, either to receive, from the proceeds of the sale, a gross sum, to be fixed according to the principles of law applicable to annuities, in satisfaction of his right or estate; or to have a proportionate share of the proceeds of the sale invested, and the interest thereof paid to him, from the time of the investment, or of the commencement of his right or estate, as justice requires, until the determination of his right or estate. Upon filing the consent with the clerk, the final order may, in the discretion of the court, direct a sale of the entire property, to which the right or estate attaches. In such a case, the court must, after the sale, ascertain the value of the right or interest of the person so consenting; and the final order must either direct the payment, from the proceeds of the sale, of the gross sum so ascertained as the value, or the investment of a just proportion of the proceeds and the payment to him of the interest thereof. But such a gross sum shall not be paid, nor shall such an investment be made, until an effectual release of the right or estate of the person so consenting, executed to the satisfaction of the court, and duly acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, has been filed with the clerk.

2 R. S. 196, §§ 181, 182 (2 Edm. 204); L. 1864, ch. 417 (6 Edm. 292, 293); L. 1874, ch. 446, §§ 13, 15, 16 (9 Edm. 932).

§ 2363. Id.; when belonging to infant, etc.

Where the interest of the infant, or of the lunatic or other incompetent person, consists of a right of dower, or an estate for life, or for years, the final order may authorize the special guardian or committee to join, with the person or persons holding the reversionary estate, in a conveyance of the property to which the interest attaches, so as to release the right of dower, or fully convey the particular estate, on receiving, from the proceeds of the sale, a gross sum, in satisfaction of that interest, or a proportionate part of the proceeds, to be invested until the determination of the particular estate; and, in either case, to be ascertained as prescribed in the last section. Where a proportion of the proceeds is so received by the guardian or committee, for investment, the final order must provide for the investment thereof, until the determination of the particular estate; and then for the payment thereof to the person entitled thereto.

§ 2364. Debts of infant, etc., to be paid equally.

In the application of money, arising from a sale, mortgage or lease, made for the purpose of paying debts, as prescribed in this title, the special guardian of the infant, or the committee of the property of the incompetent person, must pay all debts, in equal proportion, without giving a preference to a debt founded upon a specialty, or upon which judgment has been taken.

2 R. S. 54, § 15 (2 Edm. 55); L. 1874, ch. 446, § 21 (9 Edm. 923).

TITLE VIII.

Arbitrations.

- Sec. 2365. When submission to arbitration cannot be made.
 2366. What controversies may be submitted, and how.
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§ 2365. When submission to arbitration cannot be made.

A submission of a controversy to arbitration cannot be made, either as prescribed in this title or otherwise, in either of the following cases:

1. Where one of the parties to the controversy is an infant, or a person incompetent to manage his affairs, by reason of lunacy, idiocy, or habitual drunkenness.

2. Where the controversy arises respecting a claim to an estate in real property, in fee or for life.

But where a person, capable of entering into a submission, has knowingly entered into the same with a person incapable of so doing, as prescribed in subdivision first of this section, the objection, on the ground of incapacity, can be taken only in behalf of the person so incapacitated. And the second subdivision of this section does not prevent the submission of a claim to an estate for years, or other interest for a term of years, or for one year or less, in real property; or of a controversy respecting the partition of real property between joint tenants or tenants in common; or of a controversy respecting the boundaries of lands, or the admeasurement of dower.

2 R. S. 541, §§ 1 and 2 (2 Edm. 560).

§ 2366. What controversies may be submitted, and how.

Except as otherwise prescribed in the last section, two or more persons may, by an instrument in writing, duly acknowledged or proved, and certified, in like manner as a deed to be recorded, submit to the arbitration of one or more arbitrators, any controversy, existing between them at the time of the submission, which might be the subject of an action. They may, in the submission, agree that a judgment of a court of record, specified in the instrument, shall be rendered upon the award, made pursuant to the submission. If the supreme court is thus specified, the submission may also specify the county in which the judgment shall be entered. If it does not, the judgment may be entered in any county.

Id., part of § 1 and § 9.

§ 2367. Appointment of additional arbitrator, or umpire.

Where a submission is made as prescribed in this title, an additional arbitrator or an umpire cannot be selected or appointed, unless the submission expressly so provides. Where a submission, made either as prescribed in this title or otherwise, provides that two or more arbitrators, therein designated, may select or appoint a person as an additional arbitrator or as an umpire, the selection or appointment must be in writing. An additional arbitrator or umpire must sit with the original arbitrators upon the hearing. If testimony has been taken before his selection or appointment, the matter must be reheard, unless a rehearing is waived in the submission, or by the subsequent written consent of the parties, or their attorneys.

§ 2368. Time for hearing; adjournment, etc.

Subject to the terms of the submission, if any are specified therein, the arbitrators, selected as prescribed in this title, must appoint a time and place for the hearing of the matters submitted to them; and must cause notice thereof to be given to each of the parties. They, or a majority of them, may adjourn the hearing from time to time, upon the application of either party, for good cause shown, or upon their own motion; but not beyond the day fixed in the submission for rendering their award, unless the time so fixed is extended by the written consent of the parties to the submission, or their attorneys.

2 B. S. 541, § 2.

§ 2369. Arbitrators to be sworn.

Before hearing any testimony, arbitrators selected either as prescribed in this title or otherwise must be sworn, by an officer designated in section 842 of this act, faithfully and fairly to hear and examine the matters in controversy, and to make a just award, according to the best of their understanding; unless the oath is waived, by the written consent of the parties to the submission, or their attorneys.

Id., § 4, and part of § 5.

§ 2370. Attendance of witnesses, etc.

The arbitrators, selected either as prescribed in this title, or otherwise, or a majority of them, may require any person to attend before them as a witness; and they have, and each of them has, the same powers, with respect to all the proceedings before them, which are conferred, by the provisions of title second of chapter ninth of this act, upon a board, or a member of a board, authorized by law to hear testimony.

Id., § 6, and part of § 5.

§ 2371. All the arbitrators to meet; when majority may award. Fees.

All the arbitrators, selected as prescribed in this title, must meet together, and hear all the allegations and proofs of the parties; but an award by a majority of them is valid, unless the concurrence of all is expressly required in the submission. Unless it is otherwise expressly provided in the submission, the award may require the payment, by either party, of the arbitrators' fees, not

exceeding the fees allowed to a like number of referees in the supreme court; and also their expenses.

2 R. S. 541, § 7.

§ 2372. Award; to be authenticated, etc.

To entitle the award to be enforced, as prescribed in this title, it must be in writing; and, within the time limited in the submission, if any, subscribed by the arbitrators making it; acknowledged or proved, and certified, in like manner as a deed to be recorded; and either filed in the office of the clerk of the court, in which, by the submission, judgment is authorized to be entered upon the award, or delivered to one of the parties, or his attorney.

Id., § 8, and part of § 9.

§ 2373. Motion to confirm award.

At any time within one year after the award is made as prescribed in the last section, any party to the submission may apply to the court, specified in the submission, for an order confirming the award; and thereupon the court must grant such an order, unless the award is vacated, modified or corrected, as prescribed in the next two sections. Notice of the motion must be served, upon the adverse party to the submission, or his attorney, as prescribed by law for service of notice of a motion upon an attorney in an action in the same court. In the supreme court, the motion must be made within the judicial district, embracing the county where the judgment is to be entered.

Id., remainder of § 9.

§ 2374. Id.; to vacate award.

In either of the following cases, the court, specified in the submission, must make an order vacating the award, upon the application of either party to the submission:

1. Where the award was procured by corruption, fraud, or other undue means.

2. Where there was evident partiality or corruption in the arbitrators, or either of them.

3. Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.

4. Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award, upon the subject-matter submitted, was not made.

Where an award is vacated, and the time, within which the submission requires the award to be made, has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

Id., § 10, and part of § 13.

§ 2375. Id.; to modify or correct award.

In either of the following cases, the court, specified in the submission, must make an order modifying or correcting the award, upon the application of either party to the submission:

1. Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property, referred to in the award.

2. Where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matters submitted.

3. Where the award is imperfect in a matter of form, not affecting the merits of the controversy, and if it had been a referee's report, the defect could have been amended or disregarded by the court.

The order may modify and correct the award, so as to affect the intent thereof, and promote justice between the parties.

2 R. S. 541, §§ 11 and 13.

§ 2376. Motions; when to be made.

Notice of a motion to vacate, modify or correct an award, must be served upon the adverse party to the submission, or his attorney, within three months after the award is filed or delivered, as prescribed by law for service of notice of a motion, upon an attorney in an action. For the purposes of the motion, any judge, who might make an order to stay the proceedings, in an action brought in the same court, may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Id., § 12.

§ 2377. Costs on vacating award.

Where the court vacates an award, costs, not exceeding twenty-five dollars and disbursements, may be awarded to the prevailing party; and the payment thereof may be enforced, in like manner as the payment of costs upon a motion in an action.

Id., § 19, am'd.

§ 2378. Judgment on award; when and how entered. Costs.

Upon the granting of an order confirming, modifying, or correcting an award, judgment may be entered in conformity therewith, as upon a referee's report in an action, except as is otherwise prescribed in this title. Costs of the application, and of the proceedings subsequent thereto not exceeding twenty-five dollars and disbursements, may be awarded by the court, in its discretion. If awarded, the amount thereof must be included in the judgment.

Id., § 14, am'd.

§ 2379. Judgment-roll.

Immediately after entering judgment, the clerk must attach together and file the following papers, which constitute the judgment-roll:

1. The submission; the selection or appointment, if any, of an additional arbitrator, or umpire; and each written extension of the time, if any, within which to make the award.

2. The award.

3. Each notice, affidavit, or other paper, used upon an application to confirm, modify, or correct the award, and a copy of each order of the court, upon such an application.

4. A copy of the judgment.

The judgment may be docketed, as if it was rendered in an action.

2 R. S. 541, § 15, and part of § 16, am'd.

§ 2380. Effect of judgments; how enforced.

The judgment so entered has the same force and effect, in all respects, as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced, as if it had been rendered in an action in the court in which it is entered.

Id., part of § 16. See § 1270, ante; also, §§ 1240 and 1241.

§ 2381. Appeal.

An appeal may be taken from an order vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action. The proceedings upon such an appeal, including the judgment thereupon, and the enforcement of the judgment, are governed by the provisions of chapter twelfth of this act, as far as they are applicable.

Id., §§ 16, 17, 20 and 21, am'd.

§ 2382. Effect of party's death, lunacy, etc.; proceedings thereupon.

The death of a party to a submission, made either as prescribed in this title or otherwise, or the appointment of a committee of the person or property of such a party, as prescribed in title sixth of this chapter, operates as a revocation of the submission, if it occurs before the award is filed or delivered; but not afterwards. Where a party dies afterwards, if the submission contains a stipulation, authorizing the entry of a judgment upon the award, the award may be confirmed, vacated, modified, or corrected, upon the application of, or upon notice to, his executor or administrator, or a temporary administrator of his estate; or, where it relates to real property, his heir or devisee, who has succeeded to his interest in the real property. Where a committee of the property, or of the person, of a party, is appointed, after the award is filed or delivered, the award may be confirmed, vacated, modified, or corrected, upon the application of, or notice to, a committee of the property, but not otherwise. In a case specified in this section, a judge of the court may make an order, extending the time within which notice of a motion to vacate, modify, or correct the award, must be served. Upon confirming an award, where a party has died since it was filed or delivered, the court must enter judgment in the name of the original party; and the proceedings thereupon are the same, as where a party dies after a verdict.

§ 2383. Revocation of submission.

A submission to arbitration, made either as prescribed in this title or otherwise, cannot be revoked by either party, after the allegations and proofs of the parties have been closed, and the matter finally submitted to the arbitrators for their decision. A revocation, when allowed, must be made by an instrument in writing, signed by the revoking party, or his authorized agent and delivered to the arbitrators, or one of them; and it is not necessary in any case, that the instrument of revocation should be under seal. Any party to a submission may thus revoke it;

whether he is a sole party to the controversy, or one of two or more parties on the same side.

12. S. 541, part of § 23.

§ 2384. Liability of party who revokes.

Where a party expressly revokes a submission, made either as prescribed in this title or otherwise, any other party to the submission may maintain an action against him, and also against his sureties, if any, upon the submission, or any instrument collateral thereto, in which action the plaintiff may recover all the costs and other expenses, and all the damages, which he has incurred in preparing for the arbitration, and in conducting the proceedings to the time of the revocation. Either of the arbitrators may recover, in an action against the revoking party, his reasonable fees and expenses.

Id., part of § 23 and 24.

§ 2385. Limitation of recovery against him.

A sum, penalty, forfeiture, or damages, shall not be recovered for a revocation of a submission to arbitration, made either as prescribed in this title or otherwise, except as prescribed in the last section; notwithstanding any stipulated damages, penalty, or forfeiture, expressed in the submission, or in any instrument collateral thereto.

Id., § 25.

§ 2386. Application of this title.

This title does not affect any right of action in affirmance, disaffirmance, or for the modification of a submission, made either as prescribed in this title or otherwise, or upon an instrument collateral thereto, or upon an award made or purporting to be made in pursuance thereof. And, except as otherwise expressly prescribed therein, this title does not affect a submission, made otherwise than as prescribed therein, or any proceedings taken pursuant to such a submission, or any instrument collateral thereto.

Part of § 23, am'd.

TITLE IX.

Proceedings to foreclose a mortgage by advertisement

[See ch. 223, L. 1900, by which purchaser is entitled to certified copy of affidavits.]

- Sec. 2387. When mortgage may be foreclosed.
 2388. Notice of sale; how given.
 2389. Id.; how served.
 2390. Duty of county clerk.
 2391. Contents of notice of sale.
 2392. Sale; how postponed.
 2393. Id.; how conducted.
 2394. Mortgagee etc., may purchase.
 2395. Effect of sale.
 2396. Affidavit of sale, and of posting, serving, etc., notices.
 2397. When one affidavit suffices; printed notice to be annexed.
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 2399. Note upon record of mortgage.
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 2406. Application for surplus money.
 2407. Order for distribution.
 2408. Limitation of last four sections.
 2408a. Delivery of certain affidavits to purchaser.
 2409. Application of this title to mortgages to the State.

§ 2387. [Am'd, 1913.] When mortgage may be foreclosed

A mortgage upon real property, situated within the State, containing therein a power to the mortgagee, or any other person to sell the mortgaged property, upon default being made in a condition of the mortgage, may be foreclosed, in the manner prescribed in this title, where the following requisites concur:

1. Default has been made in a condition of the mortgage whereby the power to sell has become operative.
2. An action has not been brought to recover the debt secured by the mortgage, or any part thereof; or, if such an action has been brought, it has been discontinued, or final judgment has been rendered therein against the plaintiff, or an execution, or upon a judgment rendered therein in favor of the plaintiff has been returned wholly or partly unsatisfied.
3. The mortgage has been recorded in the proper book for recording mortgages, in the county wherein the property is situated.

4. The first notice required by subdivision one of the section is published within the time in which an action to foreclose such mortgage.

2 B. S. 545, §§ 1 and 2 (2 Edm. 564). Am'd, L. 1913, ch. 4 effect Sept. 1, 1913.

§ 2388. [Am'd, 1894, 1900, 1905.] Notice of sale; given.

The person entitled to execute the power of sale, must give notice, in the following manner, that the mortgage will be closed, by a sale of the mortgaged property, or a part thereof, at a time and place specified in the notice:

1. A copy of the notice must be published, at least once in each of the twelve weeks, immediately preceding the day of sale, in a newspaper published in the county or in a municipal corporation a part of which is within the county in which the property sold, or a part thereof, is situated.

L. 1894, ch. 730.

2. [Am'd, 1904.] A copy of the notice must be fastened to at least eighty-four days before the day of sale, in a conspicuous

place, at or near the entrance of the building, where the county court of each county, wherein the property to be sold is situated, is directed to be held; or, if there are two or more such buildings in the same county, then in a like place, at or near the entrance of the building nearest to the property; or, in the city and county of New York, in a like place, at or near the entrance of the building where the trial and special terms of the supreme court of the first judicial district are directed by law to be held.

L. 1904, ch. 49. In effect Sept. 1, 1904.

3. A copy of the notice must be delivered, at least eighty-four days before the day of sale, to the clerk of each county, wherein the mortgaged property, or any part thereof, is situated.

4. [Am'd, 1900, 1905.] A copy of the notice must be served, as prescribed in the next section, upon the mortgagor; or, if he is dead, upon his executor or administrator, if an executor or administrator has been appointed, and also upon his heirs, providing he died the owner of the mortgaged premises. A copy of the notice may also be served, in a like manner, upon a subsequent grantee or mortgagee of the property, whose conveyance was recorded, in the proper office for recording it in the county, at the time of the first publication of the notice of sale; upon the wife or widow of the mortgagor, and the wife or widow of each subsequent grantee whose conveyance was so recorded, then having an inchoate or vested right of dower, or an estate in dower, subordinate to the lien of the mortgage; or in the event of the death of the subsequent grantee who was at the time of his death the owner of the mortgaged premises, then upon his heirs; or upon any person, then having a lien upon the property, subsequent to the mortgage by virtue of a judgment or decree duly docketed in the county clerk's office and constituting a specific or general lien upon the property. The notice, specified in this section, must be subscribed by the person entitled to execute the power of sale, unless his name distinctly appears in the body of the notice, in which case it may be subscribed by his attorney or agent.

2 R. S. 545, § 3, am'd; L. 1842, ch. 277, § 5; L. 1844, ch. 346, § 1, and L. 1857, ch. 808, § 1 (4 Edm. 534, 667); L. 1900, ch. 766; L. 1905, ch. 433. In effect Sept. 1, 1905.

§ 2389. [Am'd, 1887.] *Id.*; how served.

Service of notice of the sale, as prescribed in subdivision fourth of the last section, must be made as follows:

1. Upon the mortgagor, his wife, widow, executor, or administrator, or a subsequent grantee of the property, whose conveyance is upon record, or his wife or widow; by delivering a copy of the notice, as prescribed in article first of title first of chapter fifth of this act, for delivery of a copy of a summons, in order to make personal service thereof upon the person to be served; or by leaving such a copy, addressed to the person to be served, at his dwelling-house, with a person of suitable age and discretion at least fourteen days before the day of sale. If said mortgagor is a foreign corporation, or being a natural person, he, or his wife, widow, executor or administrator, or a subsequent grantee of the property whose conveyance is upon record, or his wife or widow, is not a resident of or within the State, then service thereof may be made upon them in like manner without the State, at least twenty-eight days prior to the day of sale.

2. Upon any other person, either in the same method, or by depositing a copy of the notice in the post-office, properly inclosed in a postpaid wrapper, directed to the person to be served, at his

place of residence, at least twenty-eight days before the day of sale.

Id., § 3, am'd; L. 1887, ch. 685.

§ 2390. Duty of county clerk.

A county clerk, to whom a copy of a notice of sale is delivered, as prescribed in subdivision third of the last section but one, must forthwith affix it in a book, kept in his office for that purpose; must make and subscribe a minute, at the bottom of the copy, of the time when he received and affixed it; and must index the notice to the name of the mortgagor.

2 R. S. 545, § 3 in part, as am'd by L. 1857, ch. 308, § 1.

§ 2391. Contents of notice of sale.

The notice of sale must specify:

1. The names of the mortgagor, of the mortgagee and of each assignee of the mortgage.

2. The date of the mortgage, and the time when, and the place where, it is recorded.

3. The sum claimed to be due upon the mortgage, at the time of the first publication of the notice; and, if any sum secured by the mortgage is not then due, the amount to become due thereupon.

4. A description of the mortgaged property, conforming substantially to that contained in the mortgage.

Id., § 4.

§ 2392. Sale; how postponed.

The sale may be postponed, from time to time. In that case, a notice of the postponement must be published, as soon as practicable thereafter, in the newspaper in which the original notice was published; and the publication of the original notice, and of each notice of postponement, must be continued, at least once in each week, until the time to which the sale is finally postponed.

Id., § 5.

§ 2393. Id.; how conducted.

The sale must be at public auction, in the day-time, on a day other than Sunday or a public holiday, in the county in which the mortgaged property, or a part thereof, is situated; except that, where the mortgage is to the people of the State, the sale may be made at the Capitol. If the property consists of two or more distinct farms, tracts, or lots, they must be sold separately; and as many only of the distinct farms, tracts, or lots, shall be sold, as it is necessary to sell, in order to satisfy the amount due at the time of the sale, and the costs and expenses allowed by law. But where two or more buildings are situated upon the same city lot, and access to one is obtained through the other, they must be sold together.

Id., § 6, am'd.

§ 2394. Mortgagee, etc., may purchase.

The mortgagee, or his assignee, or the legal representative of either, may, fairly and in good faith, purchase the mortgaged property, or any part thereof, at the sale.

Id., § 7.

§ 2395. Effect of sale.

A sale, made and conducted as prescribed in this title, to a purchaser in good faith, is equivalent to a sale, pursuant to judgment in an action to foreclose the mortgage, so far only as to be an entire bar of all claim or equity of redemption, upon, or with respect to, the property sold, of each of the following persons:

1. The mortgagor, his heir, devisee, executor or administrator.
2. Each person claiming under any of them, by virtue of a title or of a lien by judgment or decree, subsequent to the mortgage, upon whom the notice of sale was served, as prescribed in this title.

3. Each person so claiming, whose assignment, mortgage, or other conveyance was not duly recorded in the proper book for recording the same in the county, or whose judgment or decree was not duly docketed in the county clerk's office, at the time of the delivery of a copy of the notice of said sale to the clerk of the county; and the executor, administrator, or assignee of such a person.

4. Every other person, claiming under a statutory lien or incumbrance, created subsequent to the mortgage, attaching to the title or interest of any person, designated in either of the foregoing subdivisions of this section.

5. The wife or widow of the mortgagor, or of a subsequent grantee, upon whom notice of the sale was served as prescribed in this title, where the lien of the mortgage was superior to her contingent or vested right of dower, or her estate in dower.

2 R. S. 545, § 8, am'd; L. 1842, ch. 277, and L. 1844, ch. 346, § 4 (4 Edm. 585, 668).

§ 2396. [Am'd, 1908, 1912.] Affidavit of sale, and of posting, serving, et cetera, notice.

An affidavit of the sale, stating the time when, and the place where, the sale was made; the sum bid for each distinct parcel, separately sold; the name of the purchaser of each distinct parcel; and the name of the person or persons, court officer or other officer, to whom the proceeds of the sale were paid, and the sums thereof must be made by the person who officiated as auctioneer upon the sale. An affidavit of the publication of the notice of sale, and of the notice or notices of postponement, if any, may be made by the publisher or printer of the newspaper in which they were published, or by his foreman or principal clerk. An affidavit of the affixing of a copy of the notice, at or near the entrance of the proper courthouse, may be made by the person who so affixed it, or by any person who saw it so affixed, at least eighty-four days before the day of sale. An affidavit of the affixing of a copy of the notice in the book, kept by the county clerk, may be made by the county clerk, or by any person who saw it so affixed, at least eighty-four days before the day of sale. An affidavit of the service of a copy of the notice upon the mortgagor, or upon any other person, upon whom the notice must or may be served, may be made by the person who made the service. Where two or more distinct parcels are sold to different purchasers, separate affidavits may be made with respect to each parcel, or one set of affidavits may be made for all the parcels.

Id., § 9, and am'd L. 1844, ch. 346; L. 1857, ch. 308, consolidated and am'd. Am'd by L. 1908, ch. 294; L. 1912, ch. 343 in effect Sept. 1, 1912.

§ 2397. [Am'd, 1882.] When one affidavit suffices printed notice to be annexed.

The matters required to be contained in any or all of the affidavits, specified in the last section, may be contained in one affidavit, where the same person deposes with respect to them. A printed copy of the notice of sale must be annexed to each affidavit; and a printed copy of each notice or postponement must be annexed to the affidavit of publication, and to the affidavit of sale. But one copy of the notice suffices for two or more affi-

davits where they all refer to it and are annexed to each other and filed and recorded together.

2 R. S. 545, part of § 2, am'd.

§ 2398. [Am'd, 1904.] Affidavits may be filed and recorded.

The affidavits specified in the last two sections, may be filed in the office for recording deeds and mortgages, in the county where the sale took place. They must be recorded at length by the officer with whom they are filed, in the proper book for recording deeds. The original affidavits, so filed, the record thereof, and a certified copy of the record, are presumptive evidence of the matters of fact therein stated, with respect to any property sold, which is situated in that county. Where the property sold is situated in two or more counties, a copy of the affidavits, certified by the officer with whom the originals are filed, may be filed and recorded in each other county, wherein any of the property is situated. Thereupon the copy and the record thereof have the like effect, with respect to the property in that county, as if the originals were duly filed and recorded therein.

Id., § 11, am'd, and part of § 12; L. 1904, ch. 679. In effect Sept. 1, 1904.

§ 2399. Note upon record of mortgage.

A clerk or a register, who records any affidavits, or a certified copy thereof, filed with him, must make a note, upon the margin of the record of the mortgage, in his office, referring to the book and page, or the copy thereof, where the affidavits are recorded, id., § 13.

§ 2400. Deed not necessary. When affidavits not necessary, but purchaser may require them.

The purchaser of the mortgaged premises, upon a sale conducted as prescribed in this title, obtains title thereto, against all persons bound by the sale, without the execution of a conveyance. Except where he is the person authorized to execute the power of sale, such a purchaser also obtains title, in like manner, upon payment of the purchase-money, and compliance with the other terms of sale, if any, without the filing and recording of the affidavits, as prescribed in the last section but one. But he is not bound to pay the purchase-money, until the affidavits, specified in that section, with respect to the property purchased by him, are filed, or delivered or tendered to him for filing.

Id., § 14, am'd; L. 1833, ch. 266, § 8. See § 2396, ante.

§ 2401. Costs allowed.

The following costs, in addition to the expenses specified in the next section, are allowed, in proceedings taken as prescribed in this title:

1. For drawing a notice of sale, a notice of the postponement of a sale, or an affidavit, made as prescribed in this title, for each folio, twenty-five cents; for making each necessary copy thereof, for each folio thirteen cents.

2. For serving each copy of the notice of sale, required or expressly permitted to be served by this title, and for affixing each copy thereof, required to be affixed upon the court-house, as prescribed in this title, one dollar.

3. For superintending the sale, and attending to the execution of the necessary papers, ten dollars.

2 R. S. 652, § 4, subd. 1 and 2 and part of subd. 3 (2 Edm. 672), and L. 1844, ch. 349, § 3 (4 Edm. 668).

§ 2402. Expenses allowed.

The sums actually paid for the following services, not exceeding the fees allowed by law for those services, are allowed in proceedings, under as prescribed in this title:

1. For publishing the notice of sale, and the notice or notices of postponement, if any, for a period not exceeding twenty-four weeks.

2. For the services specified in section 2390 of this act.

3. For recording the affidavits; and also, where the property sold is situated in two or more counties, for making and recording the necessary certified copies thereof.

4. For necessary postage and searches.

Id., remainder of § 4.

§ 2403. Taxation thereof.

The costs and expenses must be taxed, upon notice, by the clerk of the county where the sale took place, upon the request and at the expense of any person, interested in the payment thereof. Each provision of this act, relating to the taxation of costs in the supreme court, and the review thereof, applies to such a taxation.

Id., § 3, am'd.

§ 2404. Surplus money to be paid into supreme court.

An attorney or other person who receives any money, arising upon a sale, made as prescribed in this title, must, within ten days after he receives it, pay into the supreme court the surplus, exceeding the sum due and to become due upon the mortgage, and the costs and expenses of the foreclosure, in like manner and with like effect, as if the proceedings to foreclose the mortgage were taken in an action, brought in the supreme court, and triable in the county where the sale took place.

L. 1868, ch. 804, §§ 1, 2 and 4 (7 Edm. 353); L. 1870, ch. 706, § 1 (7 Edm. 770). See §§ 743, 745, ante. See also Rule 64.

§ 2405. Claimant of surplus money to file petition.

A person, who had, at the time of the sale, an interest in or lien upon the property sold, or a part thereof, may, at any time before an order is made, as prescribed in the next section but one, file in the office of the clerk of the county, where the sale took place, a petition stating the nature and extent of his claim, and praying for an order, directing the payment to him of the surplus money, or a part thereof.

Id., part of § 3, am'd.

§ 2406. Application for surplus money.

A person filing a petition, as prescribed in the last section, may, after the expiration of twenty days from the day of sale, apply to the supreme court, at a term held within the judicial district, embracing the county where his petition is filed, for an order, pursuant to the prayer of his petition. Notice of the application must be served, in the manner prescribed in this act for the service of a paper upon an attorney in an action, upon each per-

son, who has filed a like petition, at least eight days before the application; and also upon each person, upon whom a notice of sale was served, as shown in the affidavit of sale, or upon his executor or administrator. But, if it is shown to the court, by affidavit, that service upon any person, required to be served, cannot be so made with due diligence, notice may be given to him in any manner which the court directs.

L. 1803, ch. 804, part of § 3, am'd.

§ 2407. Order for distribution.

Upon the presentation of the petition, with due proof of notice for application, the court must make an order referring it to a suitable person to ascertain and report the amount due to the petitioner, and to each other person, which is a lien upon the surplus money; and the priorities of the several liens thereupon. Upon the coming in and confirmation of the referee's report, the court must make such an order, for the distribution of the surplus money, as justice requires.

Id., remainder of § 3, am'd.

§ 2408. Limitation of last four sections.

The last four sections do not apply to surplus money, arising upon the sale of real property, of which a decedent died seized, where letters testamentary or letters of administration, upon the decedent's estate, were, within four years before the sale, issued from a surrogate's court within the State, having jurisdiction to issue them.

L. 1867, ch. 658 (7 Edm. 142); L. 1870, ch. 170 (7 Edm. 684), and L. 1871, ch. 834 (9 Edm. 210). See, also, § 2798, post.

§ 2408a. [Added, 1909.] Delivery of certain affidavits to purchaser.

Each county clerk and register in this state, in whose office, affidavits in foreclosure of mortgages by advertisement, or the certified copies thereof, have been or shall be filed and recorded pursuant to the provisions of this title is hereby authorized to deliver the same to the purchaser of the mortgaged property on the foreclosure sale, and such purchaser shall be entitled to such delivery.

Added by L. 1909, ch. 65. Derivation — L. 1900, ch. 223, § 1. See note 16 of notes of Board of Statutory Consolidation at end of code.

§ 2409. [Am'd, 1882.] Application of this title to mortgages of the State.

This title does not affect any provision of law, inconsistent therewith, especially relating to the foreclosure of mortgages to the people of the State, or to the commissioners for loaning certain moneys of the United States.

Section 15 of part 3, ch. 8, tit. 15, R. S., am'd.

TITLE X.***Proceedings to change the name of an individual or corporation.**

Sec. 2410. Petition by individual.

2411. Petition by corporation.

2412. Contents of petition.

2413. Notice of presentation of petition.

2414. Order.

2415. When change to take effect.

2416. Substitution of new name in pending action or proceeding.

2417. Reports by clerks to state officers.

2418. [Repealed.]

§ 2410. [Am'd. 1895.] Petition by individual.

A petition for leave to assume another name may be made by a resident of the state to the county court of the county in which he resides, or, if he resides in the city of New York, either to the supreme court, or to the city court of New York. The petition of an infant shall be made by his general guardian, or by the guardian of his person, or by his next friend.

L. 1895, ch. 946.

§ 2411. [Repealed by L. 1909, ch. 28. See Consolidated Laws tit. General Corporation Law, § 60.]

§ 2412. [Am'd. 1909.] Contents of petition.

The petition must be in writing, signed by the petitioner and verified in like manner as a pleading in a court of record, and must specify the grounds of the application, the name, age and residence of the individual whose name is proposed to be changed, and the name which he proposes to assume.

Amended by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 28. See Consolidated Laws, tit. General Corporation Law, § 61. See note 68 of notes of Board of Statutory Consolidation at end of code.

§ 2413. [Am'd. 1894, 1901, 1904, 1906, 1909.] Notice of presentation of petition.

It the petition be to change the name of an infant, and is made by the infant's next friend, notice of the time and place when and where the petition will be presented must be served upon the father, or if he is dead or cannot be found, upon the mother, or if both are dead or cannot be found, upon the general guardian or guardian of the person of the infant, in like

* Whole title amended 1893.

manner as a notice of a motion upon an attorney in an action, unless it appears to the satisfaction of the court that the infant has no father or mother, or that both reside without the state or cannot be found, and that he has no guardian residing within this state, in which case the court may dispense with notice or require notice to be given to such persons and in such manner as the court thinks proper.

L. 1894, ch. 264; L. 1901, ch. 374; L. 1904, ch. 110; L. 1906, ch. 89. Amended by L. 1909, ch. 65. Also partly repealed by L. 1906, ch. 28. See Consolidated Laws, tit. General Corporation Law, § 62. See note 68 of notes of Board of Statutory Consolidation at end of code.

§ 2414. [Am'd, 1895, 1901, 1909.] Order.

If the court to which the petition is presented is satisfied thereby, or by the affidavit and certificate presented therewith, that the petition is true, and that there is no reasonable objection to the change of name proposed, and if the petition be to change the name of an infant, that the interests of the infant will be substantially promoted by the change, the court shall make an order authorizing the petitioner to assume the name proposed on a day specified therein, not less than thirty days after the entry of the order. The order shall be directed to be entered and the papers on which it was granted to be filed within ten days thereafter in the clerk's office of the county in which the petitioner resides if he be an individual, or in the office of the clerk of the city court of New York if the order be made by that court. Such order shall also direct the publication, within ten days after the entry thereof of a copy thereof in a designated newspaper, in the county in which the order is directed to be entered, at least once.

L. 1895, ch. 946; L. 1901, ch. 374. Amended by L. 1909, ch. 65. Also partly repealed by L. 1909, chs. 16 and 28. See Consolidated Laws, tit. County Law, § 161. General Corporation Law, § 63. See note 68 of notes of Board of Statutory Consolidation at end of code.

§ 2415. [Am'd, 1894, 1909.] When change to take effect.

If the order shall be fully complied with, and within forty days after the making of the order, an affidavit of the publication thereof shall be filed and recorded in the office in which the order is entered, and in each office in which certified copies thereof are required to be filed, if any, the petitioner shall, on and after the day specified for that purpose in the order, be known by the name which is thereby authorized to be assumed, and by no other name.

L. 1894, ch. 264. Amended by L. 1909, ch. 65. Also repealed by L. 1909, ch. 28. See Consolidated Laws, tit. General Corporation Law, § 64. See note 68 of notes of Board of Statutory Consolidation at end of code.

§ 2416. [Repealed by L. 1909, ch. 28. See Consolidated Laws, tit. General Corporation Law, § 65.]

§ 2417. [Repealed by L. 1909, chs. 23, 35 and 417. See Consolidated Laws, tits. Executive Law, § 34, Judiciary Law, § 254, County Law, § 161.]

§ 2418. [Apparently dropped; covered by section 2417; also repealed, L. 1895, ch. 946.]

TITLE XI.

Proceedings for the voluntary dissolution of a corporation.

Sec. 2419. When a majority of directors, etc., may petition for dissolution.

2420. Id.; when they are equally divided.

2421. Contents of petition.

2422. Affidavit to be annexed.

2423. Presentation of petition, etc. Order.

2424. Order to be published.

2425. Id.; to be served on creditors and stockholders,

2426. Hearing.

2427. Id.; original papers may be used.

2428. Application for final order.

2429. Final order.

2430. Certain sales, etc., void.

2431. Certain corporations excepted from this title.

2431a. Commissions of receiver.

2431b. Final accounting.

§§ 2419-2431b. [Repealed by L. 1909, ch. 28. See Consolidated Laws, tit. General Corporation Law, §§ 170-182, 184-195, 268 and 277.]

TITLE XII.**Proceedings supplementary to an execution against property.**

- Article 1. Proceedings to compel an examination of the judgment debtor,
and of his debtor or bailee.
2. The receiver.

ARTICLE FIRST.*Proceedings to compel an examination of the judgment debtor, and of his debtor or bailee.*

- Sec. 2432. The different remedies under this title.
2433. Nature of the remedies. Review of orders.
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§ 2432. [Am'd, 1896.] The different remedies under this title.

This title provides for three distinct remedies, as follows:

1. An order made or a warrant issued against a judgment debtor, after return of an execution.
2. An order made, or a warrant issued against a judgment debtor, after the issuing and before the return of an execution.
3. An order, made after the issuing, and either before or after the return, of an execution, against the person who has property of the judgment debtor, or is indebted to him.

The proceedings under subdivision third of this section, may be pursued either alone or simultaneously with the proceedings under subdivision first or subdivision second. The party to whom costs are awarded in a special proceeding shall be entitled to the same remedies under this title, under the same circumstances, as near as may be, as a judgment creditor. And for the purposes

on this title, the party to whom such costs are awarded shall be deemed a judgment creditor, and the party against whom they are awarded shall be deemed a judgment debtor.

L. 1896, ch. 176. In effect September 1, 1896. See Tax L., § 259.

§ 2433. Nature of the remedies. Review of orders.

Each of those remedies is a special proceeding. But an order, made in the course thereof, can be reviewed only as follows:

1. An order, made by a judge, out of court, may be vacated or modified by the judge who made it, as if it was made in an action; or it, or the order of the judge vacating or modifying it, may be vacated or modified, upon motion, by the court out of which the execution was issued.

2. Where the execution was issued out of a county court, an appeal from an order, made in the course of the proceedings, may be taken in like manner, as if the order was made in an action brought in the same court.

§ 2434. [Am'd, 1895, 1897, 1911.] What judge may entertain the proceeding.

Either special proceedings may be instituted before a judge of the court, out of which, or the county judge, the special county judge, or the special surrogate, of the county to which the execution was issued, or where it was issued to the city and county of New York, from a court other than the city court of that city, before a justice of the supreme court for that city and county. Where the execution was issued out of a court other than the supreme court, and it is shown by affidavit that each of the judges before whom the special proceedings might be instituted, as prescribed by this section, is absent from the county, or for any reason, unable or disqualified to act, the special proceedings may be instituted before a justice of the supreme court. In that case, if he does not reside within the judicial district embracing the county to which the execution was issued, the order made or warrants issued by him must be returnable to a justice of the supreme court, residing in that district, or the county judge, or the special judge, or special surrogate, or that of an adjoining county, as directed in the order or warrant. Where the judgment upon which the execution was issued was recovered in a municipal court of the city of New York, either special proceeding shall be instituted before a justice of the city court of the city of New York.

(Co. Proc., § 292, am'd; L. 1895, ch. 946; L. 1897, ch. 476; L. 1911, chs. 558, 831. In effect Sept. 1, 1911.

§ 2435. [Am'd, 1896.] Order to examine debtor after return of execution.

At any time within ten years after the return, wholly or partly unsatisfied, of an execution against property, issued upon a judgment, as prescribed in section 2458 of this act, or, in case of an order, issued in the same manner so far as the provisions of said section can be applied in substance, the creditor under such judgment or order, upon proof of the facts, by affidavit or other competent written evidence, is entitled to an order, requiring the debtor under the judgment or order, to attend and be examined concerning his property, at a time and place specified in the order.

Id., § 292; L. 1896, ch. 176. In effect September 1, 1896. See § 2458, post.

§ 2436. Id.; before return of execution.

At any time after the issuing of an execution against property, as prescribed in section 2458 of this act, and before the return thereof, the judgment creditor, upon proof, by affidavit, or other

competent written evidence, that the judgment debtor has property, which he unjustly refuses to apply towards the satisfaction of the judgment, is entitled to an order, requiring the judgment debtor to attend and be examined concerning his property, at a time and place specified in the order.

Co. Proc., § 292, subd. 2.

§ 2437. Warrant of arrest instead of order.

Upon proof entitling a judgment creditor to an order, under either of the last two sections; and also proof, by affidavit, to the satisfaction of the judge, that there is danger that the judgment debtor will leave the State, or conceal himself, and that there is reason to believe that he has property, which he unjustly refuses to apply to the payment of the judgment; the judge may, instead of making an order, issue a warrant under his hand, reciting the facts and requiring the sheriff of any county, where the judgment debtor may be found, to arrest him, and bring him before the same judge, or before another judge, if the case is one where the warrant must be returnable to another judge.

Id., § 292, subd. 4, am'd.

§ 2438. Id.; after the order has been made.

Where the facts, specified in the last section, are made to appear, as therein stated, at any time after the making of an order, requiring the judgment debtor to attend and be examined, and before the close of his examination, the judge may issue a warrant, as therein prescribed; and, if necessary, may direct the adjournment, or, if the return day of the order has elapsed, the continuance of the proceedings under the order, until after the return of the warrant, and his decision thereupon.

§ 2439. Warrant; how vacated, etc.

A warrant, issued as prescribed in the last two sections, may be vacated or modified, as prescribed in section 2433 of this act, with respect to an order.

§ 2440. Undertaking may be required, etc.

Where a judgment debtor has been arrested and brought before a judge, by virtue of a warrant, issued as prescribed in this article; and it appears to the satisfaction of the judge, from his examination, or other proof, that there is danger that he will leave the State, or conceal himself, and that he has property, which he has unjustly refused to apply to the satisfaction of the judgment; the judge may make an order, requiring him to give an undertaking, with one or more sureties, in a sum fixed and within a time specified in the order, to the effect, that he will, from time to time, as the judge directs, attend before the judge, or before a referee, appointed or to be appointed in the proceedings; and that he will not, until discharged from arrest by virtue of the warrant, dispose of any of his property, which is not exempted from seizure by section 2403 of this act. If he fails to comply with the order, the judge must forthwith, by warrant, commit him to prison, there to remain until the close of the examination, or the giving of the required undertaking; except that the judge may direct the sheriff to produce him, from time to time, as required in the course of the proceedings.

Co. Proc., part of § 292, subd. 4, am'd.

§ 2441. Order to examine person having property, etc., of judgment debtor.

Upon proof, by affidavit, or other competent written evidence, to the satisfaction of the judge, that an execution against property has been issued, as prescribed in section 2458 of this act, and either that it has been returned wholly or partly unsatisfied, or that it has not been returned; and also that any person or corporation has personal property of the judgment debtor, exceeding ten dollars in value, or is indebted to him in a sum exceeding ten dollars; the judgment creditor is entitled to an order, requiring that person or corporation to attend and be examined concerning the debt, or other property, at a time and place specified in the order. The judge may, in his discretion, require notice of the subsequent proceedings to be given to the judgment debtor, in such a manner as he deems just. But a receiver shall not be appointed without such a notice, except as otherwise prescribed in article second of this title.

Co. Proc., § 294. See § 2458, post.

§ 2442. Either order may require attendance before a referee.

An order, requiring a person to attend and be examined, made pursuant to any provision of this article, must require him so to attend and be examined, either before the judge to whom the order is returnable, or before a referee designated therein. Where the examination is taken before a referee, he must certify, to the judge to whom the order is returnable, all the evidence and the other proceedings taken before him.

Id., § 296.

§ 2443. Reference may be ordered at any time.

At any stage of the proceedings, the judge to whom the order is returnable may, in his discretion, make an order, directing that any other examination, or testimony, be taken by, or that a question arising be referred to a referee, designated in the order. Where a question is so referred, the referee may be directed to report either the evidence or the facts.

Id., § 300.

§ 2444. Proceedings upon examination; adjournment.

Upon an examination under this article, each answer of a party or witness examined must be under oath. A corporation must attend by, and answer under the oath of, an officer thereof; and the judge may, in his discretion, specify the officer. Either party may be examined as a witness, in his own behalf, and may produce and examine other witnesses, as upon the trial of an action. The judge or referee may adjourn any proceedings, under this article, from time to time, as he thinks proper.

Substituted for Co. Proc., §§ 292 and 296, or such parts thereof as relate to examinations.

§ 2445. Referee to be sworn.

Unless the parties expressly waive the referee's oath, a referee, appointed as prescribed in this article, must, before entering upon an examination, or taking testimony, subscribe and take an oath, that he will faithfully and fairly discharge his duty upon the reference, and make a just and true report, according

to the best of his understanding. The oath may be administered by an officer designated in section 842 of this act, and must be returned to the judge, with the report or testimony.

See § 1018, ante.

§ 2446. Order permitting person indebted to pay debt to sheriff.

At any time after the commencement of a special proceeding, authorized by this article, and before the appointment of a receiver therein, or the extension of a receivership thereto, the judge, by whom the order or warrant was granted, or to whom it is returnable, may, in his discretion, upon proof, by affidavit, to his satisfaction, that a person or corporation is indebted to the judgment debtor, and upon such a notice, given to such persons, as he deems just, or without notice, make an order, permitting the person or corporation, to pay to a sheriff, designated in the order, a sum, on account of the alleged indebtedness, not exceeding the sum which will satisfy the execution. A payment thus made is, to the extent thereof, a discharge of the indebtedness, except as against a transferee from the judgment debtor, in good faith and for a valuable consideration, of whose rights the person or corporation had actual or constructive notice, when the payment was made.

Co. Proc., § 293, am'd.

§ 2447. Order requiring delivery of money or property to sheriff or receiver.

Where it appears, from the examination or testimony taken in a special proceeding authorized by this article, that the judgment debtor has, in his possession or under his control, money or other personal property, belonging to him; or that one or more articles of personal property, capable of delivery, his right to the possession whereof is not substantially disputed, are in the possession or under the control of another person; the judge, by whom the order or warrant was granted, or to whom it is returnable, may, in his discretion, and upon such a notice, given to such persons, as he deems just, or without notice, make an order, directing the judgment debtor, or other person, immediately to pay the money, or deliver the articles of personal property, to a sheriff, designated in the order, unless a receiver has been appointed, or a receivership has been extended to the special proceeding, and in that case to the receiver.

Substituted for Co. Proc., § 297.

§ 2448. Duty of the sheriff.

If the sheriff, to whom money is paid, or other property is delivered, pursuant to an order made as prescribed in either of the last two sections, does not then hold an execution upon the judgment against the property of the judgment debtor, he has the same rights and powers, and is subject to the same duties and liabilities, with respect to the money or property, as if the money had been collected, or the property had been levied upon by him, by virtue of such an execution; except as otherwise prescribed in the next section.

Co. Proc., § 297.

2449. [Am'd, 1892.] How money or property applied to pay the judgment.

After a receiver has been appointed, or a receivership has been extended to the special proceeding, the judge must, by order, direct the sheriff to pay the money or the proceeds of the property, deducting his fees, to the receiver; or, if the case so requires, to deliver to the receiver the property in his hands. But if it appears, to the satisfaction of the judge, that an order, appointing a receiver or extending a receivership, is not necessary, he may by an order reciting that fact, direct the sheriff to apply the money so paid, or the proceeds of the property so delivered, upon an execution in favor of the judgment creditor, issued either before or after the payment or delivery to the sheriff; and a receiver, appointed pursuant to the provisions of this article, may, on leave of a judge having power to appoint such receiver, lease the real property that shall come into his possession for such time as shall be necessary to realize moneys sufficient to satisfy the judgment, with interest thereon and costs of the special proceeding.

Co. Proc., §§ 207 and 298; L. 1892, ch. 292.

§ 2450. Balance to be paid or delivered to judgment debtor, etc.

Where money is paid, or property is delivered, as prescribed in the last four sections, and afterwards the special proceeding is discontinued or dismissed; or the judgment is satisfied, without resorting to that money or property; or a balance of the money, or of the proceeds of the property, or a part of the property, remains in the sheriff's or the receiver's hands, after satisfying the judgment, and the costs and expenses of the special proceeding; the judge must make an order, directing the sheriff or receiver to pay the money, or deliver the property, so remaining in his hands, to the judgment debtor, or to such other person as appears to be entitled thereto, upon payment of his fees and all other sums legally chargeable against the same.

§ 2451. Judge may enjoin transfer, etc., of property.

The judge by whom the order or warrant was granted, or to whom it is returnable, may make an injunction order, restraining any person or corporation, whether a party or not a party to the special proceeding, from making or suffering any transfer or other disposition of, or interference with, the property of the judgment debtor, or the property or debt, concerning which any person is required to attend and be examined until further direction in the premises. Such an injunction order may be made simultaneously with the order or warrant, by which the special proceeding is instituted, and upon the same papers; or afterwards, upon an affidavit, showing sufficient grounds therefor. The judge or the court may, as a condition of granting an application to vacate or modify the injunction order, require the applicant to give security, in such a sum and in such a manner as justice requires.

Co. Proc., §§ 298 and 299, am'd.

§ 2452. Mode of service of certain orders.

An injunction order, or an order requiring a person to attend and be examined, made as prescribed in this article, must be served as follows:

1. The original order, under the hand of the judge making it, must be exhibited to the person to be served.

2. A copy thereof, and of the affidavit upon which it was made, must be delivered to him.

Service upon a corporation is sufficient if made upon an officer, to whom a copy of a summons must be delivered, where a summons is personally served upon the corporation; unless the officer is specially designated by the judge, as prescribed in section 2444 of this act.

Based on 2 R. S. 401, § 44 (2 Edm. 417).

§ 2453. Service of a warrant.

The sheriff, when he arrests a judgment debtor by virtue of a warrant, issued as prescribed in this article, must deliver to him a copy of the warrant, and of the affidavit upon which it was granted.

§ 2454. How proceedings discontinued or dismissed.

A special proceeding, instituted as prescribed in this article, may be discontinued at any time, upon such terms as justice requires, by an order of the judge, made upon the application of the judgment creditor. Where the judgment creditor unreasonably neglects or delays to proceed, or where it appears that his judgment has been satisfied, his proceedings may be dismissed, upon like terms, by a like order, made upon the application of the judgment debtor, or of the plaintiff in a judgment creditor's action against the debtor, or of a judgment creditor who has instituted either of the special proceedings authorized by this article. Where an order appointing a receiver, or extending a receivership, has been made, in the course of the special proceeding, notice of the application for an order specified in this section, must be given, in such a manner as the judge deems proper, to all persons interested in the receivership, as far as they can conveniently be ascertained.

§ 2455. Costs to judgment creditor.

The judge may make an order allowing to the judgment creditor a fixed sum, as costs, consisting of his witnesses' fees and other disbursements, and of a sum, in addition thereto, not exceeding thirty dollars; and directing the payment thereof out of any money which has come, or may come, to the hands of the receiver, or of the sheriff; or, within a time specified in the order, by the judgment debtor, or other person against whom the special proceeding is instituted.

Co. Proc., § 301, in part, am'd.

§ 2456. Id.: to judgment debtor, etc.

Where the judgment debtor, or other person against whom the special proceeding is instituted, has been examined and property applicable to the payment of the judgment, has not been discovered in the course of the special proceeding, the judge may make an order, allowing him a like sum as costs; and directing the payment thereof, within a time specified in the order, by the judgment creditor; or, except where it is allowed to the judgment debtor, out of any money which has come, or may come, to the hands of the receiver or of the sheriff.

Id., § 301, in part, am'd.

§ 2457. [Am'd, 1911]. Disobedience to order; how punished.

A person who refuses, or without sufficient excuse neglects, to obey an order of a judge or referee, made pursuant to the last two sections, or to any other provision of this article, and duly served upon him, or an oral direction, given directly to him by a judge or referee, in the course of the special proceedings; or to attend before a judge or referee, according to the command of a subpoena, duly served upon him, may be punished by the judge of or by the court out of which the execution was issued, by the county judge, the special county judge, or the special surrogate of the county to which the execution was issued, or by the city court of the city of New York or a justice thereof, if the proceedings were instituted before such court or any justice thereof, as for a contempt.

Co. Proc., § 302. See § 2286. Am'd by L. 1911, ch. 558, in effect Sept. 1, 1911.

§ 2458. [Am'd, 1881. 1897.] Upon what judgment and to what county the execution must have issued.

In order to entitle a judgment-creditor to maintain either of the special proceedings authorized by this article, the judgment must have been rendered upon the judgment debtor's appearance or personal service of the summons upon him, for a sum not less than twenty-five dollars or substituted service of the summons upon him in accordance with section four hundred and thirty-six of the code of civil procedure; and the execution must have been issued out of a court of record; and either:

1. To the sheriff of the county where the judgment debtor has, at the time of the commencement of the special proceedings, a place for the regular transaction of business in person; or,

2. If the judgment debtor is then a resident of the state, to the sheriff of the county where he resides; or,

3. If he is not then a resident of the state, to the sheriff of the county where the judgment-roll is filed unless the execution was issued out of a court other than that in which the judgment was rendered, and, in that case, to the sheriff of the county where the transcript of the judgment is filed.

Id., part of § 292. am'd; L. 1897, ch. 189. In effect Sept. 1, 1897.

§ 2459. In what county judgment debtor, his bailee, etc., must attend.

If the judgment debtor, or other person, required to attend and be examined, as prescribed in this article, or the officer of a corporation, required to attend in its behalf, is, at the time of the service of the order upon him, a resident of the State, or then has an office within the State, for the regular transaction of business, in person, he cannot be compelled to attend, pursuant to the order, or to any adjournment, at a place without the county wherein his residence or place of business is situated.

Id., § 292.

§ 2460. [Am'd, 1881.] No person excused from answering on the ground of fraud.

A party or a witness, examined in a special proceeding, authorized by this article, is not excused from answering a question, on the ground that his examination will tend to convict him of the commission of a fraud; or to prove that he has been a

party or privy to, or knowing of, a conveyance, assignment, transfer, or other disposition of property for any purpose; or that he or another person claims to be entitled, as against the judgment creditor, or a receiver appointed or to be appointed in the special proceeding, to hold property, derived from or through the judgment debtor, or to be discharged from the payment of a debt which was due to the judgment debtor, or to a person in his behalf. But an answer cannot be used, as evidence against the person so answering in a criminal action or criminal proceeding.

Co. Proc., § 202, am'd.

§ 2461. [Am'd, 1900.] Proceedings where judgment is against joint debtors.

When the execution was issued as prescribed in section nineteen hundred and thirty-four or section nineteen hundred and forty-one of this act, a debt due to, or other personal property owned by, one or more of the defendants not summoned, jointly with the defendants summoned, or with any of them, may be reached by a special proceeding, instituted as prescribed in this article, and founded upon the judgment.

Id., § 204, am'd. See § 1871, ante. L. 1900, ch. 217. In effect Sept. 1, 1900.

§ 2462. Proceedings commenced before one judge may be continued before another.

Sections 26, 52, and 279 of this act apply to a special proceeding, instituted as prescribed in this article; and the judge before whom it is continued, as prescribed in either of those sections, is deemed to be the judge to whom an order or warrant is returnable, for the purpose of any provision of this or the next article.

§ 2463. [Am'd, 1886, 1908.] What property cannot be reached.

This article does not authorize the seizure of, or other interference with, any property which is expressly exempt by law from levy and sale by virtue of an execution; or any money, thing in action or other property held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor; or the earnings of the judgment debtor for his personal services rendered within sixty days next before the institution of the special proceeding; when it is made to appear by his oath or otherwise, that those earnings are necessary for the use of a family, wholly or partly supported by his labor.

L. 1886, ch. 26. Am'd by L. 1908, ch. 278. In effect Sept. 1, 1908. See § 1812; Tax L., § 259.

ARTICLE SECOND.

The receiver.

Sec. 2464. When and how receiver may be appointed.

2465. Notice to other creditors.

2466. Only one receiver to be appointed. Former receivership may be extended.

2467. Order to be filed and recorded.

2468. When property is vested in receiver.

2469. How receiver's title to personal property extended by relation.

2470. County clerk to record orders, etc.; penalty for neglect.

2471. Receiver to be subject to control of court.

§ 2464. When and how receiver may be appointed.

At any time after making an order, requiring the judgment debtor, or any other person, to attend and be examined, or issuing a warrant, as prescribed in article first of this title, the judge to whom the order or warrant is returnable may make an order, appointing a receiver of the property of the judgment debtor. At least two days' notice of the application for the order appointing a receiver, must be given personally to the judgment debtor, unless the judge is satisfied that he cannot, with reasonable diligence, be found within the State; in which case, the order must recite that fact, and may dispense with notice, or may direct notice to be given in any manner which the judge thinks proper. But where the order to attend and be examined, or the warrant, has been served upon the judgment debtor, a receiver may be appointed upon the return day thereof, or at the close of the examination, without further notice to him.

Co. Proc., § 298.

§ 2465. Notice to other creditors.

The judge must ascertain, if practicable, by the oath of the judgment debtor, or otherwise, whether an action, specified in article first of title fourth of chapter fifteenth of this act, or a special proceeding instituted as prescribed in article first of this title, is pending against the judgment debtor. If either is pending, and a receiver has not been appointed therein, notice of the application for the appointment of a receiver, and of all the subsequent proceedings respecting the receivership, must be given, in such a manner as the judge directs, to the judgment creditor prosecuting it.

Id., part of § 298.

§ 2466. Only one receiver to be appointed. Former receivership may be extended.

Only one receiver of the property of a judgment debtor shall be appointed. Where a receiver thereof has already been appointed, the judge, instead of making the order prescribed in the last section but one, must make an order, extending the receivership to the special proceeding before him. Such an order gives to the judgment creditor the same rights as if a receiver was then appointed upon his application; including the right to apply to the court to control, direct, or remove the receiver, or to subordinate the proceedings in or by which the receiver was appointed, to those taken under his judgment.

Id., part of § 298. See Rules 84 and 85.

§ 2467. Order to be filed and recorded.

An order appointing a receiver, or extending a receivership, must be filed in the office of the clerk of the county, wherein the judgment-roll in the action is filed; or, if the special proceeding is founded upon an execution issued out of a court, other than that in which the judgment was rendered, in the office of the clerk of the county, wherein the transcript of the judgment is filed.

Co. Proc., part of § 298.

§ 2468. When property is vested in receiver.

The property of the judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him, or extending his receivership, as the case may be; subject to the following exceptions:

1. Real property is vested in the receiver, only from the time when the order, or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated.

2. Where the judgment debtor, at the time when the order is filed, resides in another county of the State, his personal property is vested in the receiver only from the time when a copy of the order, certified by the clerk in whose office it is recorded, is filed with the clerk of the county where he resides.

Id., § 298.

§ 2469. How receiver's title to personal property extended by relation.

Where the receiver's title to personal property has become vested, as prescribed in the last section, it also extends back by relation, for the benefit of the judgment creditor in whose behalf the special proceeding was instituted as follows:

1. Where an order, requiring the judgment debtor to attend and be examined, or a warrant, requiring the sheriff to arrest him and bring him before the judge, has been served, before the appointment of the receiver, or the extension of the receivership, the receiver's title extends back, so as to include the personal property of the judgment debtor, at the time of the service of the order or warrant.

2. Where an order or warrant has not been served, as specified in the foregoing subdivision, but an order has been made, requiring a person to attend and be examined, concerning property belonging, or a debt due, to the judgment debtor, the receiver's title extends to the personal property belonging to the judgment debtor, which was in the hands, or under the control, of the person or corporation thus required to attend, at the time of the service of the order; and to a debt then due to him from that person or corporation.

3. In every other case where notice of the application for the appointment of the receiver was given to the judgment debtor, the receiver's title extends to the personal property of the judgment debtor, at the time when the notice was served, either personally or by complying with the requirements of an order, prescribing a substitute for personal service.

4. Where the case is within two or more of the foregoing subdivisions of this section, the rule most favorable to the judgment creditor must be adopted.

5. [Added, 1892.] No person shall be appointed a receiver in this State who is not a resident thereof, nor shall any person

continue to act as receiver after he ceases to be a resident thereof, and the judgment creditor may apply to the court or judge that appointed such receiver, within thirty days after said receiver ceases to be a resident of this State, for the appointment of another person in his place, upon such notice to the persons interested as the court or judge may direct.

But this section does not affect the title of a purchaser in good faith, without notice, and for a valuable consideration; or the payment of a debt in good faith, and without notice.

§ 2470. County clerk to record orders, etc.; penalty for neglect.

Each county clerk must keep in his office a book, indexed to the names of the judgment debtors, styled "book of orders appointing receivers of judgment debtors". A county clerk, in whose office an order or a certified copy of an order is filed, as prescribed in section 2467 or section 2468 of this act, must immediately note thereupon the time of filing it, and, as soon as practicable, must record it, in the book so kept by him. He must also, upon request, furnish forthwith to any party or person interested, one or more certified copies thereof. For each omission to comply with any provision of this section, a county clerk forfeits, to the party aggrieved, two hundred and fifty dollars, in addition to all damages sustained by reason of the omission..

Co. Proc., § 298. See §§ 1247 and 1248, ante.

§ 2471. [Am'd, 1913.] Receiver to be subject to control of court.

A receiver, appointed as prescribed in this article, is subject to the direction and control of the court out of which the execution was issued, except where a receiver is appointed by the city court of the city of New York or a justice thereof, he is subject to the direction and control of the city court or a justice thereof. Where an order has been made, extending a receivership to a special proceeding founded upon a subsequent judgment, the control over, and direction of, the receiver, with respect to that judgment, remain in the court to whose control and direction he was originally subject.

Am'd, L. 1913, ch. 480. In effect Sept. 1, 1913.

TITLE XIII.

Proceedings to compel the delivery of books to a public officer.

Sec. 2471a. Delivery of books and papers, how enforced.

§ 2471a. [Repealed by L. 1909, ch. 51. See Consolidated Laws, tit. Public Officers Law, § 80.]

CHAPTER XVIII.

Surrogates' Courts, and Proceedings Therein.

- TITLE I.**—Organization, Jurisdiction, and Powers of the Court. Duties, Powers, and Disabilities of the Surrogate, and the Officers of the Court. Miscellaneous Provisions.
- TITLE II.**—Provisions Relating Generally to the Proceedings in Surrogates' Courts, and to Appeals from these Courts.
- TITLE III.**—Granting and Revoking Probate. Letters Testamentary, and Letters of Administration. Foreign Wills; Ancillary Letters.
- TITLE IV.**—Proceedings by or against an Executor or Administrator, Touching the Administration and Settlement of the Estate.
- TITLE V.**—Disposition of the Decedent's Real Property, for the Payment of Debts and Funeral Expenses. Distribution of the Proceeds.
- TITLE VI.**—Provisions Relating to a Testamentary Trustee.
- TITLE VII.**—Provisions Relating to a Guardian.

TITLE I.

Organization, jurisdiction, and powers of the court. Duties, powers, and disabilities of the surrogate, and the officers of the court. Miscellaneous provisions.

- Article 1. Jurisdiction of the court, and authority of the surrogate.
2. General duties and disabilities of the surrogate, or temporary surrogate.
3. Clerks; stenographers; miscellaneous provisions.

ARTICLE FIRST.

Jurisdiction of the court, and authority of the surrogate.

- Sec. 2472. General jurisdiction of surrogate's court.
2473. Presumption of jurisdiction.
2474. Jurisdiction not lost by defect in record.
2475. Effect of exercise of jurisdiction.
2476. Exclusive jurisdiction.
2477. Concurrent jurisdiction of two or more surrogates.
2478. Jurisdiction, how affected by locality of debts.
2479. Jurisdiction in new or altered county.
2480. Id.; transfer of proceedings to proper county.
2481. Incidental powers of the surrogate.
2482. Application of chapter; confirmation of previous acts.

§ 2472. General jurisdiction of surrogate's court.

Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

1. To take the proof of wills; to admit wills to probate; to revoke the probate thereof; and to take and revoke probate of heirship.
2. To grant and revoke letters testamentary and letters of administration, and to appoint a successor in place of a person whose letters have been revoked.
3. To direct and control the conduct, and settle the accounts, of executors, administrators, and testamentary trustees; to remove testamentary trustees, and to appoint a successor in place of a testamentary trustee so removed.

4. To enforce the payment of debts and legacies; the distribution of the estates of decedents; and the payment or delivery, by executors, administrators, and testamentary trustees, of money or other property in their possession, belonging to the estate.

5. To direct the disposition of real property, and interests in real property, of decedents, for the payment of their debts and funeral expenses, and the disposition of the proceeds thereof.

6. To administer justice, in all matters relating to the affairs of decedents, according to the provisions of the statutes relating thereto.

7. To appoint and remove guardians for infants: to compel the payment and delivery by them of money or other property belonging to their wards; and, in the cases specially prescribed by law, to direct and control their conduct, and settle their accounts.

8. [Added, 1903.] To settle the accounts of a father, mother or other relative having the rights, powers and duties of a guardian in socage, and to compel the payment and delivery of money or other property belonging to the ward.

[New.] L. 1903, ch. 407. In effect Sept. 1, 1903.

This jurisdiction must be exercised in the cases, and in the manner, prescribed by statute.

2 R. S. 220, § 1 (2 Edm. 229); also L. 1874, ch. 267 (9 Edm. 884).

§ 2472-a. [Added, 1910.] *Idem*.

The surrogate's court has also jurisdiction upon a judicial accounting or a proceeding for the payment of a legacy to ascertain the title to any legacy or distributive share, to set off a debt against the same and for that purpose ascertain whether the debt exists, to affect the accounting party with a constructive trust, and to exercise all other power, legal or equitable, necessary to the complete disposition of the matter. He must order the trial of any controverted question of fact of which either party has constitutional right of trial by jury and seasonably demands the same.

Added, L. 1910, ch. 576. In effect Sept. 1, 1910.

§ 2473. [Am'd, 1910.] *Presumption of jurisdiction.*

Where the jurisdiction of a surrogate's court to make, in a case specified in the last two sections, a decree or other determination, is drawn in question collaterally, and the necessary parties were duly cited or appeared, the jurisdiction is presumptively, and, in the absence of fraud or collusion, conclusively, established, by an allegation of the jurisdictional facts, contained in a written petition or answer, duly verified, used in the surrogate's court. The fact that the parties were duly cited is presumptively proved, by a recital to that effect in the decree.

L. 1870, ch. 359, § 1. Am'd, L. 1910, ch. 576. In effect Sept. 1, 1910.

§ 2474. *Jurisdiction not lost by defect in record.*

The surrogate's court obtains jurisdiction in every case by the existence of the jurisdictional facts prescribed by statute, and by the citation or appearance of the necessary parties. An objection to a decree or other determination, founded upon an omission therein, or in the papers upon which it was founded, of the recital or proof of any fact necessary to jurisdiction, which actually existed, or the failure to take any intermediate proceeding, required by law to be taken, is available only upon appeal. But, for the better protection of any party, or other person interested, the surrogate's court may, in its discretion, allow such a defect to be supplied by amendment.

L. 1869, ch. 290, § 1 (7 Edm. 433); L. 1870, ch. 359, § 1, and L. 1872, ch. 92 (9 Edm. 327).

§ 2475. Effect of exercise of jurisdiction.

Jurisdiction, once duly exercised over any matter, by a surrogate's court, excludes the subsequent exercise of jurisdiction by another surrogate's court, over the same matter, and all its incidents, except as otherwise specially prescribed by law. Where a guardian has been duly appointed by, or letters testamentary or of administration have been duly issued from, or any other special proceeding has been duly commenced in, a surrogate's court having jurisdiction, all further proceedings, to be taken in a surrogate's court, with respect to the same estate or matter, must be taken in the same court.

2 R. S. 222, § 12 (2 Edm. 232); 2 R. S. 61, § 28 (2 Edm. 61); 2 R. S. 117, 124 (2 Edm. 121).

§ 2476. Exclusive jurisdiction.

The surrogate's court of each county has jurisdiction, exclusive of every other surrogate's court, to take the proof of a will, and to grant letters testamentary thereupon, or to grant letters of administration, as the case requires, in either of the following cases:

1. Where the decedent was, at the time of his death, a resident of that county, whether his death happened there or elsewhere.

2. Where the decedent, not being a resident of the State, died within that county, leaving personal property within the State, or leaving personal property which has, since his death, come into the State, and remains unadministered.

3. Where the decedent, not being a resident of the State, died without the State, leaving personal property within that county, and no other; or leaving personal property which has, since his death, come into that county, and no other, and remains unadministered.

4. Where the decedent was not, at the time of his death, a resident of the State, and a petition for probate of his will, or for a grant of letters of administration, under subdivision second or third of this section, has not been filed in any surrogate's court; but real property of the decedent, to which the will relates, or which is subject to disposition under title fifth of this chapter, is situated within that county, and no other.

2 R. S. 73, § 23 (2 Edm. 75); L. 1837, ch. 460, § 1 (4 Edm. 486). See § 2503.

§ 2477. Concurrent jurisdiction of two or more surrogates.

Where personal property of the decedent is within, or comes into two or more counties, under the circumstances specified in subdivision third of the last section; or real property of the decedent is situated in two or more counties, under the circumstances specified in subdivision fourth of the last section; the surrogate's courts of those counties have concurrent jurisdiction, exclusive of every other surrogate's court, to take the proof of the will and grant letters testamentary thereupon, or to grant letters of administration, as the case requires. But where a petition for probate of a will, or for letters of administration, has been duly filed in either of the courts so possessing concurrent jurisdiction, the jurisdiction of that court excludes that of the other.

Id., § 24, am'd.

§ 2478. Jurisdiction, how affected by locality of debts.

For the purpose of conferring jurisdiction upon a surrogate's court, a debt, owing to a decedent by a resident of the State, is regarded as personal property, situated within the county where the debtor, or either of two or more joint debtors, resides; and a debt, owing to him by a domestic corporation, is regarded as personal property, situated within the county where the principal office of the corporation is situated. But the foregoing provision does not apply to a debt evidenced by a bond, promissory note, or other instrument for the payment of money only, in terms negotiable, or payable to the bearer or holder. Such a debt, whether the debtor is a resident or a non-resident of the State, or a foreign or a domestic government, State, county, public officer, association, or corporation, is, for the purpose of so conferring jurisdiction, regarded as personal property, at the place where the bond, note, or other instrument is, either within or without the State.

§ 2479. [Am'd, 1883.] Jurisdiction in new or altered county.

Where a new county has been heretofore, or is hereafter erected, or territory has been heretofore, or is hereafter transferred from one county to another, the jurisdiction of the surrogate's court of each of the counties affected thereby, to take the proof of a will, or to grant letters, depends upon the locality, when the petition is presented, of the place, where the property of the decedent is situated, or where the event occurred, as the case may be, which determines jurisdiction. If, before the erection of the new county, or the transfer of the territory, letters have been granted, upon the ground that the decedent died or resided within the county, the surrogate's court from which they were issued, has exclusive jurisdiction of the estate, and of all matters incidental thereto; and if the place where the decedent died or resided is embraced within another county, certified copies of any papers or proceedings, filed, entered, or recorded in the surrogate's court thereof, must be furnished, on the payment of the fees therefor, by the proper officer, to any person interested in the estate; and, upon the latter's request and payment of the fees therefor, the proper officer of the court so having jurisdiction must file, enter, or record the same, in like manner and with like effect as the originals. Where the letters were granted upon any ground, other than the decedent's death or residence within the county, the jurisdiction of the court from which they were issued, remains unaffected by any change in the territorial limits of its county.

L. 1870, ch. 20, §§ 1 and 2 (7 Edm. 582); L. 1883, ch. 56.

§ 2480. Id.: transfer of proceedings to proper county.

A special proceeding pending in a surrogate's court, whose jurisdiction to entertain the same is taken away by the provisions of the last section, or in consequence of the erection of a new county, or the alteration of the territorial limits of a county, after this act takes effect, must be transferred, by order of the court in which it is pending, to the surrogate's court having jurisdiction; and the latter court has the same jurisdiction, power, and authority with respect thereto, which the former court would have had, if the territorial limits of its county had not been changed.

§ 2481. [Am'd, 1909.] Incidental powers of the surrogate.

A surrogate, in court or out of court, as the case requires, has power:

1. To issue citations to parties, in any matter within the jurisdiction of his court; and, in a case prescribed by law, to compel the attendance of a party.

2. To adjourn, from time to time, a hearing or other proceeding in his court; and where all persons who are necessary parties have not been cited or notified, and citation or notice has not been waived by appearance or otherwise, it is his duty, before proceeding further, so to adjourn the same, and to issue a supplemental citation, or require the petitioner to give an additional notice, as may be necessary.

3. To issue, under the seal of the court, a subpoena, requiring the attendance of a witness, residing or being in any part of the State; or a subpoena duces tecum, requiring such attendance, and the production of a book or paper material to an inquiry pending in the court.

4. To enjoin, by order, an executor, administrator, testamentary trustee or guardian, to whom a citation or other process has been duly issued from his court, from acting as such, until the further order of the court.

5. To require, by order, an executor, administrator, testamentary trustee, or guardian, subject to the jurisdiction of his court, to perform any duty imposed upon him, by statute, or by the surrogate's court, under authority of a statute.

6. To open, vacate, modify, or set aside, or to enter, as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause. The powers conferred by this subdivision, must be exercised only in a like case and in the same manner, as a court of record and of general jurisdiction exercises the same powers. Upon an appeal from a determination of the surrogate, made upon an application pursuant to this subdivision, the general term of the supreme court has the same power as the surrogate; and his determination must be reviewed, as if an original application was made to that term.

7. To punish any person for a contempt of his court, civil or criminal, in any case where it is expressly prescribed by law that a court of record may punish a person for a similar contempt, in like manner.

8. Subject to the provisions of law, relating to the disqualification of a judge in certain cases, to complete any unfinished business, pending before his predecessor in the office, including proofs, accountings, and examinations.

9. To complete, and certify and sign in his own name, adding to his signature the date of so doing, all records or papers, left uncompleted or unsigned by any of his predecessors.

10. To exemplify and certify transcripts of all records of his court, or other papers remaining therein.

11. With respect to any matter not expressly provided for in the foregoing subdivisions of this section, to proceed, in all matters subject to the cognizance of his court, according to the course and practice of a court, having, by the common law, jurisdiction of such matters, except as otherwise prescribed by

statute; and to exercise such incidental powers, as are necessary to carry into effect the powers expressly conferred.

2 R. S. 221, §§ 6 and 11 (2 Edm. 230, 231); L. 1837, ch. 460, § 6 (4 Edm. 488); *id.*, § 61 (4 Edm. 497); L. 1870, ch. 74, § 2 (7 Edm. 501); L. 1871, ch. 424, § 2, and L. 1874, ch. 9 (9 Edm. 849).

12. A surrogate or a clerk of the surrogate's court has power to administer oaths, to take affidavits and the proof and acknowledgment of deeds and all other instruments in writing, and certify the same with the same force and effect as if taken and certified by a county judge.

This subdivision added by L. 1900, ch. 65. Derivation — L. 1884, ch. 309, § 1, as amended by L. 1900, ch. 510, § 1. See note 17 of notes of Board of Statutory Consolidation at end of code.

§ 2482. [Am'd. 1893.] Application of chapter; continuation of previous acts.

Each provision of this chapter, relating to the jurisdiction of the surrogate's court, to take the proof of a will, and to grant letters testamentary or letters of administration, or regulating the mode of proceeding in any matter connected with the estate of a decedent, applies, unless otherwise expressly declared therein, whether the will was made, or the decedent died, before or after this chapter takes effect. All acts hitherto of surrogates and officers acting as such in completing by certifying in their own names any uncertified wills, and by signing and certifying in their own names, the unsigned and uncertified records of wills and of other proofs and examinations taken in the proceedings of probate thereof, before their predecessors in office, are hereby confirmed and declared to be valid and in full compliance with the pre-existing statutory requirements.

L. 1893, ch. 686.

ARTICLE SECOND.***General duties and disabilities of the surrogate or temporary surrogate.***

- Sec. 2488.** Surrogate and acting surrogate; their official designations.
2489. Vacancy or disability; who to act as surrogate.
2490. If surrogate disqualified, who to act.
2491. Id.; in New York county.
2492. Proof of authority.
2493. Id.; when and how made.
2494. How authority superseded.
2495. Proceedings in New-York and Kings counties regulated.
2496. Id.; transfer of proceedings to surrogate's court.
2497. Temporary surrogate; when board of supervisors may appoint.
2498. Id.; compensation.
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2500. Surrogate, when not to be counsel.
2501. Surrogate, when disqualified.
2502. Disqualification; when objection must be taken.
2503. Books to be kept by surrogate.
2504. Papers and books to be preserved and bonds filed.
2505. When fees not to be charged.
2506. Books for recording instruments settling estates, etc.
2507. What papers to be transmitted to secretary of State; expenses thereof.

§ 2483. Surrogate and acting surrogate; their official designations.

Where the county judge is also surrogate, he may be designated, in any paper or proceeding relating to the office of surrogate, as the surrogate of the county, without any addition referring to his office as county judge. A local officer elected, as prescribed in the constitution, to discharge the duties of surrogate, or of county judge and surrogate, is designated in this act, and, when acting as surrogate, may be designated as the "special surrogate" of his county. Where an officer, other than the surrogate, acts as surrogate in a case prescribed by law, he must be designated by his official title, with the addition of the words, "and acting surrogate."

L. 1853, ch. 648 (4 Edm. 509); L. 1871, ch. 859, § 7 (9 Edm. 214).

§ 2484. [Am'd, 1893.] Vacancy or disability; who to act as surrogate.

Where in any county, except New York, the office of surrogate is vacant; or the surrogate is disabled by reason of sickness, absence, or lunacy, and special provision is not made by law for the discharge of the duties of his office in that contingency: the duties of his office must be discharged until the vacancy is filled or the disability ceases, as follows:

1. By the special surrogate.
2. If there is no special surrogate, or he is in like manner disabled, or is precluded or disqualified, by the special county judge.
3. If there is no special county judge, or he is in like manner disabled, or is precluded or disqualified, by the county judge.
4. If there is no county judge, or he is in like manner disabled, or is precluded or disqualified, by the district attorney.

But before an officer is entitled to act, as prescribed in this section, proof of his authority to act as prescribed in section twenty-four hundred and eighty-seven of this act must be made.

In any proceeding in the surrogate's court of the county of

Kings, before either of the officers authorized in this section to discharge the duties of the office of surrogate of such county for the time being, if an issue is joined or a contest arises either on the facts or the law, such officer, in his discretion, may, by order, transfer such cases to the supreme court to be heard and decided at a special term thereof, held in such county, which order shall be recorded in the surrogate's office. A certified copy of such order, together with the appropriate certificate or certificates of the authority of the officer to act as surrogate, shall be sufficient and conclusive evidence of the jurisdiction and authority of the supreme court in such matter or cause. After a final order or decree is made in the matter or cause so transferred to the supreme court, the court shall direct the papers to be returned and filed, and transcripts of all orders and decrees made therein to be recorded in the surrogate's office of such county; and when so filed and recorded, they shall have the same effect as if they were filed and recorded in a case pending in the surrogate's court of such county.

L. 1893, ch. 686.

§ 2485. [Am'd, 1893.] If surrogate disqualified, who to act.

Where the surrogate of any county, except New York is precluded or disqualified from acting with respect to any particular matter, his jurisdiction and powers with respect to that matter vest in the several officers designated in the last section, in the order therein provided for. If there is no such officer qualified to act therein, the surrogate may file in his office a certificate, stating that fact; specifying the reason why he is disqualified or precluded; and designating the surrogate of an adjoining county, other than New York, to act in his place in the particular matter. The surrogate so designated has, with respect to that matter, all the jurisdiction and powers of the surrogate making the designation, and may exercise the same in either county.

L. 1893, ch. 686.

§ 2486. [Am'd, 1893, 1895.] Id.; in New York county.

In the county of New York, the supreme court, at a special term thereof, on the presentation of proof of its authority, as prescribed in the next section, must exercise all the powers and jurisdiction of the surrogate's court, as follows:

1. Where the surrogate is precluded or disqualified from acting, with respect to a particular matter, it must exercise all the powers and jurisdiction of that court with respect to that matter.

2. Where the office of surrogate of the county is vacant, or the surrogate is disabled by reason of sickness, absence or lunacy, it must exercise all the powers and jurisdiction of that court, until the vacancy is filled or the disability ceases, as the case may be.

L. 1893, ch. 686; L. 1895, ch. 946.

§ 2497. [Am'd, 1895.] Proof of authority.

The authority of another officer, or, in the county of New York, of the supreme court, to act as prescribed in the last three sections, must be proved, in one of the following modes:

1. Where the surrogate is disqualified, or precluded from acting in a particular matter, that fact may be proved by the surrogate's certificate thereof; or, except as otherwise prescribed in section 2480, by affidavit or oral testimony.

2. The fact that the surrogate is so disqualified or precluded, or that he is disabled, or that the office is vacant, and also the authority of the officer, or of the court, as the case may be, to act in his place, may be proved, and are deemed conclusively established, by an order of a justice of the supreme court of the judicial district embracing the county. After such an order is made, the surrogate shall not make the certificate specified in section 2485 of this act, and if such a certificate has been theretofore filed, the powers and jurisdiction of the surrogate therein designated, as specified in that section, thenceforth cease.

L. 1895, ch. 946.

§ 2488. Id.; when and how made.

An order may be made as prescribed in subdivision second of the last section, upon or without notice, as a justice of the supreme court of the judicial district embracing the county thinks proper. It must recite the cause of the making thereof, it must designate the officer or court empowered to discharge the duties of the office of surrogate; and, if it relates to a particular matter only, it must designate that matter. It may, in the discretion of the justice, require an officer to give security for the due discharge of the duties therein. Where the office of surrogate is vacant, or the surrogate is disabled by reason of lunacy, the attorney-general, if directed by the governor, must, or the district-attorney, upon his own motion, may apply for the order, and a justice of the supreme court of the judicial district embracing the county must grant it upon his application. A justice of the supreme court of the judicial district embracing the county may also grant the order upon the application of a party, or a person about to become a party to any special proceeding in the surrogate's court. Where the surrogate is sick or absent, the granting of an order rests in the discretion of the justice, and its effect may be qualified as the justice thinks proper.

L. 1884, ch. 490, § 1.

§ 2489. How authority superseded.

Where an order is made by a justice of the supreme court of the judicial district embracing the county, as prescribed in the last two sections, or an appointment is made by the board of supervisors, as prescribed in section 2492 of this act, for any cause except a vacancy in the office of surrogate, it may be revoked, without prejudice to any proceedings theretofore taken by virtue thereof, by a justice of the supreme court of the judicial district embracing the surrogate's county, upon proof that it was improvidently made, or that the cause of making it has become inoperative. Such an order or appointment, made upon the ground that the surrogate's office is vacant, is superseded without any formal revocation, by the filling of the vacancy. After the order or appointment is revoked, or the vacancy is filled, as the case may be, the unfinished business, in any proceedings taken by virtue of the order or appointment, must be transferred to, and may be completed by, the surrogate, in the same manner and with like effect, as where a new surrogate completes the unfinished business of his predecessor.

§ 2490. [Am'd, 1895.] Proceedings in New York and Kings counties regulated.

In a special proceeding cognizable before a surrogate, taken in the supreme court, as prescribed in this article, the seal of the court in which it is taken, must be used, where a seal is necessary. The special proceeding must be entitled in that court; and the papers therein must be filed or recorded, as the case may be, and issues therein must be tried, as in an action brought in that court. The clerk of that court must sign each record, which is required to be signed by the surrogate or the clerk of the surrogate's court. The issuing of a citation may be directed, and any order intermediate the citation and the decree may be made, by a judge of the court.

L. 1895, ch. 940.

§ 2491. [Am'd, 1895.] Id., transfer of proceedings to surrogate's court.

The court may, at any time, in its discretion, upon being satisfied that the reason for the exercise of its powers and jurisdiction has ceased to operate, make an order to transfer to the surrogate's court, any matter then pending before it. Such an order operates to transfer the same accordingly. Immediately after such a transfer, or after the revocation of the order of the general term, as prescribed in the last section but one, the surrogate must cause entries to be made in the proper book in his office, referring to all the papers filed, and orders entered or other proceedings taken, in the supreme court; and he may cause copies of any of the orders or papers to be made, and recorded or filed in his office, at the expense of the county.

L. 1895, ch. 946.

§ 2492. [Am'd, 1893.] Temporary surrogate; when board of supervisors may appoint.

In any county, except New York, if the surrogate is disabled, by reason of sickness, and there is no special surrogate, or special county judge of the county, the board of supervisors may in its discretion, appoint a suitable person, to act as surrogate, until the surrogate's disability ceases; or, until a special surrogate or a special county judge is elected or appointed. A person so appointed must, before entering on the execution of the duties of his office, take and file an oath of office, and give an official bond, as prescribed by law, with respect to a person elected to the office of surrogate.

L. 1893, ch. 636.

§ 2493. Id.; compensation.

An officer, or a person appointed by the board of supervisors, who acts as surrogate of any county during a vacancy in the office, or in consequence of disability, as prescribed in the last nine sections, must be paid, for the time during which he so acts, a compensation equal, pro rata, to the salary of the surrogate; or, in a county where the county judge is also surrogate, to the salary of the county judge. The amount of his compensation must be audited and paid, in like manner as the salary of the surrogate, or of the county judge, as the case may be. Where an officer of the county performs the duties of the surrogate, with respect to a particular matter, wherein the surrogate

is disqualified or precluded from acting, the supervisors of the county must allow him a just compensation for his services therein, to be audited and collected in the same manner.

L. 1871, ch. 859, § 8 (9 Edm. 214), am'd.

§ 2494. Id.; acts, etc., where and how recorded.

Where an act is done, or a proceeding is taken by, before, or by authority of, an officer, or a person appointed by the board of supervisors, temporarily acting as surrogate of any county, as prescribed in this article, the same must be recorded, or the proper minutes thereof must be entered, in the books of the surrogate's court, in like manner as if the same was done or taken by, before, or by authority of the surrogate of the county; and the officer or person so acting, or the clerk of the surrogate's court, must sign the certificate of probate and any letters so issued, and must certify the record thereof in the book.

2 R. S. 80, § 58 (2 Edm. 81).

§ 2495. (Am'd, 1893.) Surrogate; when not to be counsel.

A surrogate shall not be counsel, solicitor, or attorney, in a civil action or special proceeding, for or against any executor, administrator, temporary administrator, testamentary trustee, guardian, or infant, over whom, or whose estate or accounts, he could have any jurisdiction by law. The surrogate of the county of Monroe shall not act as referee, or practice as attorney or counselor in any court of record in the state.

L. 1893, ch. 686.

§ 2496. Surrogate, when disqualified.

In addition to his general disqualifications as a judicial officer, a surrogate is disqualified from acting upon an application for probate, or for letters testamentary, or letters of administration, in each of the following cases:

1. Where he is, or claims to be, an heir or one of the next of kin to the decedent, or a devisee or legatee of any part of the estate.

2. Where he is a subscribing witness, or is necessarily examined or to be examined as a witness, to any written or nuncupative will.

3. Where he is named as executor, trustee, or guardian, in any will, or deed of appointment, involved in the matter.

2 R. S. 79, § 48 (2 Edm. 80); L. 1847, ch. 470, § 32 (4 Edm. 586); L. 1871, ch. 859, § 8 (9 Edm. 214).

§ 2497. Disqualification; when objection must be taken.

An objection to the power of a surrogate to act, based upon a disqualification, established by special provision of law, other than one of those enumerated in the last section, is waived by an adult party to a special proceeding before him, unless it is taken at or before the joinder of issue by that party; or, where an issue in writing is not framed, at or before the submission of the matter or question to the surrogate.

2 R. S. 276, § 14 (2 Edm. 286); L. 1844, ch. 300, § 6 (4 Edm. 698).

§ 2498. Books to be kept by surrogate.

Each surrogate must provide and keep the following books:

1. A record-book of wills, in which must be recorded, at length, every will, required by law to be recorded in his office, with the

decree admitting it to probate, and also, if the probate is not contested, the proof taken thereupon.

2. A record-book of letters testamentary and letters of administration, in which must be recorded all such letters, issued out of his court.

3. A record-book, in which must be recorded every decree, whereby the account of an executor, administrator, trustee, or guardian is settled.

4. A book, containing a minute of every paper filed, or other proceeding taken, relating to the disposition of the real property of a decedent, and a record of every order or decree, made thereupon; with a memorandum of every report made, and other proceeding taken, founded upon a decree for such a disposition.

5. A book, containing a record of every decree or order, the record of which is not required by this section to be kept elsewhere; together with a memorandum of each execution issued, and of the satisfaction of each decree recorded therein.

6. A book, in which must be recorded all letters of guardianship, issued out of his court.

7. A book of fees and disbursements, in which must be entered, by items, all fees charged or received by him for services or expenses, and all disbursements made or incurred by him, which are chargeable against those fees, or to the county.

The expense of providing the books specified in this section is a county charge.

2 R. S. 222, § 7 (2 Edm. 231); 2 R. S. 110, § 60 (2 Edm. 114); 2 R. S. 102, § 13 (2 Edm. 106); 2 R. S. 80, § 57 (2 Edm. 82); L. 1837, ch. 460, §§ 2 and 3 (4 Edm. 457); L. 1869, ch. 855.

§ 2499. The same.

To each of the books, kept as prescribed in the last section, must be attached an alphabetical index, referring to the page of the book, where each subject may be found. The surrogate may keep two or more books, for a further division of the subjects specified in either subdivision of the last section; in which case, he must keep a separate index to each set of books. Each decree, revoking the probate of a will, or revoking or otherwise affecting letters testamentary, letters of administration, or letters of guardianship, or suspending or removing a testamentary trustee, or modifying or otherwise affecting any other decree, must be plainly noted at the end or in the margin of the record of the will, letters, or original decree, with a reference to the book and page where the subsequent decree is recorded. The books, kept as prescribed in the last section, appertain to the surrogate's office, and must be opened, at all reasonable times, to the inspection of any person.

2 R. S. 222, § 7 (2 Edm. 232); L. 1837, ch. 460, § 2 (4 Edm. 459).

§ 2500. [Am'd, 1893.] Papers and books to be preserved and bonds filed.

The surrogate must carefully file and preserve in his office, every deposition, affidavit, petition, report, account, voucher, or other paper, relating to any proceeding in his court; and deliver to his successor all the papers and books kept by him. All bonds required to be filed with the surrogate, or in his office, must be proved or acknowledged as deeds are required by law to be proved or acknowledged.

L. 1893, ch. 588.

§ 2501. [Am'd, 1898.] When fees not to be charged; report of fees.

If the inventory of personal property of a testator or intestate, filed in the office of the surrogate, does not exceed the sum of one thousand dollars, no fees for any services done or performed by the surrogate shall be charged to or received from the executor or administrator. If the petition for letters testamentary or of administration shall allege that in the belief of the petitioner the inventory will not exceed such amount, no fees shall be received until it appears from the inventory when filed that the personal property does not exceed that sum. On the appointment of a guardian, if it appears that the application is made for the purpose of enabling the minor to receive bounty, arrears of pay or prize money, or pension due, or other dues or gratuity from the federal or state government, for the services of the parents or brother of such minor in the military or naval service of the United States, no fees shall be charged or received. The surrogate of each county, except New York, must, at his own expense, make a report to the board of supervisors of the county, on the first day of each annual meeting thereof, containing a statement, verified by his oath, of all fees received or charged by him for services or expenses, since the last report, and of all disbursements chargeable against the same, or to the county, stating particularly each item thereof.

L. 1898, ch. 696.

§ 2502. [Added, 1906.] Books for recording instruments settling estates, etc.

*Am'd L. 1905-
ch. 61*

Each surrogate must provide a book in which shall, upon the application of any person interested, be recorded instruments settling estates, in whole or in part, executed by one or more executors, administrators, or testamentary trustees and one or more legatees, devisees, distributees or creditors; also like instruments executed by guardians and wards who have attained full age; also instruments acknowledging payment of moneys pursuant to the provisions of decrees for the judicial settlement of accounts of executors, administrators, testamentary trustees and guardians. Every such instrument to be recorded shall be acknowledged or proved and certified in like manner as would be required in the case of a deed of real estate to be recorded in the same county; and the record thereof, or a certified copy of such record, shall be presumptive evidence of the contents of such instrument and its due execution. The person presenting any such instrument for record shall pay to the clerk of the surrogate's court a fee of ten cents for each folio. The expense of providing the book specified in this section is a county charge.

L. 1906, ch. 350. In effect Sept. 1, 1906.

§ 2503. What papers to be transmitted to secretary of State, expenses thereof.

A surrogate who admits to probate the will of a person, who was not a resident of the State at the time of his death; or grants original or ancillary letters testamentary upon such a will, or original or ancillary letters of administration upon the estate of such a person; must, within ten days thereafter, transmit to the secretary of State, to be filed in his office, a certified copy of the will or letters. The surrogate's fees for making the copy, and the expenses of transmission, must be audited by the comptroller, and paid out of the treasury upon his warrant.

2 R. S. 80, § 59 (2 Edm. 82), am'd.

ARTICLE THIRD.

Clerks; stenographers; miscellaneous provisions.

- Sec. 2504. Surrogate's court; when to be open.
 2505. When surrogate to attend.
 2506. When and where court held by county judge.
 2507. Seal.
 2508. Clerks in surrogate's office.
 2509. Clerk of surrogate's court; deputy clerk of surrogate's court; how appointed; their powers.
 2509a. Chief clerk of surrogate's court of Kings county; compensation of clerks and officers.
 2510. Additional powers of clerks of surrogates' courts.
 2511. Surrogate liable for clerk's acts.
 2512. Stenographers and court officers for surrogates' courts in New York, Kings and Erie counties.
 2513. Stenographers in other counties.
 2513a. Interpreters in surrogate's court of Kings county.
 2514. Definition of expressions used in this chapter.

§ 2504. [Am'd, 1893, 1895.] Surrogate's court; when to be open.

The surrogates' court is always open for the transaction of any business, within its powers and jurisdiction. The surrogates of the city and county of New York, from time to time must appoint and may alter the times of holding terms of that court for the trial of probate proceedings and for the hearing of motions and other chamber business. They must prescribe the duration of such terms, and assign the surrogate to preside and attend at the terms so appointed. In case of the inability of a surrogate of that county to preside or attend, the other surrogate may preside or attend in his place. Two or more terms of the surrogates' court may be appointed to be held at the same time. The term of that court held at the chambers shall dispose of all business except contested probate proceedings; all contested probate proceedings shall be disposed of at the trial term. An appointment must be published in two newspapers published in the city of New York during or before the first week in January in each year; except that the surrogates of that county may, by notice to be published in two newspapers in the city of New York for at least five days, appoint the time for holding chambers and trial terms during the year eighteen hundred and ninety-three. All the powers conferred by law upon the surrogate of the city and county of New York may be exercised by either of the surrogates of the said city and county; and there shall be published in the official law paper published in said county, upon Monday of every week, under the name of the surrogate making the several appointments, a full and true list of the names of all appraisers, transfer tax appraisers, special guardians, referees and temporary administrators, which either surrogate shall have designated or appointed during the preceding week, together with the names of the proceedings in which they were appointed and the dates of said appointments.

L. 1893, ch. 9; L. 1899, ch. 606. In effect Sept. 1, 1899.

§ 2505. [Am'd, 1881, 1892.] When surrogate to attend.

The surrogate must, unless prevented by sickness or other unavoidable casualty, attend at his office on Monday of each week.

except during the month of August, or, where Monday is a public holiday, on the following Tuesday, to execute the powers conferred and the duties imposed upon him. But the surrogate of any county may, by an instrument in writing, under his hand, filed in the office of the clerk of the county, at least twenty days before the first day of January in any year, designate a day of the week, other than Monday, on which he will attend at his office, or a month, other than August, during which he will be absent therefrom, or both, during that year; and where the county judge is also surrogate, he is not required to attend at his office on any day, when the county court or court of sessions is sitting. The surrogate must also execute the duties of his office, at such other times and places, within his county, as the public convenience requires. The surrogate may sign decrees, letters testamentary, of administration and guardianship, and orders during the month of August or such other month as he shall designate for his vacation, wherever he shall be passing such vacation within the State.

2 R. S. 221 (2 Edm. 230); L. 1847, ch. 280, § 32 (4 Edm. 585); L. 1892, ch. 525.

§ 2506. When and where court held by county judge.

The surrogate's court, in a county where the county judge is also surrogate, may be held at the time and place at which the county court is held; and, in that case, the order of business of the county court, the court of sessions, and the surrogate's court, is under the direction of the county judge.

L. 1847, ch. 280, § 32 (4 Edm. 585).

§ 2507. [Am'd. 1909.] Seal.

The seal of the surrogate of each county shall continue to be the seal of the surrogate's court of that county, and must be used as such by an officer who discharges the duties of the surrogate. A description of each of such seals must be deposited and recorded in the office of the secretary of state, unless it has already been done; and must remain of record.

Am'd by L. 1909, ch. 65. Code Civil Procedure, § 2507, combined with the second and third sentences of § 27. For remainder of § 27 see Judiciary Law, §§ 28, 158, 194. See note 69 of notes of Board of Statutory Consolidation at end of code.

§ 2508. Clerks in surrogate's office.

Each surrogate may appoint, and at pleasure remove, as many clerks for his office, to be paid by the county, as the board of supervisors of his county, or, in the city and county of New York, the board of aldermen, authorize him so to appoint. The board of supervisors or the board of aldermen, as the case requires, must fix the compensation of the clerk or clerks so appointed; and may authorize them, or either of them, to receive for their or his own use, the legal fees for making copies of any record or paper in the office of the surrogate. A surrogate may appoint, and at pleasure remove, as many additional clerks, to be paid by him, as he thinks proper.

Repealed as to county of New York by L. 1884, ch. 530, § 11.

§ 2509. [Am'd. 1893, 1900, 1903, 1907, 1908, 1909.] Clerk of surrogate's court; deputy clerk of surrogate's court; how appointed; their powers.

By a written order filed and recorded in his office, which he may in like manner revoke at pleasure, a surrogate may appoint a clerk of the surrogate's court, and in any county containing a city of the second class, and in the county of Monroe, the surrogate may also appoint a deputy clerk of said court. Both said clerk and deputy clerk shall be paid by the county, and the board of supervisors or board of aldermen, as the case requires, must fix the compensation of the clerk and deputy clerk so appointed. The clerk and deputy clerk so appointed may severally exercise, concurrently with the surrogate, the following powers of the surrogate:

1. He may certify and sign as clerk of the court, or as deputy clerk of the court, as the case may be, any of the records of the court, including the certificate specified in section twenty-six hundred and twenty-nine of this act, and the records and papers specified in subdivision nine of section twenty-four hundred and eighty-one of this act.

2. He may issue any mandate, to which a party is entitled as of course, either unconditionally or on the filing of any paper; and may sign, as clerk of the court, or as deputy clerk of the court, as the case may be, and affix the seal of the court to any letters or mandate issued from the court.

3. He may certify in the manner prescribed by chapter ninth of this act, a copy of any paper, required or permitted by law to be filed or recorded in the surrogate's office.

4. He may adjourn to a definite time, not exceeding thirty days, any matter, when the surrogate is absent from his office, or unable, by reason of other engagements, to attend to the same.

5. He may take the acknowledgment or proof of any instrument, to be used or filed in the court of which he is clerk or deputy clerk. Said deputy clerk shall also act as confidential clerk to the surrogate.

6. The clerk of the surrogate's court of each of the counties of Kings and New York may, with the approval of the surrogate or surrogates of his county, authorize or depute one or more of the other clerks, employed in the surrogate's office of his county, to sign his name, and exercise such of the other powers conferred upon him by this section, as he shall designate. The surrogate may prohibit the clerk and deputy clerk, or either of them, from exercising any powers specified in this section, but the prohibition does not affect the validity of any act of the clerk or deputy clerk done in disregard of the prohibition. The clerk or deputy clerk or other person employed in any capacity in a surrogate's office, shall not act as appraiser, as attorney or counsel, or as referee, or special guardian, in any matter before the surrogate.

L. 1892, ch. 686; L. 1900, ch. 651; L. 1903, ch. 42; L. 1907, ch. 209; L. 1908, ch. 103. In effect April 9, 1908.

7. The clerk of the surrogate's court, of each of the counties of this state shall immediately upon the filing in the office of the surrogate of any decree or order of such court directing the deposit of money, either actually in the hands of some person or persons or thereafter arising from the sale of real estate described in any such decree or order, with the county treasurer of his county, or in the case of the county of New York, with the chamberlain of the city of New York, or upon the filing in the

said surrogate's office of any treasurer's or chamberlain's receipt stating that a sum of money has been deposited with such treasurer or chamberlain, in accordance with a decree or order of any such surrogate's court, enter in a book to be kept in his office for that purpose, to be known as a court and trust fund register, the title of the proceeding, or the name of the estate in which such decree or order was made, together with a statement of the amount so deposited, or ordered to be deposited, if said decree or order contains the amount of same, and the name of the person or persons, if any, to whom said money is ordered to be paid, and the date of the filing of the same or of such receipt as herein mentioned.

This subdivision added by L. 1909, ch. 65. Derivation — L. 1889, ch. 330, § 3, as am'd by L. 1895, ch. 544, § 3, and L. 1908, ch. 185, § 2. See note 18 of notes of Board of Statutory Consolidation at end of code.

§ 2509-a. [Added, 1911.] Chief clerk of surrogate's court of Kings county; compensation of clerks and officers.

The surrogate of the county of Kings may appoint a chief clerk of the court and office of such surrogate, who shall hold office for five years unless sooner removed by the surrogate for cause, after trial, upon charges duly served upon him and an opportunity to be heard and defend. Whenever a vacancy exists for any cause in such office, the surrogate shall appoint a person to fill such office for the full term of five years. Such chief clerk shall before entering upon the performance of his duties take the constitutional oath of office and shall file the same with the county clerk of Kings county, together with a bond in the sum of ten thousand dollars, with sureties approved by the surrogate, conditioned for the faithful performance of his duties as such chief clerk. Such chief clerk shall perform such duties as now pertain to the office of chief clerk and clerk of the surrogate's court in such county, and such other duties as the surrogate may from time to time by rule of the court or otherwise impose upon him. The compensation of such chief clerk and of the other clerks and officers of the court and office of such surrogate shall, notwithstanding any other provision of law, be fixed by the said surrogate, and the same shall be a county charge. The compensation of the chief clerk shall not be decreased during his term of office.

Added by L. 1911, ch. 688, in effect July 18, 1911.

§ 2510. [Am'd, 1894, 1905, 1906, 1913.] Additional powers of clerks of surrogates' courts.

The clerk of the surrogate's court, and in the county of Kings two other clerks, and in the county of Queens one other clerk, to be designated by the surrogate, in addition to the powers enumerated in section twenty-five hundred and nine, may exercise, concurrently with the surrogate of the county the following powers of the surrogate: On the return of a citation issued from such surrogate's court on a petition for the probate of a will, where no objection to the same is filed, or, where all of the persons entitled to be cited, sign and verify the petition, or personally, or by attorney, appear on the probate thereof, cause the witnesses to the will to be examined before him. Such examination must be reduced to writing, and for such purpose, they are

hereby authorized to administer and certify oaths and affirmations in such cases in the same manner and with the same effect as if administered and certified by the surrogate.

L. 1894, ch. 211; L. 1905, ch. 615; L. 1906, ch. 95; L. 1913, ch. 439. In effect Sept. 1, 1918.

§ 2511. [Am'd, 1907.] Surrogate liable for clerk's acts.

A surrogate hereafter elected or appointed, and the sureties in his official bond, are liable for any act of the clerk or deputy clerk of the surrogate's court in the discharge of his official duties, during the surrogate's term of office, as if the act was performed by the surrogate. The surrogate may take security from the clerk or deputy clerk, or either of them, to indemnify him against the liability created by this section.

Formerly § 2510. See L. 1893, ch. 686. Am'd L. 1907, ch. 209. In effect Sept. 1, 1907.

§ 2512. [Am'd, 1909, 1910.] Stenographers and court officers for surrogates' courts in New York, Kings and Erie counties.

The surrogate of each of the counties of New York, Kings and Erie, must appoint, and may, for cause, remove, a stenographer for his court, who is entitled to a salary, fixed by law, and to be paid as the salaries of clerks in the surrogate's office are paid. In the county of Erie the salary of said stenographer shall be fixed by the board of supervisors, and the payment of such salary shall be provided for by such board in the same manner as other county expenses are paid. The surrogate of Kings county may appoint, and at pleasure remove all attendants and messengers, and court officers in his court, who must attend, from day to day, the terms and sittings of the court to preserve order, and to perform whatever services may be required of him by the surrogate. The surrogate of Erie county may appoint, and at pleasure remove, one court officer to attend his court and to perform such duties in respect thereto as the said surrogate may prescribe. Such officer shall possess all the powers of officers designated by sheriffs to attend upon such courts, and shall receive a salary to be fixed by said surrogate, not to exceed one thousand two hundred dollars a year, to be paid in equal monthly payments by the treasurer of the county of Erie.

Am'd by L. 1909, ch. 65. Derivation — Code Civil Procedure, §§ 95-97, 2512. For remainder of § 95 see Judiciary Law, §§ 108, 200. For remainder of § 96 see Judiciary Law, §§ 230, 349, 351, 351. For remainder of § 97 see Judiciary Law, §§ 180, 170, 201, 231-233, 279, 403, 405. See note 70 of notes of Board of Statutory Consolidation at end of code. Am'd L. 1910, ch. 705, in effect Sept. 1, 1910.

§ 2513. [Am'd, 1893, 1896, 1902, 1903, 1904, 1895, 1906, 1909, 1910.] Stenographers in other counties.

The surrogate of each such county, except New York, Kings, Hamilton, Queens, Richmond and Erie, may, in his discretion, appoint, and at pleasure remove, a stenographer for his court, who, except in Sullivan county, shall receive a salary to be fixed by such surrogate, not exceeding in counties having a population less than thirty thousand, eight hundred dollars per annum; in counties having a population of thirty thousand and not more than fifty thousand, not exceeding one thousand dollars per an-

num, and in counties having a population exceeding fifty thousand, not exceeding twelve hundred dollars per annum, except that in counties in which are located cities of the second class, or in counties in which are located three cities of the third class, such salary shall not exceed eighteen hundred dollars per annum; and in any county wholly containing a city of the first class, such salaries shall not exceed two thousand dollars per annum. The population of the several counties shall be determined by the last preceding census. If a regular stenographer is appointed in Sullivan county, his salary shall be five hundred dollars per annum. The board of supervisors shall provide for the payment of such salary in the same manner as other county expenses are paid. Such stenographer shall deliver to the surrogate of the county a full copy of all the minutes taken by him; and on the receipt of his fees, not exceeding three cents per folio, a like copy to the party, or each of the parties, to the proceeding in which the minutes were taken, except that in the counties of Onondaga and Monroe such fees shall not exceed six cents per folio. When not actually engaged in the discharge of his duties as stenographer, he shall perform such clerical duties in connection with the surrogate's court as the surrogate directs. In counties wherein the surrogate is also county judge, the stenographer so appointed shall be the stenographer of the county court, and shall perform the duties pertaining to a stenographer of the county court without additional compensation. In counties where, for any cause, a regular stenographer for his court has not been appointed, as provided by this section, the surrogate may, in individual proceedings requiring the services of a stenographer, appoint a stenographer who shall be paid a reasonable compensation, certified by the surrogate in every case in which he takes notes of testimony, from the estate or matter in which such services are rendered.

Am'd by L. 1898, ch. 680; L. 1898, ch. 248; L. 1902, ch. 265; L. 1903, ch. 470; L. 1904, ch. 59; L. 1905, ch. 570; L. 1906, ch. 223; L. 1909, ch. 270; L. 1910, ch. 703. In effect Sept. 1, 1910.

§ 2513-a. [Am'd. 1900.] Interpreters in surrogate's court of Kings county.

The surrogate of Kings county must from time to time appoint and may at pleasure remove an interpreter to be attached to the surrogate's court of said county. Such interpreter shall receive a salary of eighteen hundred dollars per annum to be paid by the comptroller of the city of New York, in monthly instalments and shall, before entering upon his duties, file in the office of the clerk of the county of Kings the constitutional oath of office in which there shall also be incorporated, language to the effect that he will fully and correctly interpret and translate each question propounded through him to a witness and each answer thereto in said courts. The compensation for the above interpreter to be taken out of the amount appropriated for the support of the said surrogate's court, or from any other contingent city fund.

Added by L. 1909, ch. 65. Derivation — Code Civil Procedure, § 369. For remainder of section see Judiciary Law, §§ 198, 382-385. See note 19 of notes of Board of Statutory Consolidation at end of Code.

§ 2514. [Am'd, 1900.] Definition of expressions used in this chapter.

In construing the provisions of this chapter, the following rules must be observed, except where a contrary intent is expressly declared in the provision to be construed, or plainly apparent from the context thereof:

1. The word, "intestate" signifies a person who died without leaving a valid will; but where it is used with respect to particular property, it signifies a person who died without effectually disposing of that property by will, whether he left a will or not.

2. The word, "assets" signifies personal property applicable to the payment of the debts of a decedent.

3. [Am'd, 1900.] The word "debts" includes every claim and demand, upon which a judgment for a sum of money, or directing the payment of money, could be recovered in an action; and the word "creditor" includes every person having such a claim or demand, any person having a claim for expense of administration, or any person having a claim for funeral expenses.

L, 1900, ch. 120. In effect Sept. 1, 1900.

4. The word, "will" signifies a last will and testament, and includes all the codicils to a will.

5. The expression "letters of administration," includes letters of temporary administration.

6. The expression, "testamentary trustee," includes every person, except an executor, an administrator with the will annexed, or a guardian, who is designated by a will, or by any competent authority, to execute a trust created by a will; and it includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is separable from his functions, as executor or administrator.

7. The word, "surrogate," where it is used in the text, or in a bond or undertaking, given pursuant to any provision of this chapter, includes every officer or court vested by law with the functions of surrogate.

8. The expression, "judicial settlement," where it is applied to an account, signifies a decree of a surrogate's court, whereby the account is made conclusive upon the parties to the special proceeding, either for all purposes, or for certain purposes, specified in the statute; and an account thus made conclusive is said to be "judicially settled."

9. The expression, "intermediate account," denotes an account filed in the surrogate's office, for the purpose of disclosing the acts of the person accounting, and the condition of the estate or fund in his hands and not made the subject of a judicial settlement.

10. The expression, "upon the return of a citation," where it is used in a provision requiring an act to be done in the surrogate's court, relates to the time and place at which the citation is returnable, or to which the hearing is adjourned; includes a supplemental citation, issued to bring in a party who ought to be, but has not been cited; and implies that, before doing the act specified, due proof must be made, that all persons required to be cited have been duly cited.

11. The expression, "person interested," where it is used in connection with an estate or a fund, includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee or otherwise, except as a creditor. Where a provision of this chapter prescribes that a person interested may object to an appointment, or may apply for an inventory, an account, or increased security, an allegation of his interest, duly verified, suffices, although his interest is disputed; unless he has been excluded by a judgment, decree or other final determination, and no appeal therefrom is pending.

12. The term, "next of kin," includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed residue of the assets of a decedent after payment of debts and expenses, other than a surviving husband or wife.

13. The expression, "real property," includes every estate, interest, and right, legal or equitable, in lands, tenements, or hereditaments, except those which are determined or extinguished by the death of a person seized or possessed thereof, or in any manner entitled thereto, and except those which are declared by law to be assets. The word, "inheritance," signifies real property, as defined in this subdivision, descended as prescribed by law. The

expression, "personal property," signifies every kind of property, which survives a decedent, other than real property as defined in this subdivision, and includes a right of action conferred by special statutory provision upon an executor or administrator.

¹ 2 R. S. 68, § 71 (2 Edm. 70) and subd. 13; 1 R. S. 764, § 27 (1 Edm. 708).

TITLE II.

Provisions relating generally to the proceedings in surrogates' courts, and to appeals from those courts.

- Article 1. Process and service thereof; appearance, and joinder of issue; miscellaneous regulations of practice.**
2. Hearing; including trial by jury and reference.
 3. Decrees and orders; and the enforcement thereof. Costs and fees.
 4. App. et.
 5. Provisions relating generally to letters; and generally to executors, administrators, guardians, and testamentary trustees.

ARTICLE FIRST.

Process, and service thereof; appearance, and joinder of issue; miscellaneous regulation of practice.

- Sec. 2515. Process; how executed and returnable.**
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2519. Contents of citation.
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2535. Publication of citation, etc.
2536. (Repealed.)
2537. Money paid into court and securities taken, how disposed of.
2538. Certain provisions made applicable to proceedings in surrogates' courts.

§ 2515. Process; how executed and returnable.

A citation or other mandate of a surrogate's court must, except where it is otherwise specially prescribed by law, be made returnable before the surrogate from whose court it was issued, and may be served or executed in any county. A warrant of attachment must be directed to the sheriff of the surrogate's county; who may execute it in any county, and must convey the person arrested to the place where it is returnable.

L. 1837, ch. 460, §§ 66, 67 (4 Edm. 498).

§ 2516. Proceedings to be commenced by citation.

Except in a case where it is otherwise specially prescribed by law, a special proceeding in a surrogate's court must be commenced by the service of a citation, issued upon the presentation of a petition. But upon the presentation of the petition, the court acquires jurisdiction to do any act, which may be done before actual service of the citation.

See §§ 2525 and 2533, post.

§ 2517. Id.; within the statute of limitations.

The presentation of a petition is deemed the commencement of a special proceeding, within the meaning of any provision of this act, which limits the time for the commencement thereof. But in order to entitle the petitioner to the benefit of this section, a citation issued upon the presentation of the petition,

must, within sixty days thereafter, be served, as prescribed in section 2520 of this act, upon the adverse party, or upon one of two or more adverse parties, who are jointly liable, or otherwise united in interest; or, within the same time, the first publication thereof must be made, pursuant to an order made as prescribed in section 2522 of this act.

See §§ 399 and 400, ante.

§ 2518. [Am'd, 1908.] Persons constituting a class; when to be cited; citation when some are unknown.

Where it is prescribed, in any provision of this chapter, that a petition must pray that a person, or that creditors, next of kin, legatees, heirs, devisees, or other persons constituting a class, may be cited for any purpose, all those persons are necessary parties to the special proceeding. Where persons to be cited constitute a class, the petitioner must set forth, in an affidavit, the name of each of them, unless the name, or part of the name, of one or more of them cannot, after diligent inquiry, be ascertained by him; in which case, that fact must be set forth and he may also allege that there may be others whose existence is unknown to him; and the surrogate must, thereupon, inquire into the matter. For the purpose of the inquiry, he may, in his discretion, issue a subpoena, requiring any person to attend before him to testify respecting the matter. If he is satisfied, of the reasonable diligence and good faith of the petitioner the citation may be directed to the persons, whose names are unascertained and also to all other persons belonging to such classes by a general description, showing their connection with the decedent, or interest in the property or matter in question; or other sufficient identification. A citation, thus directed, has the same force and effect, as if it was directed to the persons intended, by their names; and where the persons so intended are duly cited, in any manner prescribed by law, the decree binds them, as if they were named in the citation. A petition, duly verified, is deemed an affidavit, within the meaning of this section.

2 B. S. 74, § 26 (2 Edm. 75). Am'd by L. 1908, ch. 272. In effect Sept. 1, 1908.

§ 2519. Contents of citation.

A citation must be made returnable upon a day certain, designated therein, not more than four months after the date thereof; and must specify whose estate or what subject-matter is in question. The names of all the persons to be cited, as far as they can be ascertained, must be contained in the citation. Where the name, or part of the name, of either of them cannot be ascertained, that fact must be stated in the citation.

L. 1837, ch. 460, § 7 (4 Edm. 487).

§ 2520. [Am'd, 1913.] Citation; how served in the state.

Except where special provision is otherwise made by law, service of a citation, within the state, must be made upon an adult person, or an infant of the age of fourteen years or upwards, by delivering a copy thereof to the person to be served, or by leaving a copy at his residence, or the place where he sojourns, with a person of suitable age and discretion, under such circumstances, that the surrogate has good reason to believe that the copy came to his knowledge, in time for him to attend at the return day. A citation must be so served, if within the county of the surrogate, or an adjoining county, at least eight days before the return day thereof; if in any other county, at least fifteen days before the return day; unless, in either case,

the person served, being an adult, and not incompetent, assents in writing to a service within a shorter time. Any person, although a party to the special proceeding, may serve a citation. Upon an accounting or judicial settlement of an executor or administrator, where the number of creditors or persons claiming to be creditors, residing within the state of New York, upon whom citation is required to be served, exceeds fifty, service thereof may be made upon them by publication thereof in such newspapers and for such a length of time as shall be fixed by the surrogate and by the mailing of a copy of such citation to each of them by deposit of a copy thereof in the postoffice, properly enclosed in a postpaid sealed wrapper addressed to each of them at their last known place of residence, at least thirty days prior to the return day thereof.

Am'd, L. 1913, ch. 535. In effect May 16, 1913.

§ 2521. Substitute for personal service upon a resident.

Where it appears by affidavit, to the satisfaction of the surrogate from whose court a citation issued, that proper and diligent effort has been made to serve it upon a resident of the State, as prescribed in the last section; and that the person to be served cannot be found, or if found, that he evades service, so that it cannot be made; the surrogate may make an order, directing that service thereof be made, as prescribed in section 436 of this act; and the provisions of that section and of section 437 of this act, relating to the service of a summons, apply to the service of a citation; pursuant to an order made as prescribed in this section.

§ 2522. [Am'd, 1881.] Service by publication, etc.

The surrogate, from whose court a citation is issued, may make an order, directing the service thereof without the State, or by publication, in either of the following cases:

1. Where it is to be served upon a foreign corporation, or upon a person who is not a resident of the State.

2. Where the person to be served, being a resident of the State, has departed therefrom with intent to defraud his creditors, or to avoid the service of process.

3. Where the person to be served, whether an adult or an infant, is a resident of the State, but is temporarily absent therefrom.

4. Where the person to be served is a resident of the State, or a domestic corporation, and an attempt was made to serve a citation, issued from the same surrogate's court, upon the presentation of the same petition; before the expiration of the limitation applicable to the enforcement of the claim set forth in the petition, as fixed in chapter fourth of this act; and the limitation would have expired within sixty days next preceding the application for the order, if the time had not been extended by the attempt to serve the citation.

See § 2526, post.

§ 2523. Id.; upon persons unknown, etc.

The surrogate may also make an order, directing the service of a citation without the State, or by publication, in either of the following cases:

1. Upon a party to whom a citation is directed, either by his full name or part of his name, where the surrogate is satisfied, by affidavit, that the residence of that party cannot, after diligent inquiry, be ascertained by the petitioner.

2. Upon one or more unknown creditors, next of kin, legatees, heirs, devisees, or other persons included in a class, to whom a citation has been directed, designating them by a general description, as prescribed in this article.

§ 2524. [Am'd, 1881, 1890.] Order, when and how made; contents thereof.

Where an order, directing the service of a citation without the State, or by publication, is made as prescribed in either of the last two sections, the party applying therefor must produce proof, by affidavit or otherwise, to the satisfaction of the surrogate, that the case is one of those specified in those sections. The order must direct that service of the citation, upon the person named or described in the order, be made by publication of the citation in two newspapers, designated as prescribed in this article, unless from the petition it appears that the estate amounts to less than two thousand dollars, in which case only one newspaper shall be designated, for a specified time, which the surrogate deems reasonable, not less than once in each of six successive weeks; or, at the option of the petitioner, by delivering a copy of the citation, without the State, to each person so named or described, in person, and if the person to be served is an infant under the age of fourteen years, also to the person with whom he is sojourning or, if the service is made upon a corporation, to an officer thereof specified in section four hundred and thirty-one or four hundred and thirty-two of this act. It must also contain either a direction that on or before the day of the first publication, the petitioner deposit, in a specified post-office, a copy of the citation and of the order, contained in a securely closed post-paid wrapper, directed to the person to be served, at a place specified in the order, and, if the person to be served is an infant under the age of fourteen years, a further copy, likewise contained in a securely closed post-paid wrapper, directed to the person with whom such infant is sojourning or, a statement that the surrogate, being satisfied, by the affidavit upon which the order was granted, that the petitioner cannot, with reasonable diligence, ascertain a place or places where the person to be served would probably receive matter transmitted through the post-office, dispenses with the deposit of any papers therein.

See § 440, ante; L. 1899, ch. 606. In effect Sept. 1, 1899

§ 2525. [Am'd, 1882.] What time required for delivery of copy, etc.

Where service is made by delivering a copy of the citation without the State, pursuant to an order made as prescribed in the last section, it must be made, if within the United States, at least thirty days, if without the United States, at least forty days, before the return day of the citation. Proof of publication, deposit or delivery may be made as prescribed in section 444 of this act.

See §§ 439, 440, ante; L. 1837, ch. 460, § 8; L. 1840, ch. 884, § 1 (4 Edm. 487); L. 1863, ch. 362 (6 Edm. 124); 2 R. S. 61, 62, §§ 32, 34 (3 Edm. 61).

§ 2526. Service upon a corporation, infant, lunatic, etc.

Service of a citation must be made upon an infant under the age of fourteen years, a person judicially declared to be incompetent to manage his affairs by reason of lunacy, idioy, or habitual drunkenness, or a corporation, in the manner prescribed for personal service of a summons upon such a person, or upon

a corporation, in article first of title first of chapter fifth of this act.

L. 1870, ch. 693 (9 Edm. 490). See §§ 426, 431 and 432, ante.

§ 2527. Id.; upon infant, etc.; additional requirement in certain cases.

Where a person, cited or to be cited, is an infant of the age of fourteen years or upwards, or where the surrogate has, in his opinion, reasonable grounds to believe, that a person, cited or to be cited, is an habitual drunkard, or for any cause mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, the surrogate may, in his discretion, with or without an application therefor, and in the interest of that person, make an order requiring that a copy of the citation be delivered, in behalf of that person, to a person designated in the order; and that service of the citation shall not be deemed complete until such delivery. Where the person, cited or to be cited, is an infant under the age of fourteen years, or a person judicially declared to be incompetent to manage his affairs, by reason of lunacy, idiocy, or habitual drunkenness, and the surrogate has reasonable ground to believe that the interest of the person, to whom a copy of the citation was delivered, in behalf of the infant or incompetent person, is adverse to that of the infant or incompetent person, or that for any reason, he is not a fit person, to protect the latter's rights, the surrogate may likewise make such an order; and as a part thereof, or by a separate order, made in like manner at any stage of the proceedings, he may appoint a special guardian ad litem to conduct the proceedings in behalf of the incompetent person, to the exclusion of the committee, and with the same powers, and subject to the same liabilities, as a committee of the property.

L. 1872, ch. 693 (9 Edm. 420).

§ 2528. [Am'd, 1896, 1911.] Appearance; how made, and effect thereof.

In a surrogate's court, a party of full age may, unless he has been judicially declared to be incompetent to manage his affairs, prosecute or defend a special proceeding, in person or by attorney regularly admitted to practice in the courts of record, at his election, except in a proceeding to punish him for contempt, or where he is required to appear in person, by special provision of law, or by a special order of the surrogate. The issue and service of a citation may be waived either before or after the filing of the petition in such proceeding by a party in any proceeding by an instrument in writing, acknowledged or approved as a deed entitled to be recorded, or by personal appearance or by his attorney with written authorization executed and acknowledged as a deed and filed in the office of the surrogate. The appearance of a party against whom a citation has been issued, has the same effect as the appearance of a defendant in an action brought in the supreme court.

L. 1896, ch. 570; L. 1911, ch. 330, in effect Sept. 1, 1911. See §§ 55, 424, 796-802, ante.

§ 2529. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 472.]

§ 2530. Special guardian; when to be appointed.

Where a party, who is an infant, does not appear by his general guardian; or where a party, who is a lunatic, idiot or habitual

drunkard, does not appear by his committee, the surrogate must appoint a competent and responsible person, to appear as special guardian for that party. Where an infant appears by his general guardian, or where a lunatic, idiot, or habitual drunkard, appears by his committee, the surrogate must inquire into the facts, and must, in like manner, appoint a special guardian, if there is any ground to suppose that the interest of the general guardian or committee is adverse to that of the infant, or incompetent person; or that for any other reason, the interests of the latter require the appointment of a special guardian. A person cannot be appointed such a special guardian, unless his written consent is filed, at or before the time of entering the order appointing him.

See 2 R. S. 100, § 3 (2 Edm. 104), am'd; L. 1837, ch. 460, § 38 (4 Edm. 494); L. 1863, ch. 362, § 6 (6 Edm. 126); L. 1870, ch. 170, § 4 (7 Edm. 665); L. 1872, ch. 693, § 2 (9 Edm. 421).

§ 2531. Notice of proceedings to appoint special guardian.

Where a person, other than the infant, or the committee of the incompetent person, applies for the appointment of a special guardian, as prescribed in the last section, at least eight days' notice of the application must be personally served upon the infant, or incompetent person, if he is within the State, and also upon the committee, if any, in like manner as a citation is required by law to be served. But except in a case specified in title fifth of this chapter, the surrogate may, by an order to show cause, prescribe a shorter time, and direct the service of the order to be made in such a manner as he deems proper. The application may be made at the time of presenting the petition, and, in that case, the order to show cause may, in the surrogate's discretion, accompany the citation.

2 R. S. 100, § 4 (2 Edm. 104); L. 1837, ch. 460, § 37 (4 Edm. 494), am'd.

§ 2532. Proof of service of citation, subpoena, etc.

Proof of service of a citation, or a subpoena, issued from a surrogate's court, must be made in the manner prescribed by law, for proof of service of a summons issued out of the supreme court. In every other case, proof of service must be made by affidavit; or, where the person served is of full age and not incompetent, by a written admission signed by him, accompanied with proof, by affidavit or otherwise, of the genuineness of his signature.

2 R. S. 228, § 9 (2 Edm. 232); L. 1837, ch. 460, § 9 (4 Edm. 488).

§ 2533. Written pleadings may be required.

The surrogate may, at any time, require a party to file a written petition or answer, containing a plain and concise statement of the facts constituting his claim, objection or defence, and a demand of the decree, order, or other relief, to which he supposes himself to be entitled. The surrogate may require the petition or answer to be verified, and a copy thereof to be served upon any other person interested. A party who fails to comply with such requirement may be treated as a party in default. Except where such a requirement is made, or in a case where a written petition is expressly required by this act, a petition, or the answer thereto, may be presented orally; in which case, the substance thereof must be entered in the records of the courts.

§ 2534. Verification thereof.

The provisions of sections 523, 524, 525, and 526 of this act apply to a verification made pursuant to this chapter, and to the petition or other paper so verified, where they can be so applied in substance, without regard to the form of the proceeding. See § 2749, post.

§ 2535. Publication of citation, etc.

Where a provision of this chapter, or an order made pursuant to such a provision, directs the publication of a citation, notice or other paper, or the service thereof by publication, the publication must be made in a newspaper published in the county. The surrogate may, also, in his discretion, direct the publication thereof in any other newspaper published in the same or another county, as he deems proper, for the purpose of giving notice to the persons intended to be served or notified. If no newspaper is published in the county, the citation, notice, or other paper, must be published in the newspaper printed at Albany, in which legal notices are required by law to be published.

L. 1874, ch. 437 (0 Edm. 918); 2 R. S. 107, part of § 40 (2 Edm. 111).

§ 2536. [Repealed by L. 1900, ch. 572. In effect Sept. 1, 1900.]

§ 2537. [Am'd, 1882, 1908, 1909.] Money paid into court and securities taken; how disposed of.

Where a statute requires the payment of money into, or the deposit of a security with the surrogate's court, or the deposit of a security for the payment of money, with the surrogate, the same must be paid to or deposited with the county treasurer of the county to the credit of the beneficiary, or of the estate, or of the special proceeding; unless the statute contains special directions for another disposition thereof. Each security so deposited with the county treasurer must be held and disposed of by him, subject to the direction of the surrogate's court; except that he must, unless otherwise so directed, collect the principal and interest secured thereby. All money collected by or paid to the county treasurer, as prescribed by this section, must be held, managed, invested and disposed of by him, in like manner as money paid into the supreme court in an action pending therein. The regulations, contained in the general rules of practice, as specified in subdivision eight of section four of the state finance law, and the provisions of title third of chapter eight of this act, apply to money paid to and securities deposited with the county treasurer, as prescribed in this section; except that the surrogate's court exercises, with respect thereto, or with respect to a security, in which any of the money has been invested, or upon which it has been loaned, the power and authority conferred upon the supreme court by section seven hundred and forty-seven of this act.

Am'd by L. 1908, ch. 183; L. 1909, ch. 63, § 3, and ch. 240, § 84. See note 72 of notes of Board of Statutory Consolidation at end of code.

§ 2538. Certain provisions made applicable to proceedings in surrogates' courts.

Except where a contrary intent is expressed in, or plainly implied from the context of, a provision of this chapter, the follow-

§ 2514. [Am'd, 1900.] **Definition of expressions used in this chapter.**

In construing the provisions of this chapter, the following rules must be observed, except where a contrary intent is expressly declared in the provision to be construed, or plainly apparent from the context thereof:

1. The word, "intestate" signifies a person who died without leaving a valid will; but where it is used with respect to particular property, it signifies a person who died without effectually disposing of that property by will, whether he left a will or not.

2. The word, "assets" signifies personal property applicable to the payment of the debts of a decedent.

3. [Am'd, 1900.] The word "debts" includes every claim and demand, upon which a judgment for a sum of money, or directing the payment of money, could be recovered in an action; and the word "creditor" includes every person having such a claim or demand, any person having a claim for expense of administration, or any person having a claim for funeral expenses.

L. 1900, ch. 120. In effect Sept. 1, 1900.

4. The word, "will" signifies a last will and testament, and includes all the codicils to a will.

5. The expression "letters of administration," includes letters of temporary administration.

6. The expression, "testamentary trustee," includes every person, except an executor, an administrator with the will annexed, or a guardian, who is designated by a will, or by any competent authority, to execute a trust created by a will; and it includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is separable from his functions, as executor or administrator.

7. The word, "surrogate," where it is used in the text, or in a bond or undertaking, given pursuant to any provision of this chapter, includes every officer or court vested by law with the functions of surrogate.

8. The expression, "judicial settlement," where it is applied to an account, signifies a decree of a surrogate's court, whereby the account is made conclusive upon the parties to the special proceeding, either for all purposes, or for certain purposes, specified in the statute; and an account thus made conclusive is said to be "judicially settled."

9. The expression, "intermediate account," denotes an account filed in the surrogate's office, for the purpose of disclosing the acts of the person accounting, and the condition of the estate or fund in his hands and not made the subject of a judicial settlement.

10. The expression, "upon the return of a citation," where it is used in a provision requiring an act to be done in the surrogate's court, relates to the time and place at which the citation is returnable, or to which the hearing is adjourned; includes a supplemental citation, issued to bring in a party who ought to be, but has not been cited; and implies that, before doing the act specified, due proof must be made, that all persons required to be cited have been duly cited.

11. The expression, "person interested," where it is used in connection with an estate or a fund, includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee or otherwise, except as a creditor. Where a provision of this chapter prescribes that a person interested may object to an appointment, or may apply for an inventory, an account, or increased security, an allegation of his interest, duly verified, suffices, although his interest is disputed; unless he has been excluded by a judgment, decree or other final determination, and no appeal therefrom is pending.

12. The term, "next of kin," includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed residue of the assets of a decedent after payment of debts and expenses, other than a surviving husband or wife.

13. The expression, "real property," includes every estate, interest, and right, legal or equitable, in lands, tenements, or hereditaments, except those which are determined or extinguished by the death of a person seized or possessed thereof, or in any manner entitled thereto, and except those which are declared by law to be assets. The word, "inheritance," signifies real property, as defined in this subdivision, descended as prescribed by law. The

expression, "personal property," signifies every kind of property, which survives a decedent, other than real property as defined in this subdivision, and includes a right of action conferred by special statutory provision upon an executor or administrator.

¹ 2 R. S. 68, § 71 (2 Edm. 70) and subd. 13; 1 R. S. 754, § 27 (1 Edm. 708).

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TITLE II.

Provisions relating generally to the proceedings in surrogates' courts, and to appeals from those courts.

- Article 1. Process and service thereof; appearance, and joinder of issue; miscellaneous regulations of practice.**
2. Hearing; including trial by jury and reference.
 3. Decrees and orders; and the enforcement thereof. Costs and fees.
 4. Appeal.
 5. Provisions relating generally to letters; and generally to executors, administrators, guardians, and testamentary trustees.

ARTICLE FIRST.

Process, and service thereof; appearance, and joinder of issue; miscellaneous regulation of practice.

- Sec. 2515. Process; how executed and returnable.**
2516. Proceedings to be commenced by citation.
2517. Id.; within the statute of limitations.
2518. Persons constituting a class; when to be cited; citation when some are unknown.
2519. Contents of citation.
2520. Citation; how served in the State.
2521. Substitute for personal service upon a resident.
2522. Service by publication, etc.
2523. Id.; upon persons unknown, etc.
2524. Order; when and how made; contents thereof.
2525. What time required for delivery of copy, etc.
2526. Service upon a corporation. Infant, lunatic, etc.
2527. Id.; upon infant, etc.; additional requirement in certain cases.
2528. Appearance; how made, and effect thereof.
2529. Surrogate's father or son not to practice before him.
2530. Special guardian; when to be appointed.
2531. Notice of proceedings to appoint special guardian.
2532. Proof of service of citation, subpoena, etc.
2533. Written pleadings may be required.
2534. Verification thereof.
2535. Publication of citation, etc.
2536. (Repealed.)
2537. Money paid into court and securities taken, how disposed of.
2538. Certain provisions made applicable to proceedings in surrogates' courts.

§ 2515. Process; how executed and returnable.

A citation or other mandate of a surrogate's court must, except where it is otherwise specially prescribed by law, be made returnable before the surrogate from whose court it was issued, and may be served or executed in any county. A warrant of attachment must be directed to the sheriff of the surrogate's county; who may execute it in any county, and must convey the person arrested to the place where it is returnable.

L. 1837, ch. 460, §§ 66, 67 (4 Edm. 498).

§ 2516. Proceedings to be commenced by citation.

Except in a case where it is otherwise specially prescribed by law, a special proceeding in a surrogate's court must be commenced by the service of a citation, issued upon the presentation of a petition. But upon the presentation of the petition, the court acquires jurisdiction to do any act, which may be done before actual service of the citation.

See §§ 2525 and 2533, post.

§ 2517. Id.; within the statute of limitations.

The presentation of a petition is deemed the commencement of a special proceeding, within the meaning of any provision of this act, which limits the time for the commencement thereof. But in order to entitle the petitioner to the benefit of this section, a citation issued upon the presentation of the petition,

must, within sixty days thereafter, be served, as prescribed in section 2520 of this act, upon the adverse party, or upon one of two or more adverse parties, who are jointly liable, or otherwise united in interest; or, within the same time, the first publication thereof must be made, pursuant to an order made as prescribed in section 2522 of this act.

See §§ 399 and 400, ante.

§ 2518. [Am'd, 1908.] Persons constituting a class; when to be cited; citation when some are unknown.

Where it is prescribed, in any provision of this chapter, that a petition must pray that a person, or that creditors, next of kin, legatees, heirs, devisees, or other persons constituting a class, may be cited for any purpose, all those persons are necessary parties to the special proceeding. Where persons to be cited constitute a class, the petitioner must set forth, in an affidavit, the name of each of them, unless the name, or part of the name, of one or more of them cannot, after diligent inquiry, be ascertained by him; in which case, that fact must be set forth and he may also allege that there may be others whose existence is unknown to him; and the surrogate must, thereupon, inquire into the matter. For the purpose of the inquiry, he may, in his discretion, issue a subpoena, requiring any person to attend before him to testify respecting the matter. If he is satisfied, of the reasonable diligence and good faith of the petitioner the citation may be directed to the persons, whose names are unascertained and also to all other persons belonging to such classes by a general description, showing their connection with the decedent, or interest in the property or matter in question; or other sufficient identification. A citation, thus directed, has the same force and effect, as if it was directed to the persons intended, by their names; and where the persons so intended are duly cited, in any manner prescribed by law, the decree binds them, as if they were named in the citation. A petition, duly verified, is deemed an affidavit, within the meaning of this section.

2 R. S. 74, § 26 (2 Edm. 75). Am'd by L. 1908, ch. 372. In effect Sept. 1, 1908.

§ 2519. Contents of citation.

A citation must be made returnable upon a day certain, designated therein, not more than four months after the date thereof; and must specify whose estate or what subject-matter is in question. The names of all the persons to be cited, as far as they can be ascertained, must be contained in the citation. Where the name, or part of the name, of either of them cannot be ascertained, that fact must be stated in the citation.

L. 1837, ch. 460, § 7 (4 Edm. 487).

§ 2520. [Am'd, 1913.] Citation; how served in the state.

Except where special provision is otherwise made by law, service of a citation, within the state, must be made upon an adult person, or an infant of the age of fourteen years or upwards, by delivering a copy thereof to the person to be served, or by leaving a copy at his residence, or the place where he sojourns, with a person of suitable age and discretion, under such circumstances, that the surrogate has good reason to believe that the copy came to his knowledge, in time for him to attend at the return day. A citation must be so served, if within the county of the surrogate, or an adjoining county, at least eight days before the return day thereof; if in any other county, at least fifteen days before the return day; unless, in either case,

the person served, being an adult, and not incompetent, assents in writing to a service within a shorter time. Any person, although a party to the special proceeding, may serve a citation. Upon an accounting or judicial settlement of an executor or administrator, where the number of creditors or persons claiming to be creditors, residing within the state of New York, upon whom citation is required to be served, exceeds fifty, service thereof may be made upon them by publication thereof in such newspapers and for such a length of time as shall be fixed by the surrogate and by the mailing of a copy of such citation to each of them by deposit of a copy thereof in the postoffice, properly enclosed in a postpaid sealed wrapper addressed to each of them at their last known place of residence, at least thirty days prior to the return day thereof.

Am'd, L. 1913, ch. 535. In effect May 16, 1913.

§ 2521. Substitute for personal service upon a resident.

Where it appears by affidavit, to the satisfaction of the surrogate from whose court a citation issued, that proper and diligent effort has been made to serve it upon a resident of the State, as prescribed in the last section; and that the person to be served cannot be found, or if found, that he evades service, so that it cannot be made; the surrogate may make an order, directing that service thereof be made, as prescribed in section 436 of this act; and the provisions of that section and of section 437 of this act, relating to the service of a summons, apply to the service of a citation; pursuant to an order made as prescribed in this section.

§ 2522. [Am'd, 1881.] Service by publication, etc.

The surrogate, from whose court a citation is issued, may make an order, directing the service thereof without the State, or by publication, in either of the following cases:

1. Where it is to be served upon a foreign corporation, or upon a person who is not a resident of the State.

2. Where the person to be served, being a resident of the State, has departed therefrom with intent to defraud his creditors, or to avoid the service of process.

3. Where the person to be served, whether an adult or an infant, is a resident of the State, but is temporarily absent therefrom.

4. Where the person to be served is a resident of the State, or a domestic corporation, and an attempt was made to serve a citation, issued from the same surrogate's court, upon the presentation of the same petition; before the expiration of the limitation applicable to the enforcement of the claim set forth in the petition, as fixed in chapter fourth of this act; and the limitation would have expired within sixty days next preceding the application for the order, if the time had not been extended by the attempt to serve the citation.

See § 2526, post.

§ 2523. Id.; upon persons unknown, etc.

The surrogate may also make an order, directing the service of a citation without the State, or by publication, in either of the following cases:

1. Upon a party to whom a citation is directed, either by his full name or part of his name, where the surrogate is satisfied, by affidavit, that the residence of that party cannot, after diligent inquiry, be ascertained by the petitioner.

2. Upon one or more unknown creditors, next of kin, legatees, heirs, devisees, or other persons included in a class, to whom a citation has been directed, designating them by a general description, as prescribed in this article.

§ 2524. [Am'd, 1881, 1899.] Order, when and how made; contents thereof.

Where an order, directing the service of a citation without the State, or by publication, is made as prescribed in either of the last two sections, the party applying therefor must produce proof, by affidavit or otherwise, to the satisfaction of the surrogate, that the case is one of those specified in those sections. The order must direct that service of the citation, upon the person named or described in the order, be made by publication of the citation in two newspapers, designated as prescribed in this article, unless from the petition it appears that the estate amounts to less than two thousand dollars, in which case only one newspaper shall be designated, for a specified time, which the surrogate deems reasonable, not less than once in each of six successive weeks; or, at the option of the petitioner, by delivering a copy of the citation, without the State, to each person so named or described, in person, and if the person to be served is an infant under the age of fourteen years, also to the person with whom he is sojourning or, if the service is made upon a corporation, to an officer thereof specified in section four hundred and thirty-one or four hundred and thirty-two of this act. It must also contain either a direction that on or before the day of the first publication, the petitioner deposit, in a specified post-office, a copy of the citation and of the order, contained in a securely closed post-paid wrapper, directed to the person to be served, at a place specified in the order, and, if the person to be served is an infant under the age of fourteen years, a further copy, likewise contained in a securely closed post-paid wrapper, directed to the person with whom such infant is sojourning or, a statement that the surrogate, being satisfied, by the affidavit upon which the order was granted, that the petitioner cannot, with reasonable diligence, ascertain a place or places where the person to be served would probably receive matter transmitted through the post-office, dispenses with the deposit of any papers therein.

See § 440, ante; L. 1899, ch. 606. In effect Sept. 1, 1899

§ 2525. [Am'd, 1882.] What time required for delivery of copy, etc.

Where service is made by delivering a copy of the citation without the State, pursuant to an order made as prescribed in the last section, it must be made, if within the United States, at least thirty days, if without the United States, at least forty days, before the return day of the citation. Proof of publication, deposit or delivery may be made as prescribed in section 444 of this act.

See §§ 439, 440, ante; L. 1837, ch. 400, § 8; L. 1840, ch. 284, § 1 (4 Edm. 487); L. 1863, ch. 362 (6 Edm. 124); 2 R. S. 61, 62, §§ 32, 34 (2 Edm. 61).

§ 2526. Service upon a corporation, infant, lunatic, etc.

Service of a citation must be made upon an infant under the age of fourteen years, a person judicially declared to be incompetent to manage his affairs by reason of lunacy, idiocy, or habitual drunkenness, or a corporation, in the manner prescribed for personal service of a summons upon such a person, or upon

a corporation, in article first of title first of chapter first of this act.

L. 1870, ch. 693 (9 Edm. 420). See §§ 426, 431 and 432, ante.

§ 2527. *Id.*; upon infant, etc.; additional requirements in certain cases.

Where a person, cited or to be cited, is an infant of the age of fourteen years or upwards, or where the surrogate has, in his opinion, reasonable grounds to believe, that a person, cited or to be cited, is an habitual drunkard, or for any cause meretriciously incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, the surrogate may, in his discretion, with or without an application therefor, and in the interest of that person, make an order requiring a copy of the citation be delivered, in behalf of that person, to a person designated in the order; and that service of the citation shall not be deemed complete until such delivery. Where the person, cited or to be cited, is an infant under the age of fourteen years, or a person judicially declared to be incompetent to manage his affairs, by reason of lunacy, idiocy, or habitual drunkenness, and the surrogate has reasonable ground to believe that the interest of the person, to whom a copy of the citation was delivered, in behalf of the infant or incompetent person, is adverse to that of the infant or incompetent person, or for any reason, he is not a fit person, to protect the latter's rights, the surrogate may likewise make such an order; as a part thereof, or by a separate order, made in like manner at any stage of the proceedings, he may appoint a special guardian ad litem to conduct the proceedings in behalf of the incompetent person, to the exclusion of the committee, and with the same powers, and subject to the same liabilities, as a committee of the property.

L. 1872, ch. 693 (9 Edm. 420).

§ 2528. [Am'd, 1906, 1911.] *Appearance; how made, and effect thereof.*

In a surrogate's court, a party of full age may, unless he has been judicially declared to be incompetent to manage his affairs, prosecute or defend a special proceeding, in person or by attorney regularly admitted to practice in the courts of record, a justice of the peace, or a notary public, except in a proceeding to punish him for contempt, where he is required to appear in person, by special provision of law, or by a special order of the surrogate. The issue and service of a citation may be waived either before or after the filing of a petition in such proceeding by a party in any proceeding by instrument in writing, acknowledged or approved as a deed, and filed to be recorded, or by personal appearance or by his attorney with written authorization executed and acknowledged as a deed, and filed in the office of the surrogate. The appearance of a party against whom a citation has been issued, has the same effect as the appearance of a defendant in an action brought in the supreme court.

L. 1896, ch. 570; L. 1911, ch. 330, in effect Sept. 1, 1911. See §§ 424, 796-802, ante.

§ 2529. [Repealed by L. 1909, ch. 35. See Consolidated Judiciary Law, § 472.]

§ 2530. *Special guardian; when to be appointed.*

Where a party, who is an infant, does not appear by his special guardian; or where a party, who is a lunatic, idiot or habitual

drunkard, does not appear by his committee, the surrogate must appoint a competent and responsible person, to appear as special guardian for that party. Where an infant appears by his general guardian, or where a lunatic, idiot, or habitual drunkard, appears by his committee, the surrogate must inquire into the facts, and must, in like manner, appoint a special guardian, if there is any ground to suppose that the interest of the general guardian or committee is adverse to that of the infant, or incompetent person; or that for any other reason, the interests of the latter require the appointment of a special guardian. A person cannot be appointed such a special guardian, unless his written consent is filed, at or before the time of entering the order appointing him.

See 2 R. S. 100, § 3 (2 Edm. 104), am'd: L. 1837, ch. 460, § 38 (4 Edm. 494); L. 1863, ch. 362, § 6 (6 Edm. 126); L. 1870, ch. 170, § 4 (7 Edm. 665); L. 1872, ch. 693, § 2 (9 Edm. 421).

am'd L. 1916
ch. 445 **§ 2531. Notice of proceedings to appoint special guardian.**

Where a person, other than the infant, or the committee of the incompetent person, applies for the appointment of a special guardian, as prescribed in the last section, at least eight days' notice of the application must be personally served upon the infant, or incompetent person, if he is within the State, and also upon the committee, if any, in like manner as a citation is required by law to be served. But except in a case specified in title fifth of this chapter, the surrogate may, by an order to show cause, prescribe a shorter time, and direct the service of the order to be made in such a manner as he deems proper. The application may be made at the time of presenting the petition, and, in that case, the order to show cause may, in the surrogate's discretion, accompany the citation.

2 R. S. 100, § 4 (2 Edm. 104); L. 1837, ch. 460, § 37 (4 Edm. 494), am'd.

§ 2532. Proof of service of citation, subpoena, etc.

Proof of service of a citation, or a subpoena, issued from a surrogate's court, must be made in the manner prescribed by law, for proof of service of a summons issued out of the supreme court. In every other case, proof of service must be made by affidavit; or, where the person served is of full age and not incompetent, by a written admission signed by him, accompanied with proof, by affidavit or otherwise, of the genuineness of his signature.

2 R. S. 228, § 9 (2 Edm. 232); L. 1837, ch. 460, § 9 (4 Edm. 488).

§ 2533. Written pleadings may be required.

The surrogate may, at any time, require a party to file a written petition or answer, containing a plain and concise statement of the facts constituting his claim, objection or defence, and a demand of the decree, order, or other relief, to which he supposes himself to be entitled. The surrogate may require the petition or answer to be verified, and a copy thereof to be served upon any other person interested. A party who fails to comply with such requirement may be treated as a party in default. Except where such a requirement is made, or in a case where a written petition is expressly required by this act, a petition, or the answer thereto, may be presented orally; in which case, the substance thereof must be entered in the records of the courts.

§ 2534. Verification thereof.

The provisions of sections 523, 524, 525, and 526 of this act apply to a verification made pursuant to this chapter, and to the petition or other paper so verified, where they can be so applied in substance, without regard to the form of the proceeding.

See § 2749, post.

§ 2535. Publication of citation, etc.

Where a provision of this chapter, or an order made pursuant to such a provision, directs the publication of a citation, notice or other paper, or the service thereof by publication, the publication must be made in a newspaper published in the county. The surrogate may, also, in his discretion, direct the publication thereof in any other newspaper published in the same or another county, as he deems proper, for the purpose of giving notice to the persons intended to be served or notified. If no newspaper is published in the county, the citation, notice, or other paper, must be published in the newspaper printed at Albany, in which legal notices are required by law to be published.

L. 1874, ch. 437 (9 Edm. 918); 2 R. S. 107, part of § 40 (2 Edm. 111).

§ 2536. [Repealed by L. 1900, ch. 572. In effect Sept. 1, 1900.]

§ 2537. [Am'd, 1882, 1908, 1909.] Money paid into court and securities taken; how disposed of.

Where a statute requires the payment of money into, or the deposit of a security with the surrogate's court, or the deposit of a security for the payment of money, with the surrogate, the same must be paid to or deposited with the county treasurer of the county to the credit of the beneficiary, or of the estate, or of the special proceeding; unless the statute contains special directions for another disposition thereof. Each security so deposited with the county treasurer must be held and disposed of by him, subject to the direction of the surrogate's court; except that he must, unless otherwise so directed, collect the principal and interest secured thereby. All money collected by or paid to the county treasurer, as prescribed by this section, must be held, managed, invested and disposed of by him, in like manner as money paid into the supreme court in an action pending therein. The regulations, contained in the general rules of practice, as specified in subdivision eight of section four of the state finance law, and the provisions of title third of chapter eight of this act, apply to money paid to and securities deposited with the county treasurer, as prescribed in this section; except that the surrogate's court exercises, with respect thereto, or with respect to a security, in which any of the money has been invested, or upon which it has been loaned, the power and authority conferred upon the supreme court by section seven hundred and forty-seven of this act.

Am'd by L. 1908, ch. 183; L. 1909, ch. 63, § 3, and ch. 240, § 84. See note 72 of notes of Board of Statutory Consolidation at end of code.

§ 2538. Certain provisions made applicable to proceedings in surrogates' courts.

Except where a contrary intent is expressed in, or plainly implied from the context of, a provision of this chapter, the follow-

ing portion of this act, to wit: title first, and article third and fourth of title sixth, of chapter eighth, and articles first and second of title third, of chapter ninth, apply to surrogates' courts and to the proceedings therein, so far as they can be applied to the substance and subject-matter of a proceeding, without regard to its form.

L. 1837, ch. 460, § 77 (4 Edm. 501); 2 R. S. 221, § 6 (2 Edm. 230).

ARTICLE SECOND.

Hearing; including trial by jury and reference.

- Sec. 2539. Testimony of aged, sick, or infirm witness.
 2540. *Id.*; in another county.
 2541. Duty of stenographer.
 2542. How minutes of testimony authenticated.
 2543. *Id.*; to be bound in volumes, etc.
 2544. Request, etc., does not disqualify, etc., witness.
 2545. Exceptions upon a trial.
 2546. Surrogate may refer questions of fact, or account.
 2547. Trial by jury.
 2548. Review.
 2549. Appeal from order thereupon.

§ 2539. Testimony of aged, sick, or infirm witness.

Upon the application of a party to a special proceeding, and upon proof, by affidavit, to the satisfaction of the surrogate, that the testimony of a witness in his county, who is so aged, sick, or infirm, as to be unable to attend before him to be examined, is material and necessary to the applicant, the surrogate must, where the special proceeding was instituted to procure the probate or revocation of probate of a will, and in any other case, may, in his discretion, proceed to the place where the witness is, and there, as, in open court, take his examination. Such a notice of the time and place of taking the examination, as the surrogate prescribes, must be given, by the party applying therefor, to each other party, except to a party who has failed to appear as required by the citation. The surrogate may also, in his discretion, require notice to be given to any other person interested.

L. 1867, ch. 460, § 12 (4 Edm. 469), am'd; L. 1841, ch. 129, §§ 1, 2, 3 (4 Edm. 501). See § 2567.

§ 2540. [Am'd, 1891, 1911.] *Id.*; in another county.

In a case specified in the last section, except that the witness is in another county, where the witness is a subscribing witness to a will, if the surrogate has good reason to believe that the witness cannot attend before him, within a reasonable time, to which the hearing may be adjourned, he may make an order, directing that the witness be examined before the surrogate of the county in which he is; specifying a day, on or before which a certified copy of the order must be delivered to the latter surrogate; and directing notice of the examination to be given to such persons, and in such manner, as he thinks proper. A copy of the order, attested by the seal of the surrogate's court, must be transmitted by him to the surrogate designated in the order, together with the original will, where the testimony relates to the execution of a written will. If it shall appear from the order that objections to the probate of the will have been filed, the latter surrogate must thereupon, on the day specified in the order, or on another day to which he may adjourn the examination, take the examination of the witness; but if it shall appear from the order that no such objections have been filed, the latter surrogate may cause the examination to be taken by one of the clerks described in section twenty-five hundred and ten of this act, as if he possessed original jurisdiction of the special proceeding. The examination, after it is reduced to writing and subscribed by the witness or otherwise duly authenticated, together with a statement of the proceedings upon the execution of the order, must be certified by the surrogate or clerk taking the examination, at-

tested by the seal of his court, and returned without delay, with the original will, if any, to the surrogate who directed the examination, by whom all those papers must be filed. And in the other cases named in said section two thousand five hundred and thirty-nine, he may appoint a referee to take the testimony, who shall report the same to the said surrogate. An examination so taken has the same effect as if it was taken before the latter surrogate.

L. 1837, ch. 460, §§ 13, 14 and 15, am'd 1881; L. 1911, ch. 105, in effect Sept. 1, 1911.

§ 2541. Duty of stenographer.

The stenographer of a surrogate's court must, under the direction of the surrogate, take full stenographic notes of all proceedings, in which oral proofs are given, except where the surrogate otherwise directs. The testimony must be legibly written out at length by him, from his notes; and the minutes thereof, as so written out, must, after being authenticated, as prescribed in the next section, be filed in the surrogate's office.

L. 1871, ch. 374, part of § 1 (9 Edm. 231), am'd. See Co. Proc., § 256.

§ 2542. [Am'd, 1881.] How minutes of testimony authenticated.

The minutes of testimony written out as prescribed in the last section, or taken by the surrogate, or under his direction, while the witness is testifying, must, before being filed, be authenticated by the signature of the stenographer, referee, the surrogate or the clerk of the surrogate's court, as the case may be, to the effect that they are correct.

L. 1877, ch. 206, § 8, am'd 1881.

§ 2543. Id.; to be bound in volumes, etc.

In the city and county of New York, in the county of Kings, and in any other county where the supervisors so direct, the minutes of testimony written out by the stenographer must be bound, at the expense of the county, in volumes of convenient size and shape, indorsed, "Stenographic minutes", and numbered consecutively. Upon the record of a decree made in any contested matter, the surrogate must cause to be made a minute, referring to each volume of the stenographic minutes, and to the pages thereof, containing any testimony relating to the matter.

Id., §§ 1 and 2; Co. Proc., § 256.

§ 2544. Request, etc., does not disqualify, etc., witness.

A person is not disqualified or excused from testifying respecting the execution of a will, by a provision therein, whether it is beneficial to him or otherwise.

Substitute for 2 R. S. 57, 65, § 6, and part of § 50 (2 Edm. 65).

§ 2545. Exceptions upon a trial.

An exception may be taken to a ruling by a surrogate, upon the trial by him of an issue of fact, including a finding, or a refusal to find, upon a question of fact, in a case where such an exception may be taken to the ruling of the court, upon a trial, without a jury, of an issue of fact, as prescribed in article third of title first of chapter tenth of this act. The provisions of that article, relating to the manner and effect of taking such an exception, and the settlement of a case containing the exceptions, apply to such a trial before a surrogate; for which purpose, the decree is regarded as a judgment, and notice of an exception may be filed in the surrogate's office. Upon such a trial, the surrogate must file in his office his decision in writing, which

must state, separately, the facts found and the conclusions of law. Either party may, upon the settlement of a case, request a finding upon any question of fact, or a ruling upon any question of law; and an exception may be taken to such a finding or ruling, or to a refusal to find or rule accordingly. An appeal from a decree or an order of a surrogate's court brings up for review, by each court to which the appeal is carried, each decision, to which an exception is duly taken by the appellant, as prescribed in this section. But such a decree or order shall not be reversed, for an error in admitting or rejecting evidence, unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby.

See §§ 992-998, ante.

§ 2546. [Am'd, 1895, 1899, 1908.] Surrogate may refer question of fact, or account.

In a special proceeding other than one instituted for probate or revocation of probate of a will, the surrogate may, in his discretion, appoint a referee to take and report to the surrogate the evidence upon the facts, or upon a specific question of fact; to examine an account rendered; to hear and determine all questions arising upon the settlement of such an account, which the surrogate has power to determine; and to make a report thereon; subject, however, to confirmation or modification by the surrogate. But no referee to examine an account rendered, whether intermediate or final, or to hear and determine all questions arising upon the settlement of such an account, shall be appointed, where the estate or fund does not exceed one thousand dollars in value, or in any case where the item or items in such account to which objections have been made do not aggregate more than two hundred dollars. Such a referee has the same power, and is entitled to the same compensation as a referee appointed by the supreme court, for the trial of an issue of fact in an action; and the provisions of this act, applicable to a reference by the supreme court, apply to a reference made as prescribed in this section, so far as they can be applied in substance without regard to the form of proceeding. The surrogate of the county of New York, may, on the written consent of all parties appearing in a probate case, appoint a referee, or may, in his discretion, direct an assistant to take and report the testimony, but without authority to pass upon the issues involved therein. Unless a referee's report is passed upon and confirmed, approved, modified or rejected by a surrogate within ninety days after it has been submitted to him, it shall be deemed to have been confirmed as of course and a decree to that effect may be entered by any party interested in the proceeding upon two days' notice.

L. 1870, ch. 359, § 6, am'd 1881; L. 1895, ch. 796; L. 1899, ch. 607; L. 1908, 128. In effect Sept. 1, 1908.

§ 2547. [Am'd, 1895, 1910.] Trial by jury.

The surrogate may, in his discretion, make an order directing the trial by jury, at a trial term of the supreme court to be held within the county, or in the county court of the county, of any controverted question of fact arising in a special proceeding for the disposition of the real property of a decedent, as prescribed in title fifth of this chapter. He must order such trial of any

controverted question of fact of which either party has constitutional right of trial by jury, and seasonably demands the same. Either of the surrogates of the county of New York may, in his discretion, make an order transferring to the supreme court any special proceeding for the probate of a will pending in said county. Every order under this section must state distinctly and plainly each question of fact to be tried. The order is the only authority necessary for the trial in the supreme court of such question. The verdict, if not set aside by the judge before whom the question is tried, shall be certified to the surrogate's court by the clerk of the court in which the trial took place, and shall be conclusive except upon appeal; provided, that a new trial may be granted by the judge before whom the trial by jury takes place, upon motion therefor, to be made within ten days after the verdict was rendered, upon exceptions or because the verdict is contrary to the evidence or contrary to law, or is excessive, or is insufficient.

2 R. S. 102, part of § 11 (2 Edm. 108), am'd; L. 1847, ch. 280, § 45 (4 Edm. 568). See § 823, ante; L. 1895, ch. 946. Am'd, L. 1910, ch. 576. In effect Sept. 1, 1910.

§ 2548. [Repealed by L. 1910, ch 576. In effect Sept. 1, 1910.]

§ 2549. [Repealed by L. 1910, ch 576. In effect Sept. 1, 1910.]

ARTICLE THIRD.

Decrees and orders, and the enforcement thereof. Costs and fees.

- Sec. 2550. Definition of "final order" and "decree."
 2551. Decree settling an account, to contain summary thereof.
 2552. Decree or order; when evidence of assets.
 2553. Decree for money; how docketed.
 2554. Enforcement of decree by execution.
 2555. Id.; by punishment for contempt.
 2556. Definition of "order"; how enforced.
 2557. Costs; how made payable.
 2558. Id.; when awarded.
 2559. Id.; how awarded.
 2560. Id.; when the same as in supreme court.
 2561. When surrogate to fix amount of costs.
 2562. Additional allowance in settling accounts.
 2563. Allowance upon sale of real property.
 2564. Id.; no commissions allowed.
 2565. Fees of appraiser.
 2566. Id.; other officers, and witnesses.
 2567. Fees of the surrogate.

§ 2550. Definition of "final order" and "decree."

The final determination of the rights of the parties to a special proceeding in a surrogate's court, is styled, indifferently, a final order, or a decree.

§ 2551. Decree settling an account, to contain summary thereof.

Each decree, whereby an account is judicially settled, must contain, in the body thereof, a summary of the account as settled; or must refer to such a summary, which must be recorded in the same book, and is deemed a part of the decree.

L. 1837, ch. 460, § 2 (4 Edm. 487), am'd. See § 2499, subd. 4, ante.

§ 2552. Decree or order; when evidence of assets.

A decree, directing payment by an executor, administrator, or testamentary trustee, to a creditor of, or a person interested in, the estate or fund, or an order, permitting a judgment creditor to issue an execution against an executor or administrator is, except upon an appeal therefrom, conclusive evidence that there are sufficient assets in his hands, to satisfy the sum which the decree directs him to pay, or for which the order permits the execution to issue.

2 R. S. 116, part of § 21 (2 Edm. 121), am'd.

§ 2553. Decree for money; how docketed.

Where a decree directs the payment of a sum of money into court, or to one or more persons therein designated, the surrogate, or the clerk of the surrogate's court, must, upon payment of his fees, furnish to any person applying therefor, one or more transcripts, duly attested, stating all the particulars, with respect to the decree, which are required by law to be entered in the clerk's docket-book, where a judgment for a sum of money is rendered in the supreme court, so far as the provisions of law, directing such entries, are applicable to such a decree. Each county clerk, to whom such a transcript is presented, must, upon payment of his fees, immediately file it, and docket the decree in the appropriate docket-book, kept in his office, as prescribed by law for docketing a judgment of the supreme court. The

docketing of such a decree has the same force and effect, the lien thereof may be suspended or discharged, and the decree may be assigned or satisfied, as if it was such a judgment.

L. 1837, ch. 400, §§ 63, 64 (4 Edm. 498), am'd; L. 1844, ch. 104, § 2 (4 Edm. 637); L. 1867, ch. 782, § 9 (7 Edm. 169).

§ 2554. [Am'd, 1895.] Enforcement of decree by execution.

A decree, directing the payment of a sum of money into court, or to one or more parties, may be enforced by an execution against the property of the party directed to make the payment. The execution must be issued by the surrogate, or the clerk of the surrogate's court, under the seal of the court, and must be made returnable to the court. In all other respects, the provisions of this act, relating to an execution against the property of a judgment debtor, issued upon a judgment of the supreme court, and the proceedings to collect it, apply to an execution issued from the surrogate's court, and the collection thereof, the decree being, for that purpose, regarded as a judgment; except that the proceedings prescribed in title twelfth of chapter seventeenth of this act, if founded upon such a decree, must be taken, as if the decree was a judgment of the county court, or, in the city of New York, of the supreme court.

d., remainder of § 64, am'd; L. 1895, ch. 946.

§ 2555. Id., by punishment for contempt.

In either of the following cases, a decree of a surrogate's court, directing the payment of money, or requiring the performance of any other act, may be enforced, by serving a certified copy thereof upon the party against whom it is rendered, or the officer or person who is required thereby, or by law, to obey it; and if he refuses or wilfully neglects to obey it, by punishing him for a contempt of court.

1. Where it cannot be enforced by execution, as prescribed in the last section.

2. Where part of it cannot be so enforced by execution; in which case, the part or parts, which cannot be so enforced, may be enforced as prescribed in this section.

3. Where an execution, issued as prescribed in the last section, to the sheriff of the surrogate's county, has been returned by him wholly or partly unsatisfied.

4. Where the delinquent is an executor, administrator, guardian, or testamentary trustee, and the decree relates to the fund or estate, in which case the surrogate may enforce the decree as prescribed in this section, either without issuing an execution, or after the return of an execution, as he thinks proper.

If the delinquent has given an official bond, his imprisonment, by virtue of proceedings to punish him for a contempt, as prescribed in this section, or a levy upon his property by virtue of an execution, issued as prescribed in the last section, does not bar, suspend, or otherwise affect an action against the sureties in his official bond.

L. 1867, ch. 782, § 15. See § 1211, ante.

§ 2556. Definition of "order;" how enforced.

A direction of a surrogate's court, made or entered in writing, and not included in a decree, is styled an order. It may be enforced in like manner as a similar order, made by the supreme

court in an action; and the costs are the same as upon such an order, and may be collected in like manner.

See § 707, ante.

§ 2557. Costs; how made payable.

Except where special provision is otherwise made by law, costs, awarded by a decree, may be made payable by the party personally, or out of the estate, or fund, as justice requires; but costs, other than actual expenses, cannot be awarded to be paid out of an estate or fund, which is less than one thousand dollars in amount or value.

2 R. S. 223, § 10 (2 Edm. 332); L. 1866, § 784 (6 Edm. 831); L. 1867, ch. 782, § 8 (7 Edm. 169).

§ 2558. [Am'd, 1881, 1911, 1913.] Id.; when awarded.

The award of costs in a decree is in the discretion of the surrogate, except in one of the following cases:

1. Where special directions, respecting the award of costs, are contained in a judgment or order, made upon an appeal from the surrogate's determination, or upon a motion for a new trial of questions of fact tried by a jury; in either of which cases, costs must be awarded according to those directions.

2. When a question of fact has been tried by a jury; in which case, unless it is within the foregoing subdivision, the decree must award costs to the successful party.

3. When the decree is made upon a contested application for probate, or revocation of probate of a will, costs, payable out of the estate or otherwise, shall not be awarded to an unsuccessful contestant of the will, unless he is a special guardian for an infant, appointed by the surrogate, or is named as an executor in a paper propounded by him, in good faith, as the last will of the decedent; but where a person named as the executor in a will propounds the will for probate such person so named as executor may, whether successful or not, in the discretion of the surrogate, be awarded costs and all necessary disbursements made by him and all expenses incurred in the attempt to sustain the will; but the surrogate may order a copy of the stenographer's minutes to be furnished to the contestant's counsel, and charge the expense thereof to the estate if he shall be satisfied that the contest is made in good faith.

See 2 R. S. 102, § 12 (2 Edm. 106), and 2 R. S. 63, § 39 (2 Edm. 62). Am'd by L. 1881, ch. 685; L. 1911, ch. 539; L. 1913, ch. 447. In effect Sept. 1, 1913.

§ 2559. Id.; how awarded.

Costs, when awarded by a decree, include all disbursements of the party to whom they are awarded, which might be taxed in the supreme court. The sum allowed for costs must be fixed by the surrogate, and inserted in the decree.

§ 2560. Id.; when the same as in supreme court.

Where a question of fact has been tried by a jury, the costs, awarded against the unsuccessful party, are the same as the taxable costs of an action in the supreme court. The costs of an appeal, where they are awarded in a surrogate's court, are the same as if they were awarded in the supreme court.

§ 2561. When surrogate to fix amount of costs.

In a case other than one of those specified in the last section, the surrogate, upon rendering a decree, may, in his discretion, fix such a sum, to be allowed as costs, in addition to the dis-

bursments, as he deems reasonable, not exceeding, where there has not been a contest, twenty-five dollars, or where there has been a contest, seventy dollars; and, in addition thereto, where a trial or hearing upon the merits before the surrogate necessarily occupies more than two days, ten dollars for each additional day; and where a motion for a new trial is made before the surrogate, if it is granted, seventy dollars; if it is denied, forty dollars.

§ 2562. [Am'd, 1861.] Additional allowance in settling accounts.

In addition to the sums specified in the last two sections, the surrogate may, in his discretion, allow to an executor, administrator, guardian, or testamentary trustee, upon a judicial settlement of his account, or on an intermediate accounting required by the surrogate, such a sum, as the surrogate deems reasonable, for his counsel fees and other expenses, not exceeding ten dollars for each day occupied in the trial, and necessarily occupied in preparing his account for settlement, and otherwise preparing for the trial.

Substituted for L. 1863, ch. 362, § 8 (6 Edm. 127), and W. ch. 115.

§ 2563. Allowance upon sale of real property.

Upon the disposition of real property of a decedent, as prescribed in title fifth of this chapter, the executor, administrator, or freeholder, disposing of the property, must be allowed by the surrogate, out of the proceeds of the sale brought into court, his expenses; and he may be allowed, out of the proceeds, a reasonable sum for his own services, not exceeding five dollars for each day, actually and necessarily occupied by him in disposing of the property, and such a further sum as the surrogate thinks reasonable, for the necessary services of his attorney and counsel therein.

L. 1844, ch. 360, § 2 (4 Edm. 664), am'd.

§ 2564. Id.; no commissions allowed.

The allowances specified in the last section are in lieu of commissions.

§ 2565. Fees of appraiser.

An appraiser is entitled, in addition to his actual expenses, to a sum, to be fixed by the surrogate, not exceeding five dollars for each day, actually and necessarily occupied by him, in making the appraisal or inventory. The number of days' services, and the expenses, if any, must be proved by the affidavit of the appraiser; and the sums payable therefor taxed by the surrogate, and paid by the executor or administrator.

L. 1873, ch. 225 (9 Edm. 586.)

§ 2566. Id.; other officers, and witnesses.

Each other officer, including a referee, and each witness, is entitled to the same fees, for his services, and for travelling, as he is allowed for like services in the supreme court.

2 R. S. 59, § 19 (2 Edm. 60), am'd.

§ 2567. Fees of the surrogate.

A surrogate shall not charge or receive any fee, except as follows:

1. Where, in a case prescribed by law, or in any other case, upon the application of a party, he goes to a place, other than his office, or the court room where he is required to hold court, in order to take testimony, he may charge, and receive to his

own use, ten cents for each mile for going, and the same sum for returning.

2. [Am'd, 1904.] He must charge, and receive to the use of the county, for a copy of a paper, ten cents for each folio, and for comparing and certifying a copy of papers on appeal or a case on appeal where printed copies thereof are presented by any party to any proceeding, one cent for each folio, except where the board of supervisors have allowed his clerk to receive fees for his own use; and in that case, his clerk may charge and receive the same fee. Where in a proceeding in the surrogate's court the attorneys for all the adult parties interested and special guardians, or general guardians, appearing for all infant parties interested, other than parties in default, or against whom a final order has been taken and is not appealed from, stipulate in writing that a paper is a copy of any paper whereof a certified copy is required by any provision of this act, the stipulation takes the place of a certificate as to the parties so stipulating, and the surrogate or his clerk is not required to certify the same or entitled to any fee therefor. And the paper so proved by stipulation shall be received by the clerks of all the courts and by the courts, and shall be used or filed with the same force and effect as if certified by the surrogate or his clerk.

L. 1862, ch. 187, § 2. All acts or parts of acts and any act or part of an act in relation to the fees of the surrogate in New York county, inconsistent herewith, are hereby repealed.

L. 1869, ch. 246, § 1 (2 Edm. 436); L. 1870, ch. 339; L. 1844, ch. 306, § 3 (4 Edm. 694); L. 1837, ch. 460, § 69; L. 1904, ch. 137. In effect March 22, 1904.

ARTICLE FOURTH.

Appeal.

- Sec. 2568. When party may appeal.
 2569. When person not a party may appeal.
 2570. Appeal; to what court it may be taken.
 2571. Intermediate order; how reviewed.
 2572. Time to appeal.
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 2585. Appeal, proceedings thereupon.
 2586. Power of appellate court; further testimony.
 2587. Judgment or order upon appeal.
 2588. Award of jury trial upon reversal in probate cases.
 2589. Costs of appeal.

§ 2568. When party may appeal.

Any party aggrieved may appeal from a decree or an order of a surrogate's court, in a case prescribed in this article, except where the decree or order of which he complains was rendered or made upon his default.

See § 1294, ante.

§ 2569. When person not a party may appeal.

A creditor of, or person interested in, the estate or fund affected by the decree or order, who was not a party to the special proceeding, but was entitled by law to be heard therein, upon his application; or who has acquired, since the decree or order was made, a right or interest which would have entitled him to be heard, if it had been previously acquired; may intervene and appeal, as prescribed in this article. The facts, which entitled such a person to appeal, must be shown by an affidavit, which must be filed, and a copy thereof served with the notice of appeal.

See § 2514, subd. 11, ante.

§ 2570. [Am'd, 1895.] Appeal; to what court it may be taken.

An appeal to the appellate division of the supreme court may be taken from a decree of a surrogate's court, or from an order affecting a substantial right, made by a surrogate, or by a surrogate's court, in a special proceeding.

2 R. S. 609, §§ 104, 118 (2 Edm. 632); 2 R. S. 62, part of § 35 (2 Edm. 63); L. 1895, ch. 946.

§ 2571. Intermediate order; how reviewed.

An appeal, taken from a decree, brings up for review each intermediate order, which is specified in the notice of appeal, and necessarily affected the decree, and which has not already been reviewed by the appellate court, upon a separate appeal taken from that order.

§ 2572. Time to appeal.

An appeal by a party must be taken within thirty days after the service, upon the appellant, or upon the attorney, if any, who appeared for him in the surrogate's court, of a copy of the decree or order from which the appeal is taken, and a written notice of the entry thereof. An appeal by a person who was not a party, taken as prescribed in this article, must be taken within three months after the entry of the decree or order, unless the appellant's title was acquired by means of an assignment or conveyance from a party; in which case, the appeal must be taken within the time limited for the taking thereof by the assignor or grantor.

2 R. S. 66, § 55 (2 Edm. 66); 2 R. S. 608, §§ 90, 105, 106, 107 (2 Edm. 631, 635).

§ 2573. Who must be made parties.

Each party to the special proceeding in the surrogate's court, and each person not a party, who has, or claims to have, in the subject-matter of the decree or order, a right or interest, which is directly affected thereby, and which appears upon the face of the papers presented in the surrogate's court, or has become manifest in the course of the proceedings taken therein, must be made a party to the appeal. A person not a party, but who must be made a party, as prescribed in this section, may be brought in by an order of the appellate court, made after the appeal is taken; or the appeal may be dismissed on account of his absence. The appellate court may prescribe the mode of bringing in such a person, by publication, by personal service, or otherwise. But this section does not require a person interested, but not a party, to be brought in, if he was legally represented, or was duly cited in the court below.

§ 2574. Appeal; how taken.

An appeal must be taken by the service, within the State, upon each party to the special proceeding, other than the appellant, and upon the surrogate, or the clerk of the surrogate's court, of a written notice, referring to the decree or order appealed from, and stating that the appellant appeals from the same, or from a specified part thereof. Where a party to the special proceeding in the court below appeared in person, the notice of appeal must be personally served upon him; where he appeared by an attorney, it must be served personally, either upon him or upon his attorney. Where a party, who was duly cited, did not appear in the surrogate's court, notice of appeal must be served upon him personally, if he can, with due diligence, be found within the county; otherwise it may be served by depositing it, indorsed with a direction to the party, with the surrogate or the clerk of the surrogate's court. Where a person to be served cannot, with due diligence, be found, to make personal service upon him, as prescribed in this section, the surrogate, or a justice of the supreme court, may, by order, prescribe such a mode of service as he thinks proper; and service in that mode has the same effect as personal service.

See § 1300, ante.

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§ 2575. Certain provisions of chapter 12 made applicable.

The provisions of the following sections of this act, to wit: sections 1296, 1297, 1298, 1299, 1303, and 1305 to 1309, both inclusive, apply to an appeal taken as prescribed in this article.

§ 2576. Appeal may be on the law or the facts; case to be made, etc.

The appeal may be taken upon questions of law, or upon the facts or upon both. If it is taken from a decree rendered upon the trial, by the surrogate, of an issue of fact, it must be heard upon a case, to be made and settled by the surrogate, as prescribed by law, for making and settling of a case upon an appeal in an action.

§ 2577. Security to perfect appeal.

To render a notice of appeal effectual for any purpose, except in a case specified in the next section, or where it is specially prescribed by law, that security is not necessary to perfect the appeal, the appellant must give a written undertaking, with at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him upon the appeal, not exceeding two hundred and fifty dollars.

2 R. S. 66, § 56 (2 Edm. 67); 2 R. S. 610, § 108 (3 Edm. 632).

§ 2578. [Am'd, 1862.] Id.; where decree is for money or delivery of property, etc.

Notice of appeal by an executor, administrator, testamentary trustee, guardian, or other person appointed by the surrogate's court, from a decree, directing him to pay or distribute money, or to deposit money in a bank or trust company, or to deliver property; or by an executor or administrator from an order, granting leave to issue an execution against him, as prescribed in section 1825 of this act, does not stay the execution of the decree appealed from, unless the appellant gives an undertaking, with at least two sureties, in a sum therein specified, to the effect that, if the decree or order, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay all costs and damages which may be awarded against him upon the appeal, and will pay the sum so directed to be paid or collected, or as the case requires, will deposit or distribute the money, or deliver the property so directed to be deposited, distributed or delivered, or the part thereof as to which the decree or order is affirmed.

2 R. S. 116, § 21 (2 Edm. 121); L. 1870, ch. 359, § 12, am'd.

§ 2579. Security to stay proceedings in case of commitment.

An appeal from a decree or an order, directing the commitment of an executor, administrator, testamentary trustee, guardian, or other person appointed by the surrogate's court, or an attorney or counsel employed therein for disobedience to a direction of the surrogate, or for neglect of duty; or directing the commitment of a person refusing to obey a subpoena, or to testify, when required according to law; does not stay the execution of the decree or order appealed from, unless the appellant gives an undertaking, with at least two sureties, in a sum therein specified, to the effect that, if the decree or order appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will, within twenty days after the affirmance or dismissal, surrender himself in obedience to the decree or order, to the custody of the sheriff of the county, wherein he was directed to be committed. If the undertaking is broken it may be prosecuted in the same manner, and with the same effect, as an administrator's official

bond; and the proceeds of the action must be paid or distributed, as directed by the surrogate, to or among the persons aggrieved, to the extent of the pecuniary injuries sustained by them; and the balance, if any, must be paid into the county treasury.

2 R. S. 610, 611, § 111-115 (2 Edm. 633, 634), am'd.

§ 2580. Amount of undertaking; how fixed.

The sum specified in an undertaking, executed as prescribed in either of the last two sections, must, where the appeal is taken from a decree directing the payment, depositing, or distribution of money, be not less than twice the sum directed to be paid, deposited, or distributed. Where the appeal is taken from an order granting leave to issue an execution, it must be not less than twice the sum, to collect which the execution may issue. In every other case, it must be fixed by the surrogate, or by a judge of the appellate court, who may require proof, by affidavit, of the value of any property, or of such other facts as he deems proper. The respondent may apply to the appellate court, upon notice, for an order requiring the appellant to increase the sum so fixed. If such an order is granted, and the appellant makes default in giving the new undertaking, the appeal may be dismissed or the stay dissolved, as the case requires.

See 2 R. S. 610, § 112 (2 Edm. 634).

§ 2581. Requisites of undertaking.

An undertaking, given as prescribed in the last four sections, must be to the people of the State; must contain the name and residence of each of the sureties thereto; must be approved by the surrogate or a judge of the appellate court; and must be filed in the surrogate's office. Except as otherwise specially prescribed, the filing of a proper undertaking, and service of the notice of appeal, perfect the appeal. The surrogate may, at any time, in his discretion, make an order, authorizing any person aggrieved to bring an action upon the undertaking, in his own name, or in the name of the people. Where it is brought in the name of the people, the damages collected must be paid over to the surrogate, and distributed by him, as justice requires.

See §§ 117, 1834, ante.

§ 2582. [Am'd, 1881, 1900.] Decree for probate, etc.; how far suspended by appeal.

An appeal from a decree of a surrogate, admitting a will to probate, or granting letters testamentary, or letters of administration, or from an order or judgment of the appellate division of the supreme court affirming a decree of the surrogate admitting a will to probate or granting letters testamentary or letters of administration, does not stay the issuing of letters, where, in the opinion of surrogate, manifested by an order, the preservation of the estate requires that the letters should issue. Letters so issued confer upon the person named therein all the powers and authority, and subject him to all the duties and liabilities of an executor or administrator in an ordinary case, except that they do not confer power to sell real property by virtue of a provision in the will, or to pay or to satisfy a legacy, or distribute the unbequeathed property of the decedent, until after the final determination of the appeal; and in case letters

shall have been issued before such appeal the executor or administrator, on a like order of the surrogate, may exercise the powers and authority, subject to the duties, liabilities and exceptions above provided.

L. 1871, ch. 603, § 1 (9 Edm. 104). L. 1900, ch. 191. In effect Sept. 1, 1900.

§ 2583. Decree revoking probate, etc., not stayed.

An appeal from a decree revoking the probate of a will, or revoking letters testamentary, letters of administration, or letters of guardianship; or from a decree or an order, suspending an executor, administrator, or guardian, or removing or suspending a testamentary trustee, or a freeholder, appointed to execute a decree, as prescribed in title fifth of this chapter, or appointing a temporary administrator, or an appraiser of personal property, does not stay the execution of the decree or order appealed from.

2 R. S. 611, § 114, and part of § 110 (3 Edm. 633, 634).

§ 2584. Perfected appeal stays proceedings in other cases.

Except as otherwise expressly prescribed in this article, a perfected appeal has the effect, as a stay of the proceedings to enforce the decree or order appealed from, prescribed in section 1310 of this act, with respect to a perfected appeal from a judgment.

See § 1310, ante; 2 R. S. 66, § 55 (2 Edm. 66); 2 R. S. 610, § 109 (2 Edm. 633).

§ 2585. [Am'd, 1895.] Appeal; proceedings thereupon.

In the appellate division of the supreme court the order made upon an appeal from a decree or an order of a surrogate's court must be entered with the clerk of the appellate division, and a certified copy thereof annexed to the papers transmitted from the court below upon which the appeal was heard, must be transmitted to the court from which the appeal was taken, and the court below shall enter the judgment or order necessary to carry the determination of the appellate division into effect.

L. 1895, ch. 948. See § 1340-1345, ante.

§ 2586. Power of appellate court; further testimony.

Where an appeal is taken upon the facts, the appellate court has the same power to decide the questions of fact, which the surrogate had; and it may, in its discretion, receive further testimony or documentary evidence, and appoint a referee.

§ 2587. Judgment or order upon appeal.

The appellate court may reverse, affirm, or modify the decree or order appealed from, and each intermediate order, specified in the notice of appeal, which it is authorized by law to review, and as to any or all of the parties; and it may, if necessary or proper, grant a new trial or hearing. The decree or order appealed from may be enforced, or restitution may be awarded, as the case requires, as prescribed in title first of chapter twelfth of this act, with respect to an appeal from a judgment.

See § 1317, 1319, 1320, 1323, ante.

§ 2588. [Am'd, 1895.] Award of jury trial upon reversal in probate cases.

Where the reversal or modification of a decree by the appellate court is founded upon a question of fact, the appellate

court must, if the appeal was taken from a decree made upon a petition to admit a will to probate, or to revoke the probate of a will, make an order, directing the trial, by a jury, of the material questions of fact, arising upon the issues between the parties. Such an order must state, distinctly and plainly, the questions of fact to be tried; and must direct the trial to take place, either at a trial term of the supreme court, specified in the order; or in the county court of the county of the surrogate. After the trial, a new trial may be granted, as prescribed in section 2548 of this act.

2 R. S. 66, §§ 57, 58 (2 Edm. 67); 2 R. S. 609, § 96 (2 Edm. 632); L. 1895, ch. 946.

§ 2589. Costs of appeal.

The appellate court may award to the successful party the costs of the appeal; or it may direct that they abide the event of a new trial, or of the subsequent proceedings in the surrogate's court. In either case, the costs may be made payable out of the estate or fund, or personally by the unsuccessful party, as directed by the appellate court; or, if such a direction is not given, as directed by the surrogate.

2 R. S. 606, § 96 (2 Edm. 602); 2 R. S. 67, § 61 (2 Edm. 632); 2 R. S. 67, § 61 (2 Edm. 67). See § 2549.

ARTICLE FIFTH.

*Provisions relating generally to letters; and generally to executors, administrators, guardians, and testamentary trustees.***Sec. 2590. Requisites of letters.****2591. Their effect.****2592. Priority among different letters.****2593. Time, how reckoned upon successive letters.****2594. Official oaths of executors, etc.****2595. Deposit of securities to reduce penalty of bond.****2596. Sureties liable for money, etc., received in another capacity.****2597. When new bond or new sureties may be required.****2598. Id.; how principal may be required to give a new bond, etc.****2599. Decree revoking letters for failure to give new bond.****2600. Sureties may apply to be released, as to future breaches.****2601. Release of old sureties on the giving of new.****2602. Surrogate may direct as to custody, where co-executors, etc., disagree.****2603. Effect and contents of decree revoking letters.****2604. The last section qualified.****2605. Successor may be appointed, and may compel accounting, etc.****2606. Accounting by executor, etc., of deceased executor.****2607. When bond may be prosecuted.****2608. Successor may prosecute official bond.****2609. Action on official bond when no successor is appointed.****2610. Application of this article to executors, etc., heretofore appointed****§ 2590. Requisites of letters.**

Letters testamentary, letters of administration, and letters of guardianship must be in the name of the people of the State. Where they are granted by a surrogate, or by an officer or person appointed by the board of supervisors, temporarily acting as surrogate, they must be tested in the name of the officer granting them, signed by him, or by the clerk of the surrogate's court, and sealed with the seal of the surrogate's court. Where they are issued out of another court, they must be tested in the name of the judge holding the court, signed by the clerk thereof, and sealed with its seal.

2 R. S. 80, § 55 (2 Edm. 81). See §§ 2485, 2486, 2490, 2491, 2492 and 2494, ante.

§ 2591. Their effect.

Subject to the provisions of the next section, regulating the priority among different letters, letters testamentary, letters of administration, and letters of guardianship, granted by a court or officer, having jurisdiction to grant them, as prescribed in this chapter, are conclusive evidence of the authority of the persons to whom they are granted, until the decree granting them is reversed upon appeal, or the letters are revoked, as prescribed in this chapter.

2 R. S. 80, § 56 (2 Edm. 82).

§ 2592. Priority among different letters.

The person or persons, to whom letters testamentary, or letters of administration are first issued, from a surrogate's court having jurisdiction to issue them, as prescribed in article first of title first of this chapter, have sole and exclusive authority, as executors or administrators, pursuant to the letters, until the letters are revoked, as prescribed by law; and they are entitled to demand and recover from any person, to whom letters upon the same estate are afterwards issued, by any other surrogate's

court, the decedent's property in his hands. But the acts of a person, to whom letters were afterwards issued, done in good faith, before notice of the letters first issued, are valid; and an action or special proceeding, commenced by him, may be continued by and in the name of the person or persons to whom the letters were first issued.

2 R. S. 74, § 25 (2 Edm. 75).

§ 2593. Time, how reckoned upon successive letters.

Where it is prescribed by law, that an act, with respect to the estate of a decedent, must or may be done within a specified time after letters testamentary or letters of administration are issued, and successive or supplementary letters are issued upon the same estate, the time so specified must be reckoned from the issuing of the first letters, except in a case where it is otherwise specially prescribed by law; or where the first or any subsequent letters are revoked, as prescribed in section 2684 of this act, or by reason of the want of power in the surrogate's court to issue the same, for any cause. (See § 2682.)

§ 2594. Official oaths of executors, etc.

The official oath or affirmation of an executor, administrator, or guardian, to the effect that he will well, faithfully and honestly discharge the duties of his office, describing it, must be filed with the surrogate, before letters are issued to him. The oath may be taken before any officer, within or without the State, who is authorized to take an affidavit, to be used in the supreme court. Where it is taken without the State, it must be certified as required by law, with respect to an affidavit to be used in the supreme court.

2 R. S. 71, 77, §§ 13 and 41 (2 Edm. 72, 78); L. 1837, ch. 460, § 59 (4 Edm. 497), am'd. See Banking Law, § 1586; L. 1907, ch. 612.

§ 2595. [Am'd, 1885.] Deposit of securities to reduce penalty of bond.

In a case where a bond, or new sureties to a bond, may be required by a surrogate from an executor, administrator, guardian or other trustee, if the value of the estate or fund is so great, that the surrogate deems it inexpedient to require security in the full amount prescribed by law, he may direct that any securities for the payment of money, belonging to the estate or fund, be deposited with him, to be delivered to the county treasurer, or be deposited, subject to the order of the trustee, countersigned by the surrogate, with a trust company duly authorized by law to receive the same. After such a deposit has been made, the surrogate may fix the amount of the bond, with respect to the value of the remainder only of the estate or fund. A security thus deposited shall not be withdrawn from the custody of the county treasurer or trust company, and no person, other than the county treasurer or the proper officer of the trust company, shall receive or collect any of the principal or interest secured thereby, without the special order of the surrogate, entered in the appropriate book. Such an order can be made in favor of the trustees appointed, only where an additional bond has been given by him, or upon proof that the estate or fund has been so reduced, by payments or otherwise, that the penalty of the bond originally given, will be sufficient in amount, to satisfy the provisions of law relating to the penalty

thereof, if the security so withdrawn is also reckoned in the estate or fund.

L. 1885, ch. 516.

§ 2596. Sureties liable for money, etc., received in another capacity.

A person to whom letters are issued, is liable for money or other personal property of the estate, which was in his hands or under his control, when his letters were issued; in whatever capacity it was received by him, or came under his control. Where it was received by him, or came under his control, by virtue of letters previously issued to him, in the same or another capacity, an action to recover the money, or damages for failure to deliver the property, may be maintained upon both official bonds; but, as between (the sureties upon) the official bond given upon the prior letters, and (those upon) the official bond given upon the subsequent letters, (the latter) are liable over to the former.

and L. 1915
ch. 621
am'd L.
ch. 622
§ 2597. When new bond or new sureties may be required.

Any person, interested in the estate or fund, may present to the surrogate's court a written petition, duly verified, setting forth that a surety in a bond, taken as prescribed in this chapter, is insufficient, or has removed, or is about to remove, from the State, or that the bond is inadequate in amount; and praying that the principal in the bond may be required to give a new bond, in a larger penalty, or new or additional sureties, as the case requires; or, in default thereof, that he may be removed from his office, and that letters issued to him may be revoked. Where the bond so taken is that of a guardian, the petition may also be presented by any relative of the infant. When the bond is that of an executor or administrator, the petition may also be presented by any creditor of the decedent. If it appears to the surrogate, that there is reason to believe that the allegations of the petition are true, he must cite the principal in the bond to show cause, why the prayer of the petition should not be granted.

L. 1837, ch. 460, §§ 25, 26 (4 Edm. 492), am'd; L. 1862, ch. 229; L. 1837, ch. 460, § 35 (4 Edm. 493).

§ 2598. Id.; how principal may be required to give a new bond, etc.

Upon the return of a citation, issued as prescribed in the last section, the surrogate must hear the allegations and proofs of the parties; and if the objections, or any of them, are found to be valid, he must make an order, requiring the principal in the bond to give new or additional sureties, or a new bond in a larger penalty, as the case requires, within such a reasonable time, not exceeding five days, as the surrogate fixes; and directing that, in default thereof, his letters be revoked.

L. 1837, ch. 460, § 27, am'd; L. 1862, ch. 229 (4 Edm. 492).

§ 2599. Decree revoking letters for failure to give new bond.

If a bond with new or additional sureties, or in a larger penalty, is approved and filed in the surrogate's office, as required by such an order, the surrogate must make a decree, dismissing the proceedings, upon such terms, as to costs, as justice

requires; otherwise, he must make a decree, removing the delinquent from office, and revoking the letters issued to him.

L. 1837, ch. 460, § 28, am'd.

§ 2600. [Am'd, 1901.] Sureties may apply to be released as to future breaches.

Any or all of the sureties in a bond taken as prescribed in this chapter, may present a petition to the surrogate's court praying to be released from responsibility, on account of any future breach of the condition of the bond and that the principal in the bond be required to give new sureties and to render and settle his account and that a citation issue to said principal to attend on such application. The surrogate must thereupon issue a citation accordingly.

Id., §§ 29 and 30; L. 1862, ch. 229; L. 1876, ch. 278, and L. 1901, ch. 524. In effect Sept. 1, 1901.

§ 2601. [Am'd, 1901.] Release of old sureties on the giving of new.

Upon the return of the citation issued as prescribed in the last section if the principal in the bond does not file a new bond in the usual form with new sureties to the satisfaction of the surrogate, the surrogate must make an order requiring said principal to file such new bond within such reasonable time not exceeding five days as the surrogate fixes. Should the principal file such new bond upon the return of such citation or within the time fixed by such order, the surrogate must thereupon make a decree releasing the petitioner from liability upon the bond for any subsequent act or default of the principal and requiring the principal to render and settle his account to and including the date of such decree and to file such account within a time fixed, not exceeding twenty days from such date; otherwise he must make a decree revoking the delinquent's letters.

Id., §§ 31 and 32; L. 1862, ch. 229 (4 Edm. 483), am'd; L. 1901, ch. 524. In effect Sept. 1, 1901.

§ 2602. Surrogate may direct as to custody, where co-executors, etc., disagree.

Where two or more co-executors or co-administrators disagree, respecting the custody of money or other property of the estate; or two or more testamentary trustees or guardians of the property disagree, respecting the custody of money or other property, belonging to a fund or an estate which is committed to their joint charge; the surrogate may, upon the application of either of them, or of a creditor or person interested in the estate, and proof, by affidavit, of the facts, make an order, requiring them to show cause, why the surrogate should not give directions in the premises. Upon the return of the order, the surrogate may, in his discretion, make an order, directing that any property of the estate or fund be deposited in a safe place, in the joint custody of the executors, administrators, guardians or testamentary trustees, as the case requires, or subject to their joint order; or that the money of the estate be deposited in a specified safe bank or trust company, to their joint credit, and to be drawn out upon their joint order. Disobedience to such a direction may be punished as a contempt of the court.

§ 2603. Effect and contents of decree revoking letters.

Upon the entry of a decree, made as prescribed in this chapter, revoking letters, issued by a surrogate's court to an executor, administrator or guardian, his powers cease. The decree may, in the discretion of the surrogate, require him to account for all money and other property received by him; and to pay and deliver over all money and other property in his hands into the surrogate's court, or to his successor in office, or to such other person as is authorized by law to receive the same; or it may be made without prejudice to an action or special proceeding for that purpose, then pending, or thereafter to be brought. The revocation does not affect the validity of any act, within the powers conferred by law upon the executor, administrator, or guardian, done by him before the service of the citation, where the other party acted in good faith; or done after the service of the citation, and before entry of the decree, where his powers with respect thereto were not suspended by service of the citation, or where the surrogate, in a case prescribed by law, permitted him to do the same, notwithstanding the pendency of the special proceeding against him; and he is not liable for such an act, done by him in good faith.

2 R. S. 62, § 38 (2 Edm. 62); 2 R. S. 77, 78, §§ 40, 46 and 47 (2 Edm. 78, 80), am'd.

§ 2604. The last section qualified.

The last section does not affect the liability of a person, to whom money or other property has been paid or delivered, as husband, wife, next of kin, or legatee, to respond to the person lawfully entitled thereto, where letters are revoked, because a supposed decedent is living; or because a will is discovered, after administration has been granted in a case of supposed intestacy, or revoking a prior will, upon which letters were granted.

§ 2605. Successor may be appointed, and may compel accounting, etc.

Where letters have been revoked by a decree of the surrogate's court, that court has, except in a case where it is otherwise specially prescribed by law, the same power to appoint a successor to the person whose powers have ceased, as if the letters had not been issued. The successor may complete the execution of the trust committed to his predecessor; he may continue, in his own name, a civil action or special proceeding, pending in favor of his predecessor; and he may enforce a judgment, order, or decree, in favor of the latter. The surrogate's court has the same jurisdiction, upon the petition of the successor, or of a remaining executor, administrator, guardian or trustee, to compel the person whose letters have been revoked, to account for, or deliver over money or other property, and to settle his account, which it would have upon the petition of a creditor or person interested in the estate, if the term of office conferred by the letters, had expired by its own limitation.

2 R. S. 77, § 40 (2 Edm. 78); 2 R. S. 153, § 17 (2 Edm. 159); L. 1865, ch. 733, § 1 (6 Edm. 583). See § 2693.

§ 2606. [Am'd, 1891, 1897, 1901, 1902.] Accounting by executor, et cetera, of deceased executors.

Where an executor, administrator, guardian or testamentary trustee dies, the surrogate's court has the same jurisdiction, upon

the petition of his successor, or of a surviving executor, administrator or guardian, or of a creditor, or person interested in the estate, or of a guardian's ward or the legal representative of a deceased ward, or a surety upon the official bond of the decedent, or the legal representative of a deceased surety, to compel the executor or administrator of the decedent to account, which it would have against the decedent if his letters have been revoked by a surrogate's decree. And an executor or administrator of a deceased executor, administrator, guardian or testamentary trustee may voluntarily account for the acts and doings of the decedent, and for the trust property which had come into his possession or into the possession of the decedent. And on the death, heretofore or hereafter, of any executor, administrator, guardian or testamentary trustee while an accounting by or against him, as such, was or is pending before a surrogate's court, such court may revive said proceeding against his executor, administrator or successor and proceed with such accounting and determine all questions and grant any relief that the surrogate would have power to determine or grant in case such decedent had not died or in a case where the executor or administrator of said last mentioned decedent, acting at the time of such revival had voluntarily petitioned for an accounting as provided for in this section. On a petition filed either by or against an executor or administrator of a deceased executor, administrator, guardian or testamentary trustee, or on a revival and continuation of an accounting pending by or against such decedent at the time of his death, the successor of such decedent and all persons who would be necessary parties to a proceeding commenced by such decedent for a judicial settlement of his accounts shall be cited and required to attend such settlement. The surrogate's court may at any time on its own motion or on the motion of any party to any one of two or more of such proceedings, consolidate said proceedings but without prejudice to the power of the court to make any subsequent order in either of them. With respect to the liability of the sureties in and for the purpose of maintaining an action upon the decedent's official bond, a decree against his executor or administrator, rendered upon such an accounting, has the same effect as if an execution issued upon a surrogate's decree against the property of decedent had been returned unsatisfied during the decedent's lifetime. So far as concerns the executor or administrator of decedent, such a decree is not within the provisions of section twenty-five hundred and fifty-two of this act. The surrogate's court has also jurisdiction to compel the executor or administrator, or successor of any decedent, at any time to deliver over any of the trust property which has come to his possession or is under his control, and if the same is delivered over after a decree, the court must allow such credit upon the decree as justice requires.

L. 1891, ch. 175; L. 1897, ch. 248; L. 1901, ch. 409; L. 1902, ch. 349. In effect April 3, 1902.

§ 2607. When bond may be prosecuted.

Where an execution, issued upon a surrogate's decree, against the property of an executor, administrator, testamentary trustee, or guardian, has been returned wholly or partly unsatisfied, an action, to recover the sum remaining uncollected, may be maintained upon his official bond, by and in the name of the person in whose favor the decree was made. If the principal debtor is a

resident of the State, the execution must have been issued to the county where he resides.

L. 1837, ch. 460, § 65 (4 Edm. 498).

§ 2608. Successor may prosecute official bond.

Where letters have been revoked by a decree of the surrogate's court, the successor of the executor, administrator, or guardian, whose letters are so revoked, may maintain an action upon his predecessor's official bond, in which he may recover any money, or the full value of any other property, received by the principal in the bond, and not duly administered by him; and to the full extent of any injury sustained by the estate of the decedent or of the infant, as the case may be, by any act or omission of the principal. The money, recovered in such an action, is regarded as part of the estate in the hands of the plaintiff, and must be distributed or otherwise disposed of accordingly; except that a recovery for an act or omission, respecting a right of action, or other property, appropriated by law for the benefit of the husband, wife, family, or next of kin of a decedent, or disposed of by a will for the benefit of any person, is for the benefit of the person or persons so entitled thereto.

-2 R. S. 85, § 21 (2 Edm. 87).

§ 2609. Action on official bond when no successor is appointed.

Where the letters of an executor or administrator have been so revoked, and no successor is appointed, any person aggrieved may, upon obtaining an order from the surrogate, granting him leave so to do, maintain an action upon the official bond of the executor or administrator, in behalf of himself and all others interested; in which the plaintiff may recover any money, or the full value of any other property, received by the principal in the bond, and not duly administered by him, and to the full extent of any injury, sustained by the estate of the decedent, by any act or omission of the principal. The money recovered in such an action must be paid, by the sheriff or other officer who collects it, into the surrogate's court; and the surrogate must distribute it to the creditors or other persons entitled thereto. The proceedings for such a distribution are the same as prescribed in title fifth of this chapter, for the distribution of the proceeds of a sale of real property.

§ 2610. Application of this article to executors, etc., heretofore appointed.

The provisions of this article apply to an executor, administrator, or guardian, to whom letters have been issued, and to a testamentary trustee whose trust has been created, before this chapter takes effect; except that it does not affect, in any manner, the liability of the sureties in a bond, executed before this chapter takes effect.

TITLE III.

Granting and revoking probate, letters testamentary, and letters of administration. Foreign wills; ancillary letters.**Article 1. Probate of a will and grant of letters thereupon.**

2. Revocation of probate.
3. Probate of heirship.
4. Grant of letters of administration.
5. Temporary administration.
6. Revocation of letters testamentary and letters of administration.
7. Foreign wills; ancillary letters.
8. Probate of foreign wills.

ARTICLE FIRST.*Probate of a will and grant of letters thereupon.*

- Sec. 2611.** What wills may be proved; change of residence not to affect validity.
- 2612.** Persons incompetent to serve as executors.
- 2613.** Supplementary letters; executors not named in letters not to act; power of executor before letters of administration with the will annexed.
- 2614.** Who may propound will.
- 2615.** Who to be cited thereupon.
- 2616.** Contents of citation.
- 2617.** Persons not cited may appear.
- 2618.** Witnesses to be examined; proof required.
- 2619.** Absent, etc., witnesses to be accounted for.
- 2620.** Proof of handwriting.
- 2621.** Proof of lost or destroyed will.
- 2621-a.** Petition to compel production of will.
- 2622.** Probate not allowed, unless surrogate satisfied, etc.
- 2623.** Will; when sufficiently proved.
- 2624.** Validity and construction of testamentary provisions.
- 2625.** Surrogate's decision on probate.
- 2626.** Probate; how far conclusive as to personality.
- 2627.** Id.; as to realty.
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- 2629.** Will certified, or record thereof, may be read in evidence.
- 2630.** Recording wills proved elsewhere within the State.
- 2631, 2632.** Records of certain wills heretofore proved; how far evidence.
- 2633.** Id.; as to wills of real property.
- 2634.** Allowance to executor or administrator for recording will or exemption.
- 2635.** Wills to be returned after probate.
- 2636.** When letters testamentary may be issued.
- 2637.** Surrogate to inquire into objections.
- 2638.** Bond; when required.
- 2639.** Renunciation; retraction thereof.
- 2640.** Selection of an executor under a power.
- 2641.** Objection to such a person; how taken, etc.
- 2642.** Executor failing to qualify or renounce; how excluded.
- 2643.** Letters of administration with will annexed; when and to whom.
- 2644.** Id.; renunciation or exclusion of persons having prior right.
- 2645.** Executor or administrator to qualify.
- 2646.** Effect of certain provisions limited.

§ 2611. [Repealed by L. 1909, ch. 18. See Consolidated Laws, tit. Decedent Estate Law, §§ 23-25.]

§ 2612. [Am'd, 1893.] **Persons incompetent to serve as executors.**

No person is competent to serve as an executor who, at the time the will is proved, is:

1. Incapable in law of making a contract.
2. Under the age of twenty-one years.
3. An alien not an inhabitant of this state; or

4. Who shall have been convicted of an infamous crime; or

5. Who, on proof, is found by the surrogate to be incompetent to execute the duties of such trust by reason of drunkenness, dishonesty, improvidence or want of understanding. If any such person be named as the sole executor in a will, or if all the persons named therein as executors be incompetent, letters of administration with the will annexed must be issued as in the case of all of the executors renouncing. A surrogate, in his discretion, may refuse to grant letters testamentary or of administration to a person unable to read and write the English language.

L. 1893, ch. 686.

§ 2613. [Am'd, 1893.] Supplementary letters: executors not named in letters not to act; power of executor before letters of administration with the will annexed.

If the disability of a person under age, or an alien named as executor in a will, be removed before the execution of the provisions of such will is completed, he shall be entitled, on application, to supplementary letters testamentary, to be issued in the same manner as the original letters, and authorized to join in the execution of the will with the persons previously appointed. A person named in a will as executor, and not named as such in the letters testamentary or in letters of administration with the will annexed, shall be deemed to be superseded thereby, and shall have no power or authority whatever as such executor until he appears and qualifies. An executor named in a will has no power to dispose of any part of the estate of the testator before letters testamentary are granted, except to pay funeral charges, nor to interfere with such estate in any manner further than is necessary for its preservation. Where letters of administration with the will annexed are granted, the will of the deceased shall be observed and performed; and the administrators, with such will, have the rights and powers and are subject to the same duties as if they had been named executors in the will.

L. 1893, ch. 686.

§ 2614. [Am'd, 1897.] Who may propound will.

A person designated in a will as executor, devisee, or legatee, or any person interested in the estate, or a creditor of the decedent, or any party to an action brought or about to be brought, and interest in the subject thereof, in which action the decedent, if living, would be a proper party, may present to the surrogate's court having jurisdiction, a written petition, duly verified, describing the will, setting forth the facts, upon which the jurisdiction of the court to grant probate thereof depends, and praying that the will may be proved, and that the persons, specified in the next section, may be cited to attend the probate thereof. Upon the presentation of such a petition, the surrogate must issue a citation accordingly.

L. 1837, ch. 460. § 4 (4 Edm. 487). L. 1897, ch. 177. In effect April 3, 1897.

§ 2615. [Am'd, 1894, 1905.] Who to be cited thereupon.

The following persons must be cited upon a petition, presented as prescribed in the last section:

1. If the will relates exclusively to real property, the husband or wife, if any, and all the heirs of the testator.

2. If the will relates exclusively to personal property; the husband or wife, if any, and all the next of kin of the testator.

3. If the will relates to both real and personal property, the husband or wife, if any, and all the heirs, and all the next of kin of the testator.

L. 1894, ch. 118.

4. [Added, 1905.] Any person designated in the will as executor.

L. 1905, ch. 438. In effect Sept. 1, 1905.

§ 2616. [Am'd, 1911.] Contents of citation.

The citation must set forth the name of the decedent, and of the person by whom the will is propounded; and it must state whether the will relates, or purports to relate, exclusively to real property, or personal property, or to both. Where the will propounded was nuncupative, that fact must be stated in the citation. Where the surrogate is unable to ascertain to his satisfaction, whether the decedent left surviving him, any person, who would be entitled to the property affected by the will, if the decedent had died intestate; or if it shall appear to the surrogate that the decedent left no known heirs-at-law or next of kin, the citation must be directed, where the will relates to real property, to the attorney-general; where it relates to personal property, to the attorney-general and to the public administrator, who would have been entitled to administration, if the decedent had died intestate.

Am'd by L. 1911, ch. 433, in effect Sept. 1, 1911.

§ 2617. [Am'd, 1894.] Persons not cited may appear.

Any person, although not cited, who is named as a devisee or legatee in the will propounded, or as executor, trustee, devisee or legatee in any other paper purporting to be a will of the decedent, or who is otherwise interested in sustaining or defeating the will, may appear, and, at his election, support or oppose the application. A person so appearing becomes a party to the special proceeding. But this section does not affect a right or interest of such a person unless he so becomes a party. And in case the will propounded for probate is opposed, due and timely notice of the hearing of the objections to the will shall be given, in such manner as the surrogate shall direct, to all persons in being, who would take any interest in any property under the provisions of the will, and to the executor or executors, trustee or trustees named therein, if any, who have not appeared in the proceeding, and any decree in the proceeding shall not affect the right or interest of any such person unless he shall be so notified.

L. 1894, ch. 118.

§ 2618. [Am'd, 1913.] Witnesses to be examined; proof required.

Upon the return of the citation, the surrogate must cause the witnesses to be examined before him. In a case where there is no contest and no objection or if no objections to the probate are filed and if all the parties are of full age and of sound mind or if the special guardian attends before the surrogate the

surrogate may in his discretion order that a witness who is in the state but not in the county where the will is offered for probate or an adjoining county, be examined before the surrogate of the county in which the witness shall be, in which case the original will shall be attached to the order and transmitted to the surrogate of the county where the proofs are ordered to be taken and the proofs and said original will shall be returned to the surrogate before whom the proceeding is pending. The proofs must be reduced to writing. Before a written will is admitted to probate, two, at least, of the subscribing witnesses must be produced and examined, if so many are within the State, and competent and able to testify. Before a nuncupative will is admitted to probate, its execution and the tenor thereof must be proved by at least two witnesses. Any party, who contests the probate of the will, may, by a notice filed with the surrogate at any time before the proofs are closed, require the examination of all the subscribing witnesses to a written will, or of any other witness, whose testimony the surrogate is satisfied may be material; in which case, all such witnesses, who are within the State, and competent and able to testify, must be so examined.

L. 1837, ch. 460, part of §§ 10 and 11 (4 Edm. 488, 489); L. 1841, ch. 129, §§ 1, 2 and 3 (4 Edm. 501). Am'd, L. 1913, ch. 412. In effect Sept. 1, 1913.

§ 2619. [Am'd, 1882.] Absent, etc., witnesses to be accounted for.

The death, absence from the State, lunacy, or other incompetency of a witness, required to be examined, as prescribed in this or the last section, or proof that such witness cannot, after due diligence, be found within the State or elsewhere, must be shown by affidavit or other competent evidence, to the satisfaction of the surrogate, before dispensing with his testimony. Where a witness, being within the State, is disabled from attending, by reason of age, sickness, or infirmity, his disability must be shown in a like manner; and in that case, the testimony of the witness, where it is required, and he is able to testify, must be taken in the manner prescribed by law, and produced before the surrogate, as part of the proofs.

L. 1837, ch. 460, part of §§ 10, 11 (4 Edm. 489).

§ 2620. [Am'd, 1888, 1902.] Proof of handwriting.

If all the subscribing witnesses to a written will are, or if a subscribing witness, whose testimony is required, is dead, or incompetent, by reason of lunacy or otherwise, to testify or unable to testify; or if such a subscribing witness is absent from the state; or if such a subscribing witness has forgotten the occurrence, or testifies against the execution of the will; the will may nevertheless be established, upon proof of the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances, as would be sufficient to prove the will upon the trial of an action. Where a subscribing witness is absent from the state, upon application of either party, the surrogate shall cause the testimony of such witness to be taken by commission, when it is made to appear that by due diligence such testimony may be obtained. Where a written will is proved, as prescribed in this section, it must be filed and remain in the surrogate's office. But when it shall be shown, by affidavit or otherwise, to the satisfaction of the surrogate, that the decedent left real or personal property in another state or territory of the United

States or in a foreign country, and that the laws of such state, territory or country require the production of the original will before the provisions thereof become effective, the surrogate may, at any time after probate, and upon such notice to the parties interested in the estate as he may think proper, cause any original will remaining on file in his office to be sent by post or otherwise to any court which, or to any officer of such state, territory or country who, under the laws thereof, is empowered to receive the same for probate, or may deliver such will to any person interested in the probate thereof in such state, territory or country, or to his representative, upon such terms as he shall think proper for the protection of other parties interested in the estate. Where in any matter before the surrogate or in a surrogate's court the testimony of any witness shall be taken by or on commission, the same, together with the commission on which it is taken, shall be duly filed in the office of the surrogate but need not be recorded. The testimony or other proceeding duly taken to be used before the surrogate or surrogate's court, by a stenographer, shall be filed and need not be recorded.

L. 1837, ch. 460, § 20 (2 Edm. 491); 2 R. S. 58, §§ 13, 16, 17 (2 Edm. 59, 60); L. 1888, ch. 508. See § 2635. L. 1902, ch. 114. In effect March 12, 1902.

§ 2621. Proof of lost or destroyed will.

A lost or destroyed will can be admitted to probate in a surrogate's court, but only in a case, where a judgment establishing the will could be rendered by the supreme court, as prescribed in section 1865 of this act.

L. 1870, ch. 359, § 8; 2 R. S. 68, § 67, b. (2 Edm. 69).

§ 2621-a. [Added, 1910.] Petition to compel production of will.

A person claiming to be interested in the estate of decedent may present a petition under oath to a surrogate's court, against any one or more persons suspected of destroying, retaining, concealing or conspiring with others to destroy, retain or conceal a will or testamentary instrument of the decedent, and the court thereupon must issue a citation, directed to such person or persons, ordering the production of the will or testamentary instrument or show cause why it should not be produced. On the return of the citation, the court may order the suspected person or persons, to appear before it and be examined on oath upon the matter of the petition. If any person cited fails to appear and submit to examination or refuses to answer such questions as are lawfully propounded to him, or to obey any lawful order of the court, he may be committed to jail as for a contempt of court until he submits to its order. The court may award costs as in a special proceeding, to be paid by either party.

Added, L. 1910, ch. 358. In effect May 24, 1910.

§ 2622. Probate not allowed, unless surrogate satisfied, etc.

Before admitting a will to probate, the surrogate must inquire particularly into all the facts and circumstances, and must be satisfied of the genuineness of the will, and the validity of its execution. Before admitting a written will to probate, the surrogate may, in his discretion, require proof of the circumstances attending the execution, the delivery, and the possession thereof, or any of them, to be made by the affidavit, or the testimony at the hearing, of the person who received the will from the tes-

tator, if he can be produced, and, also, of the person presenting it for probate.

L. 1837, ch. 460, § 17, and part of § 10 (4 Edm. 489, 490).

§ 2623. Will; when sufficiently proved.

If it appears to the surrogate that the will was duly executed; and that the testator, at the time of executing it, was in all respects competent to make a will, and not under restraint; it must be admitted to probate, as a will valid to pass real property, or personal property, or both, as the surrogate determines, and the petition and citation require, and must be recorded accordingly. The decree admitting it to probate must state whether the probate was or was not contested.

2 R. S. 58, § 14 (2 Edm. 59); L. 1837, ch. 460, § 18 (4 Edm. 490).

§ 2624. [Am'd, 1910, 1913.] Validity and construction of testamentary provisions.

But if a party expressly puts in issue, before the surrogate, the validity, construction, or effect of any disposition of property, contained in the will of a resident of the State, executed within the State, the surrogate may determine the question upon rendering a decree; or, unless the decree refuses to admit the will to probate, by reason of a failure to prove any of the matters specified in the last section, may admit the will to probate and reserve the question of construction or effect for future consideration and decree.

L. 1870, ch. 350, § 11. Am'd, L. 1910, ch. 584; L. 1913, ch. 337. In effect Sept. 1, 1913. See § 2604, post.

§ 2625. [Am'd, 1910.] Surrogate's decision on probate.

A decree admitting a will of real or personal property, or both, to probate is conclusive as an adjudication of the validity of the will, and of the questions determined under section twenty-six hundred and twenty-four of this act, except as in this chapter otherwise provided.

L. 1837, ch. 460, § 21 (4 Edm. 491), am'd. Am'd, L. 1910, ch. 578. In effect Sept. 1, 1910.

§ 2626. [Repealed by L. 1910, ch. 578. In effect Sept. 1, 1910.]

§ 2627. [Repealed by L. 1910, ch. 578. In effect Sept. 1, 1910.]

§ 2628. [Repealed by L. 1909, ch. 18. See Consolidated Laws, tit. Decedent Estate Law, § 46.]

§ 2629. [Am'd, 1882, 1910.] Will certified, or record thereof, may be read in evidence.

The surrogate must cause to be indorsed upon, or annexed to, the original will admitted to probate, or the exemplified copy, or statement of the tenor of the will, which was admitted without production of an original written will, a certificate, under his hand, or the hand of the clerk of his court, and his seal of office, stating that it has, upon due proof, been admitted to probate, as a will valid to pass real or personal property, or both, as the case may be. The will, or the copy or statement, so authenti-

cated, the record thereof, or an exemplified copy of the record, may be read in evidence, as proof of the original will, or of the contents or tenor thereof, without further evidence, and with the effect specified in the preceding sections.

2 R. S. 58, § 15 (2 Edm. 59); 2 R. S. 80, § 58 (2 Edm. 82). See § 2500. Am'd L. 1882, ch. 399; L. 1910, ch. 578. In effect Sept. 1, 1910.

§ 2630. Recording wills proved elsewhere within the State.

A transcript of a will of real property, proved and recorded in any court of the State, of competent jurisdiction, and of all the notices, process, and proofs relating to the same, must, when duly exemplified, be recorded, upon the request of any person interested therein, in the surrogate's court of any county, in which real property of the testator is situated.

L. 1837, ch. 460, § 68 (4 Edm. 499).

§ 2631. Records of certain wills heretofore proved; how far evidence.

The exemplification of the record of a will, proved before the judge of the former court of probates, and recorded in his office before the first day of January, in the year 1785, certified under the seal of the officer having custody of the record, must be admitted in evidence in any case, after it has been made to appear that diligent and fruitless search has been made for the original will.

2 R. S. 59, § 20 (2 Edm. 60).

§ 2632. [Am'd, 1804, 1901.] The same.

An exemplified copy of the last will and testament of any deceased person, which has been admitted to probate, whether as a will of real or personal property, or both, and recorded in the office of the surrogate in any county of this state, shall be admitted in evidence in any of the courts of this state, without the proofs and examination taken on the probate thereof, and whether such proofs shall have been recorded or not, with like effect as if the original of such will had been produced and proven in such court, when thirty years have elapsed since the will was admitted to probate and recorded. And the recording of such will shall be evidence that the same was duly admitted to probate. The exemplification of the record of a will which has been proved before the surrogate or judge of probate, or other officer exercising the like jurisdiction, of another state must, when certified by the officer having by law, when the certificate was made, custody of the record, be admitted in evidence, as if the original will was produced and proved, when thirty years have elapsed since the will was proved.

L. 1804, ch. 89; L. 1901, ch. 540. In effect Sept. 1, 1901.

§ 2633. [Repealed by L. 1909, ch. 18. See Consolidated Laws, tit. Decedent Estate Law, § 42.]

§ 2634. [Am'd, 1909.] Allowance to executor or administrator for recording will or exemplification.

An executor, or administrator, with the will annexed, who causes a record of a will or exemplification to be made as pre-

scribed in section forty-two of the decedent estate law, must be allowed, in his account, the fees paid by him therefor.

Id., §§ 3 and 4 (4 Edm. 439). Am'd by L. 1900, ch. 65. Also partly repealed by L. 1900, ch. 18. See Consolidated Laws, tit. Decedent Estate Law, § 43. See note 73 of notes of Board of Statutory Consolidation at end of code.

§ 2635. [Am'd, 1902.] Wills to be returned after probate.

Except where special provision is otherwise made by law, or where the surrogate sends a will into another state or territory or into a foreign country, or delivers it to a party in interest, as provided in section two thousand six hundred and twenty of this act, a written will, after it has been proved and recorded, must be retained by the surrogate, until the expiration of one year after it has been recorded, and, if a petition for the revocation of probate thereof is then filed, until a decree is made thereupon. It must then be returned, upon demand, to the person who delivered it, unless he is dead, or a lunatic, or has removed from the state; in which case, it may, in the discretion of the surrogate, be delivered to any person named therein as devisee, or to an heir or assignee of a devisee; or, if it relates only to personal property, to the executor, or administrator, with the will annexed, or to a legatee.

2 R. S. 66, § 54 (2 Edm. 60); L. 1902, ch. 114. In effect March 12, 1902.

§ 2636. When letters testamentary may be issued.

Where a will, which is admitted to probate, names one or more persons to be executor or executors thereof, upon a contingency, the surrogate must inquire into the facts, and, if the contingency has happened, that fact must be recited in the decree. Immediately after a will has been admitted to probate, the person or persons named therein as executors, who are competent by law to serve, and who appear and qualify, are entitled to letters testamentary thereupon; unless, before the letters are granted, a creditor of the decedent, or a person interested in the estate, files an affidavit, specifying his demand, or how he is interested, and either setting forth specifically one or more legal objections to granting the letters to one or more of the executors, or stating that he is advised and believes that there are such objections, and that he intends to file a specific statement of the same. Where such an affidavit is filed, the surrogate must stay the granting of letters, at least thirty days, or until the matter is sooner disposed of. A specification or statement of an objection, made as prescribed in this section, must be verified by the oath of the objector, or his attorney, to the effect that he believes it to be true.

2 R. S. 69, § 1 (2 Edm. 71); L. 1837, ch. 460, § 22 (4 Edm. 491).

§ 2637. Surrogate to inquire into objections.

The surrogate must inquire into an objection, filed as prescribed in the last section; and, for that purpose, he may receive proof, by affidavit, or otherwise, in his discretion. If it appears that there is a legal and sufficient objection to any person, named as executor in the will, letters shall not be issued to him, except as prescribed in the next section.

2 R. S. 70, § 6 (2 Edm. 71).

§ 2638. Bond; when required.

In either of the following cases, a person named as executor in a will, may entitle himself to letters testamentary thereupon, by giving a bond as prescribed by law, although an objection against him has been established to the satisfaction of the surrogate:

1. Where the objection is, that his circumstances are such, that they do not afford adequate security to the creditors, or persons interested in the estate, for the due administration of the estate.

2. Where the objection is that he is not a resident of the State; and he is a citizen of the United States.

But a person against whom there is no objection, except that of non-residence, is entitled to letters testamentary, without giving a bond, if he has an office within the State, for the regular transaction of business in person; and the will contains an express provision, to the effect that he may act without giving security.

Id.; § 7, am'd; L. 1873, ch. 657 (9 Edm. 699).

§ 2639. Renunciation; retraction thereof.

A person, named as executor in a will, may renounce the appointment by an instrument in writing, signed by him, and acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, or attested by one or more witnesses, and proved to the satisfaction of the surrogate. Such a renunciation may be retracted by a like instrument, at any time before letters testamentary, or letters of administration with the will annexed, have been issued to any other person in his place; or, after they have been so issued, if they have been revoked, or the person to whom they were issued has died, or become a lunatic, and there is no other acting executor or administrator. Where a retraction is so made, letters testamentary may, in the discretion of the surrogate, be issued to the person making it. An instrument specified in this section must be filed and recorded in the surrogate's office.

Id., § 8 (2 Edm. 72).

§ 2640. Selection of an executor under a power.

Where the will contains a valid power, authorizing the selection, as executor thereof, of a person not named therein, the selection must be made, by the person appointed for that purpose, within thirty days after making the decree admitting the will to probate; in default whereof, the power of selection is deemed to have been renounced. Such selection must be made by an instrument in writing, designating the person selected, signed by the proper person, and acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, or proved to the satisfaction of the surrogate, and filed in the surrogate's office. Where the will authorizes the person, so to be selected, to act with the executor or executors named therein, the issuing of letters must be delayed until the expiration of the period, fixed in this section for the exercise of the power of

selection, and, if the selection is so made, for five days thereafter.

§ 2641. Objection to such a person; how taken, etc.

Within five days after a selection is made, as prescribed in the last section, any person may file an affidavit, verified as prescribed in section 2636 of this act, showing that he is a creditor of the decedent, or a person interested in the estate, and setting forth specifically one or more legal objections to granting letters to the person selected. The proceedings to be taken thereupon are the same, as prescribed in sections 2637 and 2638 of this act. If letters are not issued to the person so selected, the power of selection is deemed to be exhausted.

§ 2642. [Am'd, 1883.] Executor failing to qualify or renounce; how excluded.

If a person, named as executor in a will, does not qualify or renounce, within thirty days after probate thereof; or if a person, chosen by virtue of a power in the will, does not qualify or renounce within thirty days after the filing of the instrument designating him; or, in either case, if objections are filed, and the executor does not qualify or renounce, within five days after they are determined, in his favor, or, in a case specified in section 2638 of this act, within five days after an objection has been established; the surrogate must, upon the application of any other executor, or any creditor or person interested in the estate, make an order requiring him to qualify within a time therein specified; and directing that, in default of so doing, he be deemed to have renounced his appointment. Where it appears by affidavit or other written proof, to the satisfaction of the surrogate, that such an order cannot, with due diligence, be served personally within the State, upon the person therein named, the surrogate may prescribe the manner in which it must be served, which may be by publication. If the person, so appointed executor, does not qualify within the time fixed, or within such further time as the surrogate allows for that purpose, an order must be made and recorded, reciting the facts, and declaring that he has renounced his appointment as executor. Such an order may be revoked by the surrogate in his discretion, and letters testamentary may be issued to the person so failing to renounce or qualify, upon his application, in a case where he might have retracted an express renunciation, as prescribed in section 2639 of this act. And where any powers to sell, mortgage or lease real estate, or any interest therein, are given to executors as such, or as trustees, or as executors and trustees, and any of such persons named as executors shall neglect to qualify, then all sales, mortgages and leases under said powers made by the executors who shall qualify shall be equally valid as if the other executors or trustees had joined in such sale.

2 R. S. 70, 71, §§ 9, 10, 11, 12 (2 Edm. 272); L. 1883, ch. 401.

§ 2643. [Am'd, 1895, 1901, 1910.] Letters of administration with will annexed; when and to whom.

If no person is named as executor in the will, or selected by virtue of a power contained therein; or if, at any time, by reason of death, incompetency adjudged by the surrogate, renunciation in either of the methods prescribed in sections two thousand six

hundred and thirty-nine and two thousand six hundred and forty-two of this act, or revocation of letters, there is no executor, or administrator with the will annexed, qualified to act; the surrogate must, upon the application of a creditor of the decedent, or a person interested in the estate of the decedent, or having a lien upon any real property upon which the decedent's estate has a lien, and upon such notice to the other creditors and persons interested in the estate, as the surrogate deems proper, issue letters of administration with the will annexed, as follows:

1. To one or more of the residuary legatees, who are qualified to act as administrators. If any one of such legatees who would otherwise be so entitled is a minor, administration shall be granted to his guardian, if competent. A corporation which is a residuary legatee shall be qualified to act as such administrator, although not specially authorized by its charter or any provision of law.

2. If there is no such residuary legatee or guardian, or none who will accept, then to one or more of the principal or specified legatees so qualified. If any one of such legatees who would be otherwise so entitled is a minor, administration shall be granted to his guardian, if competent.

3. If there is no such legatee or guardian, or none who will accept, then to the husband, or wife, or to one or more of the next of kin, or to one or more of the heirs or devisees, so qualified.

4. If there is no qualified person, entitled under the foregoing subdivisions, who will accept, then to one or more of the creditors who are so qualified, except that in the counties of New York and Kings the public administrator shall have preference, after the next of kin, over the creditors and all other persons.

5. If there is no qualified creditor who will accept, then to any proper person designated by the surrogate.

2 R. S. 71, § 14 (2 Edm. 72); L. 1895, ch. 734; L. 1901, ch. 141; L. 1910, ch. 585. In effect Sept. 1, 1910.

§ 2644. Id.; renunciation or exclusion of persons having prior right.

But where a person applies for letters of administration with the will annexed, as prescribed in the last section, and another person has a right to the administration prior to that of the petitioner, the application must be made by petition, unless a written renunciation of every person having such a prior right, is filed with the surrogate, and the execution thereof is proved to his satisfaction. The petition must pray that all the persons having a prior right, who have not renounced, be cited to show cause, why administration should not be granted to the petitioner. The proceedings thereupon are the same, as upon an application for administration upon the estate of an intestate.

2 R. S. 76, § 35 (2 Edm. 77).

§ 2645. Executor or administrator to qualify.

An executor, from whom a bond is required, as prescribed in this article, or an administrator with the will annexed, must, before letters are issued to him, qualify as prescribed by law, with respect to an administrator upon the estate of an intestate; and the provisions of article fourth of this title, with respect to the bond to be given by the administrator of an intestate, apply to a bond given pursuant to this section; except that, in fixing the

penalty thereof, the surrogate must take into consideration the value of the real property, or of the proceeds thereof, which may come to the hands of the executor or administrator, by virtue of any provision contained in the will.

2 R. S. 76, § 42. See post, §§ 2667, 2615, 2616.

§ 2646. Effect of certain provisions limited.

This article does not vary the effect of a decree for probate, made before this chapter takes effect, as declared in the statutes then in force.

ARTICLE SECOND.

Revocation of probate.

Sec. 2647. Persons interested may apply to revoke probate.

2648. When application must be made.

2649. Citation thereupon.

2650. Executor, etc., to suspend proceedings. *am'd L. 1910 ch. 520*

2651. Hearing. *am'd L. 1910 ch. 542*

2652. Decree.

2653. Notice of decree of revocation.

2653a. Determining validity of a will.

§§ 2647-2653. [Repealed by L. 1910, ch. 578. In effect Sept. 1, 1910.]

§ 2653a. [Added, 1892; am'd, 1896, 1897.] **Determining validity of a will.**

Any person interested as devisee, legatee or otherwise, in a will or codicil admitted to probate in this state, as provided by the code of civil procedure, or any person interested as heir-at-law, next of kin or otherwise, in any estate, any portion of which is disposed of, or affected, or any portion of which is attempted to be disposed of, or affected, by a will or codicil admitted to probate in this state, as provided by the code of civil procedure, within two years prior to the passage of this act, or any heir-at-law or next of kin of the testator making such will, may cause the validity or invalidity of the probate thereof to be determined in an action in the supreme court for the county in which such probate was had. All the devisees, legatees and heirs of the testator and other interested persons, including the executor or administrator, must be parties to the action. Upon the completion of service of all parties, the plaintiff shall forthwith file the summons and complaint in the office of the clerk of the court in which said action is begun and the clerk thereof shall forthwith certify to the clerk of the surrogate's court in which the will has been admitted to probate, the fact that an action to determine the validity of the probate of such will has been commenced, and on receipt of such certificate by the surrogate's court, the surrogate shall forthwith transmit to the court in which such action has been begun a copy of the will, testimony and all papers relating thereto, and a copy of the decree of probate, attaching the same together, and certifying the same under the seal of the court. The issue of the pleadings in such

action shall be confined to the question of whether the writing produced is or is not the last will and codicil of the testator, or either. It shall be tried by a jury and a verdict thereon shall be conclusive as to the real or personal property; unless a new trial be granted or the judgment thereon be reversed or vacated. On the trial of such issue the decree of the surrogate admitting the will or codicil to probate shall be prima facie evidence of the due attestation, execution and validity of such will or codicil. A certified copy of the testimony of such of the witnesses examined upon the probate, as are out of the jurisdiction of the court, dead, or have become incompetent since the probate, shall be admitted in evidence on the trial. The party sustaining the will shall be entitled to open and close the evidence and argument. He shall offer the will in probate and rest. The other party shall then offer his evidence. The party sustaining the will shall then offer his other evidence and rebutting testimony may be offered as in other cases. If all the defendants make default in pleading, or if the answers served in said action, raise no issues, then the plaintiff may enter judgment as provided in article two of chapter eleven of the code of civil procedure in the case of similar defaults in other actions. If the judgment to be entered in an action brought under this section is that the writing produced is the last will and codicil, or either of the testator, said judgment shall also provide that all parties to said action, and all persons claiming under them subsequently to the commencement of the said action, be enjoined from bringing or maintaining any action or proceeding, or from interposing or maintaining a defense in any action or proceeding based upon a claim that such writing is not the last will or codicil, or either, of the testator. Any judgment heretofore entered under this section determining that the writing produced is the last will and codicil, or either, of the testator, shall, upon application of any party to said action, or any person claiming through or under them, and upon notice to such persons as the court at special term shall direct, be amended by such court so as to enjoin all parties to said action, and all persons claiming under the parties to said action subsequently to the commencement thereof, from bringing or maintaining any action or proceeding impeaching the validity of the probate of the said will and codicil, or either of them, or based upon a claim that such writing is not the last will and codicil, or either, of the testator, and from setting up or maintaining such impeachment or claim by way of answer in any action or proceeding. When final judgment shall have been

entered in such action, a copy thereof shall be certified and transmitted to the clerk of the surrogate's court in which such will was admitted to probate. The action brought as herein provided shall be commenced within two years after the will or codicil has been admitted to probate, but persons within the age of minority, of unsound mind, imprisoned, or absent from the state, may bring such action two years after such disability has been removed.

L. 1892, ch. 501; L. 1896, ch. 943; L. 1897, ch. 701. In effect May 22, 1897. Supersedes amendment in ch. 104, L. 1897.

ARTICLE THIRD.*Probate of heirship.*

- Sec. 2654.** Heir, etc., may apply to establish heirship.
2655. Citation; appearance of persons interested.
2656. What facts to be ascertained; decree thereupon.
2657. Decree to be recorded; effect thereof.
2658. Petition to vacate or modify it.
2659. Id.; when granted.

§ 2654. Heir, etc., may apply to establish heirship.

Where a person, seized in fee of real property within the State, dies intestate, or without having devised his real property to specific persons, his heirs, or any of them, or any person deriving title from or through such heirs or any of them, may present to the surrogate's court which has acquired jurisdiction of the estate, or, if no surrogate's court has acquired such jurisdiction, then to the surrogate's court of the county where the real property, or any part thereof is situated, a written petition duly verified; describing the real property; setting forth the facts upon which the jurisdiction of the court depends; and the interest or share of the petitioner, and of each other heir of the decedent, in the real property; and praying for a decree establishing the right of inheritance thereto, and that all the heirs of the decedent may be cited to attend the probate of that right. Upon the presentation of such a petition the surrogate must issue a citation accordingly.

§ 2655. Citation; appearance of persons interested.

The citation must set forth the name of the decedent and of the petitioner; the interest or share which the petitioner claims; and a brief description of the real property. Any heir of the decedent, who has not been cited, may nevertheless appear at the hearing; and thereby make himself a party to the special proceeding. But this section does not affect a right or interest of such a person, unless he becomes a party.

See §§ 2616, 2617, 2619 and 2623, ante.

§ 2656. What facts to be ascertained; decree thereupon.

Upon the return of the citation, the surrogate must hear the allegations and proofs of the parties. If it appears that there is a contest, respecting the heirship of a party, or respecting the share to which a party is entitled, as an heir of the decedent, the surrogate must dismiss the proceedings. If there is no such contest, he must inquire into the facts and circumstances of the case. The petitioner must establish, by satisfactory evidence, the fact of the decedent's death; the place of his residence at the time of his death; his intestacy, either generally, or as to the real property in question; the number of heirs entitled to inherit the property in question; the name, age, residence, and relationship to the decedent, of each; and the interest or share of each in the property. The surrogate, where these facts are established, must make a decree, describing the property, and declaring that the right of inheritance thereto has been established to his satisfaction, in accordance with the facts, which must be recited in the decree.

L. 1873, ch. 562, §§ 1 and 2, am'd: L. 1874, ch. 127 (9 Edm. 861).

§ 2657. Decree to be recorded; effect thereof.

An exemplified copy of a decree, made as prescribed in the last section, and of the proofs taken thereupon, may be recorded in the office of the clerk, or of the register, as the case requires, of each county in which the real property is situated, as prescribed by law for recording a deed, and, from the time when the exemplifications are so recorded, the decree, or the record thereof, is presumptive evidence of the facts so declared to be established thereby.

L. 1873, ch. 552, §§ 1 and 2, am'd; L. 1874, ch. 127 (9 Edm. 861).

§ 2658. Petition to vacate or modify it.

Any person, other than a party to a special proceeding, instituted as prescribed in this article, or the heir, devisee, or assignee of such a party, may, at any time within ten years after a decree establishing the right of inheritance is made therein, present to the court a written petition, duly verified, showing that he has a right, title, or interest in the real property, or a part thereof, which is injuriously affected by the decree; stating that the decree is erroneous in some material particular, specified therein; and praying that the decree may be set aside or modified in that particular, and that all the persons, whose heirship was established by the decree, may be cited to show cause, why the prayer of the petition should not be granted. If an heir has since died, or has conveyed the share or interest so established, by a deed duly recorded in the county, the petition must state that fact; and must pray that the persons who have succeeded to his interest, may be also cited. Upon the presentation of such a petition, the surrogate must issue a citation accordingly.

§ 2659. Id.; when granted.

Where a petition is presented as prescribed in the last section, and it appears, upon the hearing, that, if the petitioner, or his ancestor, testator, or grantor, had been a party to the special proceeding, the decree or a part thereof could not have been legally made, as prescribed in this article, the surrogate must vacate or modify the decree accordingly. An exemplified copy of the decree or order, so vacating or modifying the original decree, may be recorded in the office of any clerk or register, where a copy of the original decree was recorded.

ARTICLE FOURTH.

Grant of letters of administration.

- Sec. 2660.** Who entitled to letters of administration.
2661. Persons incompetent to receive letters.
2662. Application for letters.
2663. Citations; proceedings upon return thereof.
2664. Administrator's bond.
2665. When county treasurer to be ex-officio public administrator.
2666. Bond, letters of administration and proceedings thereon.
2667. When authority of county treasurer superseded.
2668. Powers and proceedings of county treasurer as administrator; payments into state treasury.
2669. Public administrator of Kings county.

§ 2660. [Am'd, 1894, 1897, 1900, 1913.] **Who entitled to letters of administration.**

Administration in case of intestacy must be granted to the relatives of the deceased entitled to succeed to his personal property, who will accept the same, in the following order:

1. To the surviving husband or wife.
2. To the children.
3. To the father.
4. To the mother.
5. To the brothers.
6. To the sisters.
7. To the grandchildren.
8. To any other next of kin entitled to share in the distribution of the estate.
9. To an executor or administrator of a sole legatee named in a will, whereby the whole estate is devised to such deceased sole legatee.

If a person entitled is a minor, administration must be granted to his guardian, if competent, in preference to creditors or other persons. If no relative, or guardian of a minor relative, will accept the same, the letters must be granted to the creditors of the deceased; the creditor first applying, if otherwise competent, to be entitled to preference. If no creditor applies, the letters must be granted to any other person or persons legally competent. Letters of administration shall also be granted to an executor or administrator of a deceased person named as sole legatee in a will. The public administrator in the city of New York has preference after the next of kin and after an executor or administrator of a sole legatee named in a will whereby the whole estate is devised to such deceased sole legatee over creditors and all other persons. In other counties, the county treasurer shall have preference next after creditors over all other persons, except that where the surrogate is unable to ascertain to his satisfaction whether the decedent left surviving him any person or persons entitled to succeed to his estate, or where it shall appear to the surrogate that the deceased left no known heirs-at-law or next of kin, then the public administrator or county treasurer shall have preference over creditors. If several persons of the same degree of kindred to the intestate are entitled to administration, they must be preferred in the following order: First, men to women; second, relatives of the whole blood to those of the half blood; third, unmarried women to married. If there are several persons equally entitled to administration, the surrogate may grant letters to one or more of such persons, and administration may be granted to one or more competent persons, although not entitled to the same, with the consent of the person entitled to be joined with such person or persons; which consent must be in writing, and filed in the

office of the surrogate. If, in an action, brought or about to be brought, the intestate, if living, would be a proper party thereto, any party to such action, interested in the subject thereof, may apply to the surrogate's court for the granting of letters of administration to himself, or some other qualified person, and upon the jurisdictional facts being satisfactorily shown, and no relative, or guardian or a minor relative, and no creditor, county treasurer or public administrator consenting to such administration, some legally competent person must be appointed administrator.

L. 1894, ch. 508; L. 1897, ch. 177. Am'd by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 18. See Consolidated Laws, tit. Decedent Estate Law, § 103. See note 74 of notes of Board of Statutory Consolidation at end of code. Am'd L. 1913, ch. 403. In effect April 29, 1913.

§ 2661. [Am'd, 1893.] Persons incompetent to receive letters.

Letters of administration shall not be granted to a person convicted of an infamous crime, nor to any one incapable by law of making a contract, nor to person not a citizen of the United States, unless he is a resident of the state, nor to a person under twenty-one years of age, or who is adjudged incompetent by the surrogate to execute the duties of such trust by reason of drunkenness, improvidence or want of understanding.

L. 1893, ch. 686.

§ 2662. [Am'd, 1893, 1909.] Application for letters.

A person entitled absolutely or contingently, to administration on the estate of an intestate, or any person having a claim for the funeral expenses of the decedent, may present to the surrogate's court having jurisdiction, a written petition, duly verified, praying for a decree awarding letters of administration, either to him, or to such other person or persons, having a prior right, as is entitled thereto, or in the alternative, as the petitioner elects, and if necessary, that the persons required to be cited, as prescribed in the next section, be cited to show cause why such a decree should not be made. The petition must set forth the petitioner's title; the facts on which the jurisdiction of the court to grant letters of administration upon the estate depends; and the names of the husband or wife, if any, and of the next of kin of the decedent, so far as they are known to the petitioner, or can be ascertained by him with due diligence. A citation shall not be issued, and a decree shall not be made, where a citation is not necessary, until the petitioner presumptively proves, by affidavit or otherwise, to the satisfaction of the surrogate, the existence of all the jurisdictional facts, and particularly that the decedent left no will. For the purpose of the inquiry touching any of these matters, the surrogate may issue a subpoena, requiring any person to attend and be examined as a witness.

Am'd by L. 1893, ch. 686; L. 1909, ch. 184. In effect Sept. 1, 1909.

§ 2663. [Am'd, 1893, 1911.] Citations; proceedings upon return thereof.

Every person, being a resident of the State, who has a right to administration, prior or equal to that of the petitioner, and who has not renounced, must be cited upon a petition for letters of administration. The surrogate may, in his discretion, issue a citation to non-residents, or those who have renounced, or to any or all other persons interested in the estate, whom he thinks proper to cite. Where it is not necessary to cite any person, a decree, granting to the petitioner letters, may be made on presentation of the petition. Where the surrogate is unable to ascertain, to his satisfaction, whether the decedent left, surviving him, any person

entitled to succeed to his estate, or if it shall appear to the surrogate that the decedent left no heirs-at-law or next of kin, a citation must be issued directed generally to all creditors of, and persons interested in the estate, and also to the attorney-general, and the public administrator of the proper county, requiring them to show cause why administration should not be granted to the petitioner. Any person who has a right to administration, prior or equal to that of the petitioner, may renounce his right by a written instrument, acknowledged or proved and certified in like manner as a deed to be recorded in the county, or otherwise proved to the satisfaction of the surrogate; which must be filed in the surrogate's office. Where a citation is issued, any creditor of the decedent, or any person interested in the personal estate, although not cited, may appear and make himself a party to the special proceeding, in like manner and with like effect, as a devisee or legatee, who is not cited on an application for probate. On the return of a citation, issued as prescribed in this article, the surrogate must make such a decree in the premises as justice requires. The decree may award administration to any party to the special proceeding who appears to be entitled thereto. The surrogate, in his discretion, may award administration without a personal examination of the persons to whom it is awarded.

Am'd by L. 1893, ch. 686; L. 1911, ch. 431, in effect Sept. 1, 1911.

§ 2664. [Am'd, 1893.] **Administrator's bond.**

A person appointed administrator, before letters are issued to him, must file his official oath, exetute to the people of the State, and file with the surrogate, the joint and several bond of himself and two or more sureties, in a penalty fixed by the surrogate, not less than twice the value of the personal property of which the decedent died possessed and of the probable amount to be recovered by reason of any right of action, granted to an executor or administrator, by special provision of law. The sum to be fixed as the amount of the penalty must be ascertained by the surrogate, by the examination on oath of the applicant or any other person, or otherwise, as the surrogate thinks proper. The bond must be conditioned that the administrator will faithfully discharge the trust reposed in him as such and obey all lawful decrees and orders of the surrogate's court touching the administration of the estate committed to him. But where a right of action is granted to an executor or administrator by special provision of law, if it appears to be impracticable to give a bond sufficient to cover the probable amount to be recovered, the surrogate may, in his discretion, accept modified security, and issue letters limited to the prosecution of such action, but restraining the executor or administrator from a compromise of the action, and the enforcement of any judgment recovered therein, until the further order of the surrogate on additional further satisfactory security. In cases where all the next of kin to the intestate consent the penalty of the bond need not exceed double the amount of the claims of the creditors, against the estate, presented to the surrogate, pursuant to a notice to be published twice a week for four weeks in the official State paper and in two newspapers published in the city of New York, and once a week for four weeks in two newspapers published in the county where the intestate usually resided, and in the county where he died, reciting an intention to apply for letters under this provision, and notifying creditors to present their claims to the surrogate on or before a day to be fixed in such notice, which shall be at least thirty days after the first publication thereof; but no

bond so given shall be for less than five thousand dollars; and such bond may be increased by order of the surrogate for cause shown. Pending such application, no temporary administrator shall be appointed, except on petition of such next of kin.

L. 1893, ch. 686. See Banking Law, § 1386, L. 1907, ch. 612.

§ 2865. [Am'd, 1893.] When county treasurer to be ex-officio public administrator.

The county treasurer of each county, except New York and Kings, by virtue of his office, has authority to collect and take charge of the assets of every person dying intestate, amounting to one hundred dollars or more, on which letters of administration are not granted, in the following cases:

1. When such persons leave assets in the county of the treasurer and there is no widow or relative in the county entitled or competent to take letters of administration on the estate.

2. When assets of any such person, after his death, come into the county of the treasurer and there is no person in the county entitled and competent to take administration of the estate.

In such cases intestacy is presumed until a will is proved and letters testamentary issued thereon. For the purpose of collecting and preserving such estates, the county treasurer may maintain suits in his name of office, and without any other authority, in the same manner as an executor may by law. If there is a widow or relative of such intestate entitled to administration on his estate in the county, and if due proof is made to the surrogate in the county that there are creditors or relatives of the deceased, residing more than one hundred miles distant from the residence of the surrogate, who are interested in the distribution of the estate, and that the effects of the deceased are in danger of waste or embezzlement, he may grant an order to the treasurer of the county, authorizing him to seize and secure the said effects, or any part thereof, which order shall vest in him all the powers given in this section. When any county treasurer is authorized, pursuant to the provisions of this section, to take charge of any property of an intestate, he shall have the same powers and be entitled to take the same proceedings which an administrator of the estate of a deceased person may have or be entitled to take, for the discovery of any property of the intestate, which may be concealed or withheld, and for the sale of any that may be perishable; and to cause an inventory of the property of the intestate to be made by appraisers appointed by the surrogate, executed by the county treasurer and filed with the surrogate. Such inventory shall be returned to the surrogate within ten days after the county treasurer takes charge of such property; and the time for making the return may, for good cause shown, be extended by the surrogate ten days longer. If the county treasurer neglects to make the return within the time prescribed, he shall forfeit the sum of five hundred dollars, to be sued for and recovered by the county superintendent of the poor, for the use of the poor of the county, and also forfeit his office. The treasurer of the county of Richmond shall not act in any case where the public administrator of the city of New York has jurisdiction.

L. 1893, ch. 686.

§ 2866. [Am'd, 1893.] Bond; letters of administration and proceedings thereon.

When the inventory is returned, the county treasurer must give the bond required by law to be given by a temporary administrator appointed by a surrogate, with such sureties and in such penalty as the surrogate approves, and the surrogate must then

issue letters to such county treasurer, authorizing him to collect and preserve the estate of the deceased. The surrogate must immediately thereafter cause notice thereof to be published once in each week for three months, in a newspaper printed in his county, and in the official State paper, requiring all persons claiming a right to administer on such estate to appear and interpose such claim before the surrogate within a certain time to be therein specified, not less than six months after the first publication of such notice in the official State paper. If before such time any person entitled to administer appears and claims the same, the surrogate must cause ten days' notice of such claim to be served on the county treasurer and may, at the expiration of such time, grant letters to such persons unless it appear that he is not entitled thereto; and thereon the publication of the notice must be discontinued. At the time appointed, if letters have not been previously granted, any person entitled to administration on such estate and duly qualified and competent, who appears and claims the same, shall be entitled to letters testamentary or of administration, as the case may be. On the granting of such letters, all control and authority of the county treasurer over the estate of the deceased cease, and he must deliver all the assets in his hands to the person so appointed after deducting therefrom the expenses incurred in securing and preserving the assets, in obtaining letters, and publishing the notice herein required, and a reasonable compensation for his services not exceeding three dollars for each day necessarily employed, to be allowed and taxed by the surrogate on the oath of the county treasurer. If letters testamentary or of administration be not granted by the surrogate to any person at or before the expiration of the time specified in the notice then unless it appear that such letters have already been granted by some other surrogate, the surrogate must grant letters of administration thereon to the county treasurer as in other cases, on receiving the like bond, with the like sureties, and in the like penalty, as administrators are required to give. The county treasurer must accept of such letters and give the bond above required. Such letters and the record thereof, and a transcript of such record, duly certified, are conclusive evidence of the authority of the county treasurer in all cases in which the surrogate has jurisdiction under this article. The surrogate must immediately transmit to the comptroller a certified copy of all such letters granted by him to the county treasurer, the expense of which must be paid to him out of the State treasury, on the warrant of the comptroller. Until letters of administration be granted, the county treasurer shall not proceed further in the administration of any estate than to pay the funeral charges of the deceased, to collect debts, to take possession of and secure his effects, to sell such thereof as are perishable and to defray the expenses of the proceedings required by law.

L. 1893, ch. 686.

§ 2067. [Am'd, 1893.] When authority of county treasurer superseded.

The powers and authority of the county treasurer in relation to the estate of a deceased person shall be superseded:

1. By the production of letters testamentary granted before or subsequently to his becoming vested with the authority of an administrator on the same estate.
2. By the production of letters of administration granted to any other person on the same estate before the county treasurer became vested with the powers of an administrator thereon.
3. By the production of letters of administration issued by the

surrogate of a county in this State of which the deceased was a resident at the time of his death, granted after the county treasurer became vested with the powers of an administrator on the estate of such deceased.

When his authority is so superseded, he must deliver to the executor or administrator producing such letters, all the assets of the deceased in his hands, after deducting therefrom the allowance for his services and the expenses incurred to be taxed and allowed by the surrogate. All acts done by him in good faith previous to the time when his authority shall be superseded shall be valid. All suits commenced by him may be continued by and in the name of the executor or administrator who succeeds him in the administration of the estate in relation to which the suit may be brought.

L. 1893, ch. 686.

§ 2668. [Am'd, 1893.] Powers and proceedings of county treasurer as administrator; payments into state treasury.

On receiving letters of administration, the county treasurer shall be vested with all the powers and rights of other administrators, and subject to the same duties and obligations, except as herein otherwise provided. He must account and may be compelled to account in the same manner as other administrators, and proceedings for such accounting may be had at the instance of any person interested, or of the attorney-general or the comptroller. He must be allowed on the settlement of his accounts for his expenses as other administrators, and for his services double the commissions allowed them by law. The residue of any moneys in his hands must be paid into the treasury of the state for the benefit of the persons entitled to receive the same. He must exhibit to the comptroller annually, at the time of rendering his account of taxes, a verified statement of all moneys received by him for commissions, services and expenses, and the total amount of his receipts and expenditures in each case in which he has taken charge of and collected any effects, or in which he has administered on any estate during the preceding year, with the name of the deceased, his place of residence at the time of his death, if known, and the place from which he came, if he was not a resident of the State at the time of his death. A copy of such statement must be published once a week for three weeks in a paper printed in the county and in the official State paper, the expense of which may be retained by him out of any balance in his hands payable into the State treasury. For a neglect to comply with this provision, he forfeits one hundred dollars to the people of the State, to be recovered by the attorney-general, and the comptroller shall give notice to the attorney-general of every such omission.

L. 1903, ch. 686.

§ 2669. [Am'd, 1893, 1904.] Public administrator of Kings county.

The surrogate of the county of Kings shall, on or before the nineteenth day of October, nineteen hundred and eleven, and every five years thereafter—except as hereinafter provided—appoint a suitable person as public administrator of said county to hold office for the term of five years unless sooner removed for cause, the said term beginning on the nineteenth day of October, nineteen hundred and eleven. In case of a vacancy in said office by reason of death, resignation or otherwise said surrogate shall fill the same by appointing a suitable person as public administrator for the full term of five years from the date of such ap-

pointment and qualification. Before entering upon the performance of the duties of his office the person so appointed must take and subscribe before the county clerk, or a justice of the supreme court, the constitutional oath of office, and execute a bond with sureties to be approved by a justice of the supreme court, to the county of Kings, in a penal sum of fifty thousand dollars, conditioned for the faithful discharge of all the duties of his office, and that he will fully and correctly account for and pay over all moneys and property that may come into his hands as such public administrator, according to law, which bond must be filed with the clerk of the county. He shall be entitled to retain from all moneys or property of any intestate that come into his hands after deducting all actual and necessary expenses the same commissions as are now allowed by law to executors or administrators, and he shall receive a salary for his services to be fixed by the board of estimate and apportionment of the city of New York upon the recommendation of the surrogate of the county of Kings, the same to be raised and paid each year in the same manner as are other county charges. The public administrator shall not receive to his own use any fees or emoluments in addition to his salary, and he shall pay into the treasury of the city of New York all commissions and costs received by him from any source whatever; such payments shall be made monthly and shall be accompanied by a sworn statement in such form as the comptroller of the city of New York shall prescribe, showing in detail the costs and commissions received and allowed to him. A suitable office for said public administrator shall be provided for him in one of the county buildings in the county of Kings. The surrogate shall also appoint a counsel and a clerk to said public administrator, their salaries to be fixed by the board of estimate and apportionment of the city of New York upon the recommendation of said surrogate and to be raised and paid each year in the same manner as are other county charges. He shall have the prior right and authority to collect, take charge of and administer upon the goods, chattels, personal property and debts of persons dying intestate, and for that purpose to maintain suits as such public administrator as any executor or administrator might by law in the following cases:

1. Whenever such person dies leaving any assets or effects in the county of Kings, and there is no widow, husband or next of kin entitled to a distributive share in the estate of such intestate, resident in the state, entitled, competent or willing to take out letters of administration on such estate.

2. Whenever assets or effects of any person dying intestate, after his death, come into the county of Kings and there is no such person entitled, competent or willing to take administration of the estate. In such cases intestacy is presumed until a will is proved and letters testamentary issued thereon. All provisions of law conferring jurisdiction, authority or power on, or otherwise relating to, the office of public administrator of the city of New York and to the office of public administrator in the several counties of the state, so far as applicable, apply to and are conferred on the office hereby created. The surrogate of the county of Kings, in cases where now authorized by law to issue letters of temporary administration, may in his discretion issue letters of temporary administration to such administrator without further security than required by this section.

L. 1893, ch. 686; L. 1904, ch. 357; L. 1911, ch. 774, in effect July 20,

ARTICLE FIFTH.

Temporary administration.

- Sec. 2670. When and how temporary administrators may be appointed.
 2671. Apparently superseded by § 2670.
 2672. General powers, etc., of temporary administrator.
 2673. Id.; as to requiring creditors to present claims.
 2674. Id.; as to paying debts.
 2675. Id.; as to real property.
 2676. Special powers of temporary administrator of absentee.
 2677. Temporary administrator of absentee may provide for family.
 2678. Deposit of money by temporary administrator.
 2679. Proceedings where he neglects to deposit.
 2680. Money deposited; how withdrawn.
 2681. Notices required by this article; how given.
 2682. When time to run for and against the estate.
 2683. Application of this chapter to collectors, etc., heretofore appointed.

§ 2670. [Am'd, 1892, 1901.] When and how temporary administrators may be appointed.

On the application of a creditor, or a person interested in the estate, the surrogate may, in his discretion, issue to one or more persons, competent and qualified to serve as executors, letters of temporary administration, in either of the following cases:

1. When for any cause, delay necessarily occurs in the granting of letters testamentary or letters of administration, or in probating a will.

2. Where a person, of whose estate the surrogate would have jurisdiction, if he was shown to be dead, disappears or is missing, so that, after diligent search, his abode cannot be ascertained, and under circumstances which afford reasonable ground to believe either that he is dead, or that he has become a lunatic, or that he has been secreted, confined, or otherwise unlawfully made away with; and the appointment of a temporary administrator is necessary for the protection of his property, and the rights of creditors or of those who will be interested in the estate, if it is found that he is dead. An appointment of a temporary administrator, in a case specified in subdivision first must be made by an order. At least ten days' notice of the application for such an order must be given to each party to the proceeding who has appeared, unless the surrogate is satisfied by proof that the safety of the estate requires the notice to be shortened, in which case he may shorten the time of service to not less than two days. Application for such an appointment, in a case specified in subdivision second, must be made by petition, in like manner as where an application is made for administration in case of intestacy; and the proceedings are the same as prescribed in article fourth of this title, relating to such last mentioned application. Such an application for the appointment of a temporary administrator may also be made, with like effect, and in like manner, as if made by a creditor, by the county treasurer of the county where the person, whose estate is in question, last resided; or, if he was not a resident of the state, of the county where any of his property, real or personal, is situated. A temporary administrator must qualify, as prescribed in article fourth of this title, with respect to an administrator in chief.

L. 1892, ch. 686; L. 1901, ch. 20. In effect Sept. 1, 1901.

§ 2671. [Apparently superseded by section 2670.]

§ 2672. [Am'd, 1881.] General powers, etc., of temporary administrator.

A temporary administrator, appointed as prescribed in this article, has authority to take into his possession personal property; to secure and preserve it; and to collect choses in action; and for either of those purposes, he may maintain any action or special proceeding. An action may be maintained against him, by leave of the surrogate, upon a debt of the decedent, or of the absentee whom he represents, in like manner, and with like effect, as if he was an administrator in chief. The surrogate may, by an order, made upon at least ten days' notice to all the parties who have appeared in the special proceeding, authorize the temporary administrator to sell, after appraisal, such personal property, specifying it, of the decedent, or of the absentee whom he represents, as it appears to be necessary to sell, for the benefit of the estate; or, if it appears that the safety of the estate requires the notice to be shortened, the surrogate may shorten the notice to not less than two days. The surrogate may, also, by order, authorize him to pay funeral expenses, or any expense of the administration of his trust, or stenographer's or referee's fees on contest of a will or administration; and he may also direct the payment of a legacy or other pecuniary provision under a will or a distributive share or just proportionate part thereof, according to section two thousand seven hundred and nineteen of this act as though he were an executor or administrator.

L. 1837, ch. 460, § 24 (4 Edm. 491), am'd; L. 1864, ch. 71, § 9 (6 Edm. 234).

§ 2673. *Id.*; as to requiring creditors to present claims.

After six months have elapsed, since letters were issued to a temporary administrator, appointed upon the estate, of either a decedent or an absentee, he has the same power, as an administrator in chief, to publish a notice requiring creditors of the decedent or absentee, to exhibit their demands to him. The publication thereof has the same effect, with respect to the temporary administrator, and also an executor or administrator, subsequently appointed upon the same estate, as if the temporary administrator was the executor or an administrator in chief, and the person to whom the subsequent letters are issued was his successor.

L. 1870, ch. 359, § 10.

§ 2674. *Id.*; as to paying debts.

After a year has elapsed, since letters were issued to a temporary administrator, appointed under the estate, of either a decedent or an absentee, the surrogate may, upon the application of the temporary administrator, and upon proof, to his satisfaction, that the assets exceed the debts, make an order, permitting the applicant to pay the whole or any part of a debt, due to a creditor of the decedent or absentee; or, upon the petition of such a creditor, he may issue a citation to the temporary administrator, requiring him to show cause why he should not pay the petitioner's debt. When such a petition is presented, the proceedings are, in all respects, the same as where a creditor presents a petition, praying for a decree directing an executor or

administrator to pay his debt, as prescribed in article first of title fourth of this chapter.

L. 1870, ch. 350, § 10.

§ 2675. [Am'd, 1901.] Id.; as to real property.

When a temporary administrator is appointed and a proceeding is pending for the probate of a will of real property, or there is a delay in the granting of letters testamentary or administration on such a will or in the qualification of a trustee named therein, the order appointing him may confer upon him authority to take possession of real property, in the same or another county, which is affected by the will, and to receive the rents and profits thereof. The surrogate may, by an order, confer upon him authority to lease any or all of the real property, for a term not exceeding one year; or to do any other act with respect thereto, except to sell it, which is, in the surrogate's opinion, necessary for the execution of the will, or the preservation or benefit of the real property. For either of these purposes, he may maintain or defend any action or special proceeding.

Id., § 13; L. 1901, ch. 21. In effect Sept. 1, 1901.

§ 2676. Special powers of temporary administrator of absentee.

A temporary administrator, appointed upon the estate of an absentee, has all the powers and authority enumerated in the last section, with respect to the real property of the absentee. His acts, done in pursuance of that authority, bind the absentee, if he is living, or his heir or devisee, if he is dead, in the same manner as the acts of an executor or administrator bind his successor.

§ 2677. Temporary administrator of absentee may provide for family.

Upon proof, satisfactory to the surrogate, that the wife or an infant child of an absentee, upon whose estate a temporary administrator has been appointed, is in such circumstances as to require provision to be made out of the estate for his or her maintenance, clothing, or education, the surrogate may make an order, directing the temporary administrator to make such provision therefor, as the surrogate deems proper, out of any personal property in his hands, not needed for the payment of debts.

L. 1875, ch. 518, § 4.

§ 2678. [Am'd, 1883.] Deposit of money by temporary administrator.

A temporary administrator, appointed as prescribed in this article, must, within ten days after any money belonging to the estate comes into his hands, deposit it as prescribed in this section. Where he was appointed by the surrogate's court of any county except New-York, it must be deposited with a person, with a bank, or with a domestic incorporated trust company, designated by the surrogate; but a natural person, so designated as depository, must first file in the surrogate's office a bond to the surrogate, in a penalty by him, executed by the depository and two sureties, and conditioned to render a faithful account, and pay over all money received by him, upon the

direction of any court of competent jurisdiction. Where the temporary administrator was appointed by the surrogate of the county of New-York, the money must be deposited in a domestic incorporated trust company, having its principal office or place of business in the city of New-York, and either specially approved by the surrogate, or designated, in the general rules of practice, as a depository of funds paid into court.

L. 1864, ch. 71, §§ 1, 2 (6 Edm. 232); L. 1863, ch. 309.

§ 2679. Proceedings where he neglects to deposit.

If a temporary administrator neglects to make a deposit, as prescribed in the last section, within the time therein limited, the surrogate must, upon the application of a creditor or person interested in the estate, accompanied with satisfactory proof of the neglect, make an order, directing him to do so forthwith, or to show cause why a warrant of attachment should not issue against him. In the county of New-York, the order must be made returnable three days after issuing it; and it must be served upon the temporary administrator, at least two days before the return day thereof, either personally or by leaving a copy thereof within the State at his dwelling place, or his office for the regular transaction of business in person; or, if it cannot be served in either of those methods, by serving it in such other manner, as the surrogate directs. In any other county, it must be made returnable within a reasonable time, not exceeding fifteen days after issuing it; and it must be served, in like manner, at least ten days before the return day thereof.

Id., § 3 (6 Edm. 232).

§ 2680. Money deposited; how withdrawn.

Money deposited by a temporary administrator, as prescribed in this article, cannot be withdrawn, except upon the order of the surrogate, a certified copy of which must be presented to the depository. Such an order may be made upon two days' notice of the application therefor, given to all the parties to the special proceeding, in which the temporary administrator was appointed, who appeared therein; but not otherwise.

Id., § 6.

Am'd L. 1715
CR. 644 **§ 2681. Notices required by this article; how given.**

A notice required to be given, as prescribed in this article, to a party other than the temporary administrator, must be served upon the attorney of the party to whom notice is to be given; or, if he has not appeared by an attorney, upon the party, in like manner as a notice may be served upon an attorney in a civil action, brought in the supreme court. But where the attorney or party to be served does not reside in the surrogate's county; or where the attorney for a party has died, and no other appearance for that party has been filed in the surrogate's office; the surrogate may, by order, dispense with notice to that party; or may require notice to be given to him, in any manner which he thinks proper.

§ 2682. When time to run for or against the estate.

Section 2583 of this act does not affect any proceeding in favor of or against an executor, or an administrator in chief, where a temporary administrator of the same estate has been

appointed, except as otherwise prescribed in section 2673 and section 2674 of this act.

§ 2683. Application of this chapter to collectors, etc., heretofore appointed.

Each provision of this chapter, imposing a duty or liability upon a temporary administrator, appointed upon the estate of a decedent, or his sureties; or conferring upon the surrogate power or authority with respect to such a temporary administrator, or his sureties; applies to a collector or special administrator, appointed before this chapter takes effect, and his sureties; except so far as it is repugnant to the provisions of law in force, when the collector or special administrator was appointed, or to the letters issued to him.

ARTICLE SIXTH.

Revocation of letters testamentary and letters of administration.

Sec. 2684. Revocation of letters, upon proof of will, or revocation of probate, etc.

2685. Revocation of letters for disqualification, misconduct, etc.

2686. Petition; citation thereupon.

2687. Hearing; decree.

2688. Decree not to affect testamentary trusts.

2689. Application by executor, etc., for revocation of letters.

2690. Proceedings thereupon.

2691. In what cases letters may be revoked without a citation.

2692. Remaining executors may act, where letters of one revoked.

2693. In other cases, successor to be appointed.

§ 2684. Revocation of letters, upon proof of will or revocation of probate, etc.

Where, after letters of administration, on the ground of intestacy, have been granted, a will is admitted to probate, and letters are issued thereupon; or where, after letters have been issued upon a will, the probate thereof is revoked, or a subsequent will is admitted to probate, and letters are issued thereupon; the decree, granting or revoking probate, must revoke the former letters.

2 R. S. 78, § 46 (2 Edm. 80). See § 2603, ante.

§ 2685. Revocation of letters for disqualification, misconduct, etc.

In either of the following cases, a creditor, or person interested in the estate of a decedent, may present, to the surrogate's court, from which letters were issued to an executor or administrator, a written petition, duly verified, praying for a decree revoking those letters; and that the executor or administrator may be cited to show cause, why a decree should not be made accordingly:

1. Where the executor or administrator was, when letters were issued to him, or has since become, incompetent, or disqualified by law to act as such; and the grounds of the objection did not exist, or the objection was not taken by the petitioner, or a person whom he represents, upon the hearing of the application for letters.

2. Where, by reason of his having wasted or improperly applied the money or other assets in his hands, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the property committed to his charge; or by reason of other misconduct in the execution of his office, or dishonesty, drunkenness, improvidence, or want of understanding; he is unfit for the due execution of his office.

3. Where he has wilfully refused, or, without good cause, neglected, to obey any lawful direction of the surrogate, contained in a decree or order; or any provision of law, relating to the discharge of his duty.

4. Where the grant of his letters was obtained by a false suggestion of a material fact.

5. In the case of an executor, where his circumstances are such, that they do not afford adequate security to the creditors or persons interested, for the due administration of the estate.

6. In the case of an executor, where he has removed or is about to remove from the State, and the case is not one, where

a non-resident executor would be entitled to letters without giving a bond.

7. In the case of an executor, where, by the terms of the will, his office was to cease upon a contingency, which has happened.

8. In the case of a temporary administrator, appointed upon the estate of an absentee, where it is shown that the absentee has returned; or that he is living, and capable of returning and resuming the management of his affairs; or that an executor, or an administrator in chief has been appointed upon his estate; or that a committee of his property has been appointed by a competent court of the State.

2 R. S. 72 (2 Edm. 73); L. 1837, ch. 400, § 84 (4 Edm. 493).

§ 2686. Petition; citation thereupon.

A petition, presented as prescribed in the last section, must set forth the facts and circumstances, showing that the case is one of those therein specified. Upon proof, by affidavit or oral testimony, satisfactory to the surrogate, of the truth of the allegations contained in the petition, a citation must be issued according to the prayer thereof; except that, where the case is within subdivision fifth of the last section, and the executor has given a bond, as prescribed in article first of this title, the surrogate may, in his discretion, entertain or decline to entertain the application.

§ 2687. Hearing; decree.

Upon the return of a citation, issued as prescribed in the last section, if the objections, or any of them, are established to the surrogate's satisfaction, he must make a decree, revoking the letters issued to the person complained of. But the surrogate may, in his discretion, dismiss the proceedings, upon such terms, as to costs, as justice requires, and may allow the letters to remain unrevoked, in either of the following cases:

1. Where the case is within subdivision third of the last section but one, if the direction of the surrogate or the provision of law is obeyed, and suitable amends made to each person injured by the neglect or refusal to obey it.

2. Where the case is within subdivision fourth of that section, if the person cited is entitled to letters, notwithstanding the false suggestion.

3. Where the case is within subdivision fifth of that section, if the executor gives, within a reasonable time, not exceeding five days, a bond, as prescribed in article first of this title.

2 R. S. 72, §§ 20 and 21 (2 Edm. 74)

§ 2688. Decree not to affect testamentary trusts.

Where an executor or an administrator is also a testamentary trustee, a decree revoking his letters does not affect his power or authority as testamentary trustee, except in the case specially prescribed for that purpose, in title sixth of this chapter.

§ 2689. Application by executor, etc., for revocation of letters.

An executor or administrator may, at any time, present, to the surrogate's court a written petition, duly verified, praying

that his account may be judicially settled; that a decree may thereupon be made, revoking his letters, and discharging him accordingly; and that the same persons may be cited to show cause, why such a decree should not be made, who must be cited upon a petition for a judicial settlement of his account, as prescribed in article second of title fourth of this chapter. The petition must set forth the facts upon which the application is founded; and it must, in all other respects, conform to a petition praying for a judicial settlement of the account of an executor or administrator. The surrogate may, in his discretion, entertain or decline to entertain the application.

L. 1870, ch. 359, § 3.

§ 2690. Proceedings thereupon.

If the surrogate entertains an application, made as prescribed in the last section, the proceedings thereupon must be, in all respects, the same, as upon a petition for a judicial settlement of the petitioner's account; except that, upon the hearing, the surrogate must first determine, whether sufficient reasons exist for granting the prayer of the petition. If he determines that they exist, he must make an order accordingly, and allowing the petitioner to account, for the purpose of being discharged. Upon his fully accounting, and paying over all money which is found to be due from him to the estate, and delivering over all books, papers, and other property of the estate in his hands, either into the surrogate's court, or in such a manner as the surrogate directs, a decree may be made, revoking the petitioner's letters, and discharging him accordingly.

Id., part of § 3.

§ 2691. In what cases letters may be revoked without a citation.

In either of the following cases, the surrogate must make a decree, revoking letters testamentary or letters of administration, issued from his court, without a petition or the issuing of a citation:

1. Where the person, to whom the letters were issued, is not a resident of the State, or is absent therefrom; and, upon being duly cited to account, neglects to appear upon the return of the citation, without showing a satisfactory excuse therefor; and the surrogate has not sufficient reason to believe that such an excuse can be made.

2. Where a citation, issued to such a person, in a case prescribed by law, cannot be personally served upon him, by reason of his having absconded or concealed himself.

3. Where, by reason of his default in returning an inventory, such a person has remained, for thirty days, committed to jail, under the surrogate's order, granted in proceedings taken as prescribed in section 2715 of this act.

4. In the case of a temporary administrator, where an order has been made and served, as prescribed in section 2679 of this act, directing him to deposit money, or show cause why a warrant of attachment should not issue against him; and a warrant of attachment, issued thereupon, has been returned not served upon him.

L. 1840, ch. 288, part of § 1 (4 Edm. 503); 2 R. S. 85, § 19 (2 Edm. 87).

§ 2692. Remaining executors may act, where letters of one revoked.

Where one of two or more executors or administrators dies, or becomes a lunatic, or is convicted of an infamous offence, or becomes otherwise incapable of discharging the trust reposed in him; or where letters are revoked with respect to one of them, a successor to the person, whose letters are revoked, shall not be appointed, except where such an appointment is necessary, in order to comply with the express terms of a will; but the others may proceed and complete the administration of the estate, pursuant to the letters, and may continue any action or special proceeding, brought by or against all.

2 R. S. 78, § 44 (2 Edm. 79); L. 1837, ch. 400, § 38 (4 Edm. 498).

§ 2693. In other cases, successor to be appointed.

When all the executors or all the administrators, to whom letters have been issued, die, or become incapable, as prescribed in the last section, or the letters are revoked as to all of them; the surrogate must grant letters of administration to one or more persons as their successors, in like manner as if the former letters had not been issued; and the proceedings to procure the grant of such letters, are the same, and the same security shall be required, as in a case of intestacy, except that the surrogate may, in his discretion, in case where the estate has been partially administered upon the former representative or representatives, fix as the penalty of the bond to be given by such successor or successors, a sum not less than twice the value of the assets of the estate remaining unadministered.

Id., § 45. See § 2695.

ARTICLE SEVENTH.

Foreign wills; ancillary letters.

- Sec. 2694. Testamentary dispositions; what law governs.
 2695. Ancillary letters upon foreign probate.
 2696. Id.; upon foreign grant of administration.
 2697. To whom ancillary letters granted.
 2698. Petition; citation.
 2699. Hearing; security.
 2700. Persons acting under ancillary letters must transmit assets.
 2701. Id.; when they may be directed to pay, etc., without transmission.
 2702. Id.; general powers and duties.
 2703. Recording wills proved in other states, etc.
 2704. Papers recorded, etc.; how authenticated.
 2705. [Repealed.]

§ 2694. [Repealed by L. 1909, ch. 18. See Consolidated Laws, tit. Decedent Estate Law, § 47.]

§ 2695. [Am'd, 1888, 1909.] **Ancillary letters upon foreign probate.**

Where a will of personal property, made by a person who resided without the State at the time of the execution thereof, or at the time of his death, has been admitted to probate, within the foreign country, or within the state, or the territory of the United States, where it was executed, or where the testator resided at the time of his death; the surrogate's court, having jurisdiction of the estate, must, upon an application made as prescribed in this article, accompanied by a copy of the will, and of the foreign letters, if any have been issued, authenticated as prescribed in section forty-five of the decedent estate law, record the will and foreign letters, and issue thereupon ancillary letters testamentary, or ancillary letters of administration with the will annexed, as the case requires.

2 R. S. 67, § 68a (2 Edm. 68); L. 1840, ch. 384, § 2 (4 Edm. 501); L. 1888, ch. 495, Am'd by L. 1909, ch. 65, § 3. See note 75 of notes of Board of Statutory Consolidation at end of code.

§ 2696. [Am'd, 1888, 1909.] **Id.; upon foreign grant of administration.**

Upon the application by the party entitled, as hereinafter provided, or by his duly authorized attorney in fact, made as prescribed in this article, to a surrogate's court having jurisdiction of the estate, and upon the presentation of a copy, authenticated as prescribed in section forty-five of the decedent estate law, of letters of administration upon the estate of a decedent who resided, at the time of his death, without this State, but within the United States, granted within the state or territory where the decedent so resided, or, in cases where the decedent, at the time of his death, resided without the United States, upon the presentation to such surrogate's court of satisfactory proof that the party so applying, either personally or by such attorney in fact, is entitled to the possession in the foreign country of the personal estate of such decedent, the surrogate's court to which such copy of such foreign letters so authenticated, or such proof is so presented, must issue ancillary letters of administration, in accordance with such application, except in the following cases:

1. Where ancillary letters have been previously issued, as prescribed in the last section.

2. Where an application, for letters of administration upon the estate, has been made by a relative of the decedent, who

is legally competent to act, to a surrogate's court of this State, having jurisdiction to grant the same; and letters have been granted accordingly or the application has not been finally disposed of.

2 B. S. 75, § 31 (2 Edm. 77); L. 1888, ch. 405. Am'd by L. 1909, ch. 65, § 3. See note 76 of notes of Board of Statutory Consolidation at end of code.

§ 2697. [Am'd, 1881.] To whom ancillary letters granted.

Where the will specially appoints one or more persons as the executors thereof, with respect to personal property situated within the State, the ancillary letters testamentary must be directed to the persons so appointed, or to those who are competent to act and qualify. If all are incompetent, or fail to qualify, or in a case where such an appointment is not made, ancillary letters testamentary, or ancillary letters of administration, issued as prescribed in this article, must be directed to the person named in the foreign letters, or to the person otherwise entitled to the possession of the personal property of the decedent, unless another person applies therefor, and files with his petition, an instrument, executed by the foreign executor or administrator, or person otherwise entitled as aforesaid; or if there are two or more, by all who have qualified and are acting; and also acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, authorizing the petitioner to receive such ancillary letters; in which case, the surrogate must, if the petitioner is a fit and competent person, issue such letters directed to him. Where two or more persons are named in the foreign letters, or in an instrument executed as prescribed in this section, the ancillary letters may be directed to either or any of them, without naming the others, if the others fail to qualify, or if, for good cause shown, to the surrogate's satisfaction, the decree so directs.

L. 1863, ch. 403, § 1 (6 Edm. 144).

§ 2698. [Am'd, 1899, 1910.] Petition; citation.

An application for ancillary letters, testamentary, or ancillary letters of administration, as prescribed in this article, must be made by petition. Upon the presentation thereof, the surrogate must ascertain, to his satisfaction, whether any creditors, or persons claiming to be creditors of the decedent reside within the State; and if so, the name and residence of each creditor, or person claiming to be a creditor, so far as the same may be ascertained. Unless such creditors shall file duly acknowledged waivers of the issuance and service of citation, he must thereupon issue a citation, directed to each person whose name and residence have been so ascertained and who has not waived the issuance and service of such citation. The surrogate may also in his discretion issue a citation directed generally to all creditors, or persons claiming to be creditors, of the decedent. Any such person, although not cited by his name, may appear, and contest the application, and thus make himself a party to the special proceeding. (See Tax L., § 228.)

Id., §§ 2 and 3 (6 Edm. 144); L. 1899, ch. 717; L. 1910, ch. 234. In effect Sept. 1, 1910.

§ 2699. Hearing; security.

Upon the return of the citation, the surrogate must ascertain, as nearly as he can do so, the amount of debts due, or claimed

to be due, from the decedent to residents of the State. Before ancillary letters are issued, the person, to whom they are awarded must qualify, as prescribed in article fourth of this title, for the qualification of an administrator upon the estate of an intestate; except that the penalty of the bond may, in the discretion of the surrogate, be in such a sum, not exceeding twice the amount which appears to be due from the decedent to residents of the State, as will, in the surrogate's opinion, effectually secure the payment of those debts; or the sums which the resident creditors will be entitled to receive, from the persons to whom the letters are issued, upon an accounting and distribution, either within the State, or within the jurisdiction where the principal letters were issued.

L. 1863, ch. 403, part of § 1.

§ 2700. Persons acting under ancillary letters must transmit assets.

The person to whom ancillary letters are issued, as prescribed in this article, must, unless otherwise directed in the decree awarding the letters; or in a decree made upon an accounting; or by an order of the surrogate, made during the administration of the estate; or by the judgment or order of a court of record, in an action to which that person is a party; transmit the money and other personal property of the decedent, received by him, after the letters are issued, or then in his hands in another capacity, to the State, territory, or country, where the principal letters were granted, to be disposed of pursuant to the laws thereof. Money or other property, so transmitted by him, at any time before he is so directed to retain it, must be allowed to him upon an accounting.

§ 2701. *Id.* when they may be directed to pay, etc., without transmission.

The surrogate's court, or any court of the State, which has jurisdiction of an action to procure an accounting, or a judgment construing the will, may, in a proper case, by its judgment or decree, direct a person, to whom ancillary letters are issued as prescribed in this article, to pay, out of the money or the avails of the property, received by him under the ancillary letters, and with which he is chargeable upon his accounting, the debts of the decedent, due to creditors residing within the State; or, if the amount of all the decedent's debts, here and elsewhere, exceeds the amount of all the decedent's personal property, apportionable thereto, to pay such a sum to each creditor, residing within the State, as equals that creditor's share of all the distributable assets, or to distribute the same among legatees or next of kin, or otherwise dispose of the same, as justice requires.

§ 2702. *Id.* general powers and duties.

The provisions of this chapter, relating to the rights, powers, duties, and liabilities of an executor or administrator, apply to a person to whom ancillary letters are granted, as prescribed in this article; except those contained in title fifth thereof; or where special provision is otherwise made in this article; or where a contrary intent is expressed in, or plainly to be inferred from, the context.

§§ 2703-2704. [Repealed by L. 1909, ch. 18. See Consolidated Laws, tit. Decedent Estate Law, §§ 44-45.]

§ 2705. [Repealed by L. 1888, ch. 495.]

ARTICLE EIGHTH.

(Added by L. 1909, ch. 65.)

Probate of foreign wills.

Sec. 2705. Probate of foreign wills in this state.

§ 2705. Probate of foreign wills in this state.

The last will and testament of any person being a citizen of the United States, or, if female, whose father or husband previously shall have declared his intention to become such citizen, who shall have died, or hereafter shall die, while domiciled or resident within the United Kingdom of Great Britain and Ireland, or any of its dependencies, which shall affect property within this state, and which shall have been duly proven within such foreign jurisdiction, and there admitted to probate, shall be admitted to probate in any county of this state wherein shall be any property affected thereby, upon filing in the office of the surrogate of such county, and there recording, a copy of such last will and testament, certified under the hand and seal of a consul-general of the United States resident within such foreign jurisdiction, together with the proofs of the said last will and testament, made and accepted within such foreign jurisdiction, certified in like manner; and letters testamentary of such last will and testament shall be issued to the persons named therein to be the executors and trustees, or either, thereof, or to those of them who, prior to the issuance of such letters, by formal renunciation, duly acknowledged or proven in the manner prescribed by law, shall not have renounced the trust therein devolved upon them; provided, that before any such will shall be admitted to probate in any county of this state, the same proceedings shall be had in the surrogate's court of the proper county as are required by law upon the proof of the last will and testament of a resident of this state who shall have died therein; except that there need be cited upon such probate proceedings only the beneficiaries named in such will.

Added by L. 1909, ch. 65. Derivation — L. 1894, ch. 731, § 1. See note 25 of notes of Board of Statutory Consolidation at end of code.

TITLE IV.

Proceedings by or against an executor or administrator touching the administration and settlement of the estate.

- Article 1. Aid, supervision, and control of an executor or administrator.
 2. Accounting; and settlement of the estate.

ARTICLE FIRST.*Aid, supervision, and control of an executor or administrator.*

Sec. 2706. Liability of persons unauthorized to act as executors or administrators.

2707. Proceedings to discover property withheld, etc.

2706. Order: service of citation and order; officers who may act in surrogate's absence.

2709. Examination and decree.

2710. Security to prevent decree; warrant to seize property.

2711. Appointment of appraisers and appraisal.

2712. What shall be deemed assets.

2713. Exemption for widow and children.

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2716. Id.; how compelled.

2717. Sale of personal property.

2718. Ascertainment of debts.

2718a. Claims against executor or administrator.

2719. Payment of debts.

2720. Apportionment of rents, annuities and dividends.

2721. Payment of legacies.

§ 2706. [Am'd, 1893.] Liability of persons unauthorized to act as executors or administrators.

Every person becoming possessed of property of a testator or intestate, without being thereto duly authorized as executor or administrator, or without authority from the executor or administrator, is liable to account for the full value of such property to every person entitled thereto, and shall not be allowed to retain or deduct therefrom any debt due to him.

L. 1893, ch. 686.

§ 2707. [Am'd, 1893, 1903.] Proceedings to discover property withheld, etc.

An executor or administrator may present to the surrogate's court, from which letters were issued to him, a written petition duly verified setting forth, on knowledge, or information and belief, any facts tending to show that money or other personal property which should be delivered to the petitioner, or included in an inventory or appraisal, is in the possession, under the control or within the knowledge or information of a person who withholds the same from him; or who refuses to impart knowledge or information he may have concerning the same, or to disclose any other fact which will aid such executor or administrator in making discovery of such property, so that it cannot be inventoried or appraised; and praying an inquiry respecting it, and that the person complained of may be cited to attend the inquiry and be examined accordingly, and to deliver the property if in his control. The petition may be accompanied by an affidavit or other evidence written or oral tending to support the allegations thereof. If the surrogate is satisfied, on the papers so presented, that there are reasonable grounds for the inquiry, he must issue a citation accordingly; which may be made returnable forthwith, or at a future time fixed by the surrogate, and may be served at any time before the hearing. Where the person or any of the persons, to be cited does not reside, or is not

within the county of the surrogate, the citation, in the surrogate's discretion, may require him to appear at a specified time and place within the county where he resides or is served before the surrogate of that county.

L. 1893, ch. 686; L. 1903, ch. 526. In effect Sept. 1, 1903.

§ 2708. [Am'd, 1893, 1895, 1903.] Order; service of citation and order; officers who may act in surrogate's absence.

The surrogate must annex to or endorse upon the citation an order requiring the party cited to attend personally, at the time and place therein specified. The citation and order must be personally served, and service thereof is ineffectual, unless it is accompanied with payment or tender of the sum required by law to be paid or tendered to a witness who is subpoenaed to attend a trial in the supreme court.

L. 1893, ch. 686; L. 1895, ch. 946; L. 1903, ch. 526. In effect Sept. 1, 1903.

§ 2709. [Am'd, 1893, 1903.] Examination and decree.

On the attendance of a person to whom a citation is issued, as prescribed in this article, he may submit an answer duly verified showing cause why the examination should not proceed. The surrogate may then dismiss the proceeding or direct the examination to proceed. In the latter case he must be sworn to answer truly all questions put to him, touching the inquiry prayed for in the petition; and he may be examined fully and at large respecting property of the decedent, or of which the decedent had possession at the time of or within two years before his death. A refusal to attend or be sworn, or to answer a question which the surrogate determines to be proper, is punishable in the same manner as a like refusal by a witness subpoenaed to attend a hearing before the surrogate. The extent of the examination shall be in the discretion of the surrogate. If the witness is examined concerning any personal communication or transaction between himself and the decedent, all objection under section eight hundred and twenty-nine to his testimony as to the same in future litigation is waived. Either party may produce further evidence, in like manner and with like effect as on a trial.

Old sections 2710-2712 consolidated; L. 1893, ch. 686; L. 1903, ch. 526. In effect Sept. 1, 1903.

§ 2710. [Am'd, 1893, 1903.] Security to prevent decree; warrant to seize property.

If the facts admitted by the witness show that he is in the control of property to whose immediate possession the petitioner is entitled, the surrogate may decree that it be delivered to the petitioner. If the witness admits having the control of the property, but the facts as to the petitioner's right are in dispute, the proceeding shall end, unless the parties consent to its determination by the surrogate, in which case it shall be so determined.

Old sections 2713-2714 consolidated; L. 1893, ch. 686; L. 1903, ch. 526. In effect Sept. 1, 1903.

§ 2711. [Am'd, 1893, 1901.] Appointment of appraisers and appraisal.

On the application of an executor or administrator, the surrogate, by writing, must appoint two disinterested appraisers, as often as may be necessary, to appraise the personal property of a deceased person, who shall be entitled to receive a reasonable compensation for their services, to be allowed by the surrogate, not exceeding for each the sum of five dollars for each day actually employed in making appraisement, in addition to expenses actually and necessarily incurred. The number of days' services

rendered, and the amount of such expenses, must be verified by the affidavit of the appraiser, delivered to the executor or administrator, and adjusted by the surrogate before payment of the fees. The executors and administrators, within a reasonable time after qualifying and after giving a notice of at least five days to the legatees, and next of kin, residing in the county where the property is situated, and posting a notice in three of the most public places of the town, specifying the time and place at which the appraisement will be made, must make a true and perfect inventory of all the personal property of the testator or intestate; and if in different and distant places two or more such inventories as may be necessary. Before making the appraisement, the appraisers must take and subscribe an oath, to be inserted in the inventory, that they will truly, honestly and impartially appraise the personal property exhibited to them, according to the best of their knowledge and ability. They must in the presence of such of the parties interested as attend, estimate and appraise the property exhibited to them, and set down each article separately with the value thereof in dollars and cents, distinctly, in figures opposite to the articles respectively. Service of the notice above mentioned may be either personal or in the manner prescribed by section seven hundred and ninety-seven, subdivision one and section seven hundred and ninety-eight of this act.

L. 1893, ch. 686; L. 1901, ch. 195. In effect Sept. 1, 1901.

§ 2712. [Am'd, 1893.] What shall be deemed assets.

The following shall be deemed assets and go to the executors or administrators, to be applied and distributed as part of the personal property of the testator or intestate, and be included in the inventory:

1. Leases for years; lands held by the deceased from year to year; and estates held by him for the life of another person.
2. The interest remaining in him, at the time of his death, in a term of years after the expiration of any estate for years therein, granted by him or any other person.
3. The interest in lands devised to an executor for a term of years for the payment of debts.
4. Things annexed to the freehold, or to any building for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support.
5. The crops growing on the land of the deceased at the time of his death.
6. Every kind of produce raised annually by labor and cultivation, except growing grass and fruit ungathered.
7. Rent reserved to the deceased which had accrued at the time of his death.
8. Debts secured by mortgages, bonds, notes or bills; accounts, money, and bank bills, or other circulating medium, things in action, and stock in any corporation or joint-stock association.
9. Goods, wares, merchandise, utensils, furniture, cattle, provisions, moneys unpaid on contracts for the sale of lands, and every other species of personal property not hereinafter excepted. Things annexed to the freehold, or to a building, shall not go to the executor, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned in the fourth subdivision of this section. The right of an heir to any property, not enumerated in this section, which by the common law would descend to him, is not impaired by the general terms of this section.

L. 1893, ch. 686.

§ 2718. [Am'd, 1893.] Exemption for widow and children.

If a man having a family die, leaving a widow or minor child or children, the following articles shall not be deemed assets, but must be included and stated in the inventory of the estate without being appraised:

1. All spinning-wheels, weaving-loom, one knitting-machine, one sewing-machine, and stoves put up or kept for use by his family.

2. The family bible, family pictures and school-books, used by or in such family, and books not exceeding in value fifty dollars, which were kept and used as part of the family library.

3. Sheep to the number of ten, with their fleeces, and the yarn and cloth manufactured from the same; one cow, two swine, and the pork of such swine, and necessary food for such swine, sheep or cow for sixty days, and all necessary provisions and fuel for such widow, child or children for sixty days after the death of such deceased person.

4. All necessary wearing apparel, beds, bedsteads and bedding, necessary cooking utensils, the clothing of the family, the clothes of the widow and her ornaments proper for her station; one table, six chairs, twelve knives and forks, twelve plates, twelve tea cups and saucers, one sugar dish, one milk-pot, one tea-pot, and twelve spoons, and other household furniture not exceeding one hundred and fifty dollars in value.

5. Other necessary household furniture, provisions or other personal property, in the discretion of the appraisers, to the value of not exceeding one hundred and fifty dollars.

Such articles and property shall remain in the possession of the widow, if there be one, during the time she lives with and provides for such minor child or children. If she ceases so to do, she shall be allowed to retain as her own, her wearing apparel, her ornaments and one bed, bedstead and the bedding for the same, and the property specified in subdivision five; and the other articles so exempted shall then belong to such minor child or children. If she lives with and provides for such minor child or children until it or they become of full age, all the articles and property in this section mentioned shall belong to the widow. If there be a widow and no minor child, all the articles and property in this section mentioned shall belong to the widow. If a married woman die, leaving surviving her a husband, or a minor child or children, the same articles and personal property shall be set apart by the appraisers with the same effect for the benefit of such husband or minor child or children.

L. 1893, ch. 686.

§ 2714. [Am'd, 1893.] Contents of inventory.

The inventory must contain a particular statement of all bonds, mortgages, notes and other securities for the payment of money belonging to the deceased, known to the executor or administrator; with the name of the debtor in each security, the date, the sum originally payable; the indorsements thereon, if any, with their dates and the sum which, in the judgment of the appraisers, is collectible on each security; and of all moneys, whether in specie, or bank bills, or other circulating medium belonging to the deceased, which have come to the hands of the executor or administrator, and if none have come to his hands, the fact shall be stated in the inventory. The naming of a person executor in a will does not operate as a discharge or bequest of any just claim

which the testator had against him; but it must be included among the credits and effects of the deceased in the inventory, and the executor shall be liable for the same as for so much money in his hands at the time the debt or demand becomes due, and he must apply and distribute the same in the payment of debts and legacies, and among the next of kin as part of the personal property of the deceased. The discharge or bequest in a will of a debt or demand of the testator against an executor named therein, or against any other person, is not valid as against the creditors of the deceased; but must be construed only as a specific bequest of such debt or demand; and the amount thereof must be included in the inventory and, if necessary, be applied in the payment of his debts; and if not necessary for that purpose, must be paid in the same manner and proportion as other specific legacies. If personal property not mentioned in any inventory come to the possession or knowledge of an executor or administrator, he must cause the same to be appraised as herein required, and an inventory thereof to be returned within two months after the discovery thereof; and the making of such inventory and return may be enforced in the same manner as in the case of a first inventory.

L. 1893, ch. 686.

§ 2715. [Am'd, 1893.] Return of inventory.

Duplicates of the inventory must be made and signed by the appraisers, one of which must be retained by the executor or administrator, and the other returned to the surrogate within three months from the date of the letters. On returning such inventory, the executor or administrator must take and subscribe an oath, indorsed upon or annexed to the inventory, stating that the inventory is in all respects just and true, that it contains a true statement of all the personal property of the deceased which has come to his knowledge, and particularly of all money, bank bills and other circulating medium belonging to the deceased, and of all just claims of the deceased against him, according to the best of his knowledge. Any one executor or administrator, on the neglect of the others, may return an inventory; and the executors or administrators so neglecting shall not thereafter interfere with the administration or have any power over the personal property of the deceased; but the executor or administrator so returning the inventory shall have the whole administration, until the delinquent return, and verify an inventory, in accordance with the provisions of this article.

L. 1893, ch. 686.

§ 2716. [Am'd, 1893.] Return of inventory; how compelled.

A creditor or person interested in the estate may present to the surrogate's court proof, by affidavit, that an executor or administrator has failed to return an inventory, or a sufficient inventory, within the time prescribed by law therefor. If the surrogate is satisfied that the executor or administrator is in default, he must make an order requiring the delinquent to return the inventory, or a further inventory, or in default thereof, to show cause, at a time and place therein specified, why he should not be attached. On the return of the order, if the delinquent has not filed a sufficient inventory, the surrogate must issue a warrant of attachment against him, on which the proceedings are

the same as on a warrant issued for disobedience to an order, prescribed in title twelfth of chapter seventeenth of this act. A person committed to jail on the return of a warrant of attachment, issued as prescribed in this section, may be discharged by the surrogate or a justice of the supreme court, on his paying and delivering, under oath, all the money and other property of the decedent, and all papers relating to the estate, under his control, to the surrogate, or to a person authorized by the surrogate to receive the same.

Old sections 2715-2716 consolidated; L. 1893, ch. 686.

§ 2717. [Am'd, 1893, 1912.] Sale of personal property.

If an executor or administrator discover that the debts against any deceased person or the legacies bequeathed by him cannot be paid and satisfied without a sale of the personal property of the deceased, the same, so far as may be necessary for the payment of such debts or legacies, must be sold. An administrator may sell the personal property of the intestate at any time when it is necessary to do so for the purpose of distribution. The sale may be public or private, and, except in the city of New York, may be on credit not exceeding one year, with approved security. The executor or administrator is not responsible for any loss happening on the sale when made in good faith and with ordinary prudence. Articles not necessary for the support and subsistence of the family of the deceased, or not specifically bequeathed, must be first sold; and articles so bequeathed must not be sold until the residue of the personal estate has been applied to the payment of debts.

Am'd by L. 1893, ch. 686; L. 1912, ch. 341, in effect Sept. 1, 1912.

§ 2718. [Am'd, 1893.] Ascertainment of debts.

The executor or administrator at any time after the granting of his letters, may insert a notice once in each week for six months in such newspaper or newspapers printed in the county as the surrogate directs, requiring all persons having claims against the deceased to exhibit the same, with the vouchers therefor, to him, at a place to be specified in the notice, at or before a day therein named, which must be at least six months from the day of the first publication of the notice. The executor or administrator may require satisfactory vouchers in support of any claim presented and the affidavit of the claimant that the claim is justly due, that no payments have been made thereon, and that there are no offsets against the same to the knowledge of the claimant. If the executor or administrator doubts the justice of any such claim, he may enter into an agreement in writing with the claimant to refer the matter in controversy to one or more disinterested persons, to be approved by the surrogate. On filing such agreement and approval in the office of the clerk of the su-

preme court in the county in which the parties or either of them reside, an order shall be entered by the clerk referring the matter in controversy to the person or persons so selected. On the entry of such order the proceeding shall become an action in the supreme court. The same proceedings shall be had in all respects, the referees shall have the same powers, be entitled to the same compensation, and subject to the same control as if the reference had been made in an action in which such court might, by law, direct a reference. In determining the question of costs the referee shall be governed by sections eighteen hundred and thirty-five and eighteen hundred and thirty-six of this act. Judgment may be entered on the report of the referee and such judgment shall be valid and effectual in all respects as if the same had been rendered in a suit commenced by the ordinary process, and the practice on appeal therefrom shall be the same as in other civil actions. If a suit be brought on a claim which is not presented to the executor or administrator within six months from the first publication of such notice, the executor or administrator shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claims, or of any legacies, or in making distribution to the next of kin before such suit was commenced.

L. 1893, ch. 686. See § 1822.

§ 2718-a. [Added, 1904.] Claims against executor or administrator.

Upon the petition of an executor or administrator, after notice of publication to creditors to present claims has been completed, a citation may be issued against any claimant directing him to present his claim to the surrogate for determination at a date not less than three months from the service of the citation upon him. If he shall not have commenced an action against the petitioner upon his claim prior to the return day, the claim shall be deemed forever barred unless on the return day he shall consent to its determination by the surrogate, in which case it shall be so determined. The word claimant within the meaning of this section shall be deemed to include every person claiming to be a creditor of the estate or claiming a right in or lien upon any personal property in the custody of the petitioner or any claim against the petitioner by reason of any act of his in the administration of the estate, or in his representative capacity.

L. 1904, ch. 380. In effect Sept. 1, 1904.

§ 2719. [Am'd, 1893.] Payment of debts.

Every executor and administrator must proceed with diligence to pay the debts of the deceased according to the following order:

1. Debts entitled to a preference under the laws of the United States.

2. Taxes assessed on the property of the deceased previous to his death.

3. Judgments docketed, and decrees entered against the deceased according to the priority thereof respectively.

4. All recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts.

Preference shall not be given in the payment of a debt over other debts of the same class, except those specified in the third class. A debt due and payable shall not be entitled to a preference over debts not due. The commencement of a suit for the recovery of a debt or the obtaining a judgment thereon against the executor or administrator shall not entitle such debt to preference over others of the same class. Debts not due may be paid according to the class to which they belong, after deducting a rebate of legal interest on the sum paid for the unexpired term of credit without interest. An executor or administrator shall not satisfy his own debt or claim out of the property of the deceased until proved to and allowed by the surrogate; and it shall not have preference over others of the same class. Preference may be given by the surrogate to rents due or accruing on leases held by the testator or intestate at the time of his death, over debts of the fourth class, if it appear to his satisfaction that such preference will benefit the estate of the testator or intestate. The surrogate may authorize the executor or administrator to compromise or compound a debt or claim, on application, and for good and sufficient cause shown, and to sell at public auction on such notice as the surrogate prescribes, any uncollectible, stale or doubtful debt or claim belonging to the estate; but any party interested in the final settlement of the estate may show on such settlement that such debt or claim was fraudulently or negligently compromised or compounded.

L. 1893, ch. 686.

§ 2720. [Am'd, 1893.] Apportionment of rents, annuities and dividends.

All rents reserved on any lease made after June seventh, eighteen hundred and seventy-five, and all annuities, dividends and other payments of every description made payable or becoming due at fixed periods under any instrument executed after such date, or, being a last will and testament that takes effect after such date, shall be apportioned so that on the death of any person interested in such rents, annuities, dividends or other such payments, or in the estate or fund from or in respect to which the same issues or is derived, or on the determination by any other means of the interest of any such person, he, or his

executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, dividends and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof, as the case may be, including the day of the death of such person, or of the determination of his or her interest, after making allowance and deductions on account of charges on such rents, annuities, dividends and other payments. Every such person or his executors, administrators or assigns shall have the same remedies at law and in equity for recovering such apportioned parts of such rents, annuities, dividends and other payments, when the entire amount of which such apportioned form part, become due and payable and not before, as he or they would have had for recovering and obtaining such entire rents, annuities, dividends and other payments, if entitled thereto: but the persons liable to pay rents reserved by any lease or demise, or the real property comprised therein shall not be resorted to for such apportioned parts, but the entire rents of which such apportioned parts from* parts, must be collected and recovered by the person or persons who, but for this section, or chapter five hundred and forty-two of the laws of eighteen hundred and seventy-five, would have been entitled to the entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this section. This section shall not apply to any case in which it shall be expressly stipulated that no apportionment be made, or to any sums made payable in policies of insurance of any description.

L. 1893, ch. 696.

§ 2721. [Am'd, 1893.] Payment of legacies.

No legacy shall be paid by an executor or administrator until after the expiration of one year from the time of granting letters testamentary or of administration, unless directed by the will to be sooner paid. If directed to be sooner paid, the executor or administrator may require a bond, with two sufficient sureties, conditioned, that if debts against the deceased duly appear, and there are not other assets sufficient to pay other legacies, then the legatees will refund the legacy so paid, or such ratable portion thereof with the other legatees, as may be necessary for the payment of such debts, and the proportional parts of such other legacies, if there be any, and the costs and charges incurred by reason of the payment to such legatee, and that if the probate of the will, under which such legacy is paid, be revoked, or the will declared void, that such legatee will refund the whole of such

* So in the original.

legacy, with interest, to the executor or administrator entitled hereto. After the expiration of one year, the executors or administrators must discharge the specific legacies bequeathed by the will and pay the general legacies, if there be assets. If there are not sufficient assets, then an abatement of the general legacies must be made in equal proportions. Such payment shall be enforced by the surrogate in the same manner as the return of an inventory, and by a suit on the bond of such executor or administrator whenever directed by the surrogate.

L. 1893, ch. 686.

ARTICLE SECOND.

Accounting and settlement of the estate.

Sec. 2722. Petition to compel payment; hearing; decree.

2723. Decree for payment of legacy, etc., on giving security.

2724. Proceedings for neglect to set apart exempt property; proceedings upon judicial settlement.

2725. Intermediate accounting.

2726. When surrogate may require judicial settlement of account.

2727. Citation; order to account, and proceedings thereon.

2728. Executors, etc., may petition for judicial settlement; citation thereupon.

2729. Affidavit to account; vouchers; examination of accounting party.

2730. Commissions of executor or administrator.

2731. Determination of claim by surrogate; suspension of statute of limitations in certain cases.

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2733. Adjustment of advancements.

2734. Estates of married women.

2735-2741. [Repealed, L. 1893, ch. 636.]

2742. Effect of judicial settlement of account.

2743. Decree for payment and distribution.

2744. Id.; when specific property may be delivered.

2745. Id.; when money may be retained.

2746. Id.; share of infant.

2747. Legacy, etc., to unknown person to be paid into State treasury.

2748. When legacy, etc., to be paid to county treasurer.

2722. [Am'd, 1893, 1911.] Petition to compel payment; hearings; decree.

In either of the following cases a petition may be presented to the surrogate's court, praying for a decree directing an executor or administrator to pay the petitioner's claim, and that he be cited to show cause why such a decree should not be made:

1. By a creditor, for the payment of a debt, or of its just proportional part, at any time after six months have expired since letters were granted.

2. By a person entitled to a legacy, or any other pecuniary provision under the will, or a distributive share, for the payment or satisfaction thereof, or of its just proportional part, at any time after one year has expired since letters were granted.

3. By the attorney-general in any case where a decedent died intestate as to any of his estate, leaving no known heirs or next of kin.

On the presentation of such a petition, the surrogate must issue a citation accordingly; and on the return thereof, he must make such a decree in the premises as justice requires. But in either of

following cases the decree must dismiss the petition without adjudice to an action or an accounting, in behalf of the petitioner:

1. Where the executor or administrator files a written answer, duly verified, setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity or legality absolutely, or on information and belief.

2. Where it is not proved, to the satisfaction of the surrogate, that there is money or other personal property of the estate applicable to the payment or satisfaction of the petitioner's claim, and which may be so applied without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction.

Old sections 2717 and 2718 consolidated. Am'd by L. 1893, ch. 686; L. 1911, ch. 434, in effect Sept. 1, 1911.

§ 2723. [Am'd, 1893.] Decree for payment of legacy, etc., on giving security.

In a case specified in subdivision second of the last section, the surrogate may, in his discretion, entertain the petition at any time after letters are granted, although a year has not expired. In such a case, if it appears, on the return of the citation, that a decree for payment may be made, as prescribed in the last section; and that the amount of money, and the value of the other property, in the hands of the executor or administrator, applicable to the payment of debts, legacies and expenses, exceed, by at least one-third, the amount of all known debts and claims against the estate, of all legacies which are entitled to priority over the petitioner's claim, and of all legacies or distributive shares of the same class; and that the payment or satisfaction of the legacy, pecuniary provision, or distributive share, or some part thereof, is necessary for the support or education of the petitioner, the surrogate may, in his discretion, make a decree, directing payment or satisfaction accordingly, on the filing of a bond, approved by the surrogate, conditioned as prescribed by law, with respect to a bond which an executor, or an administrator with the will annexed, may require from a legatee, on payment or satisfaction of a legacy, before the expiration of one year from the time when letters were issued, pursuant to a direction to that effect, contained in the will.

L. 1893, ch. 686.

§ 2724. [Am'd, 1893.] Proceedings for neglect to set apart exempt property; proceedings upon judicial settlement.

Where an executor or administrator has failed to set apart property for a surviving husband, wife or child, as prescribed by law, the person aggrieved may present a petition to the surrogate's court, setting forth the failure, and praying for a decree, requiring such executor or administrator to set apart the property accordingly; or, if it has been lost, injured, or disposed of, to pay the value thereof, or the amount of the injury thereto; and

that he be cited to show cause why such a decree should not be made. If the surrogate is of the opinion that sufficient cause is shown, he must issue a citation accordingly. On the return of the citation, the surrogate must make such a decree in the premises as justice requires. In a proper case the decree may require the executor personally to pay the value of the property, or the amount of the injury thereto. The decree, made on a judicial settlement of the account of an executor or administrator, may award to a surviving husband, wife, or child, the same relief which may be awarded, in his or her favor, on a petition presented as prescribed in the last section.

L. 1893, ch. 686.

§ 2725. [Am'd, 1893, 1911.] Intermediate accounting.

An executor or administrator at any time may, voluntarily, file in the surrogate's office an intermediate account, and the vouchers in support of the same. In either of the following cases, the surrogate may, in his discretion, make an order, requiring an executor or administrator to render an intermediate account:

1. Where an application for an order, permitting an execution to issue on a judgment against the executor or administrator, has been made by the judgment creditor, as prescribed in section 1826 of this act.

2. On the return of a citation, issued on the petition of a judgment creditor, praying for a decree, granting leave to issue an execution on a judgment rendered against the decedent in his lifetime, as prescribed in section 1381 of this act.

3. On the return of a citation, issued on the petition of a creditor, or person entitled to a legacy, or other pecuniary provision, or a distributive share, or of the attorney-general, praying for a decree directing payment thereof, as prescribed in section 2722 of this act.

4. Where eighteen months have elapsed since letters were issued, and no special proceeding, on a petition for a judicial settlement, of the executor's or administrator's account, is pending.

Am'd by L. 1893, ch. 686; L. 1911, ch. 436, in effect Sept. 1, 1911.

§ 2726. [Am'd, 1893.] When surrogate may require judicial settlement of account.

In either of the following cases, the surrogate's court may, from time to time, compel a judicial settlement of the account of an executor or administrator.

1. Where one year has expired since letters were issued to him.

2. Where letters issued to him have been revoked, or, for any other reason, his powers have ceased.

3. Where a decree for the disposition of real property, or of an interest in real property, has been made, as prescribed in title fifth of this chapter, and the property, or a part thereof, has been disposed of by him, pursuant to the decree.

4. Where he has sold, or otherwise disposed of any of the decedent's real property, or the rents, profits, or proceeds thereof,

rsuant to a power contained in the decedent's will, where one ar has elapsed since letters were issued to him.

The surrogate's court may compel a judicial settlement of the count of a temporary administrator at any time. It may also mpel a judicial settlement of the account of a freeholder, appointed to dispose of a decedent's real property, or interest in al property, as prescribed in title fifth of this chapter, in like manner as where the same has been disposed of by the executor r administrator.

L. 1893, ch. 686.

§ 2727. [Am'd, 1893, 1901, 1911.] Citation; order to account and proceedings thereon.

A petition praying for the judicial settlement of an account, and that the executor and administrator be cited to show cause why he should not render and settle his account, may be presented, in a case prescribed in the last section, by a creditor or a person interested in the estate or fund, including a child born after the making of a will; or by any person, in behalf of an infant so interested; or by a surety in the official bond of the person required to account, or the legal representative of such a surety, or by the attorney-general, in any case where the decedent died intestate as to any of his estate, leaving no known heirs or next of kin. On the presentation of such a petition, a citation must be issued accordingly; except that in a case specified in subdivision first of the last section, if the petition is presented within eighteen months after letters were issued to the executor or administrator, the surrogate may entertain or decline to entertain it, in his discretion. On the return of a citation issued as prescribed in either of the foregoing sections of this article, if the executor or administrator fails either to appear, or to show good cause to the contrary, or to present in a proper case, a petition as prescribed in the next section, an order must be made, directing him to account within such a time, and in such a manner as the surrogate prescribes, and to attend, from time to time, before the surrogate, for that purpose. The executor or administrator is bound by such an order, without service thereof. If he disobeys it the surrogate may issue a warrant of attachment against him, and his letters may be revoked, as where a warrant of attachment is issued to compel the return of an inventory. If it appears that there is a surplus, distributable to creditors or persons interested, the surrogate may, at any time, issue a supplemental citation, directed to the persons who must be cited, on the petition of an executor or administrator for a judicial settlement of his account, and requiring them to attend the accounting. The pendency of a proceeding against an executor or administrator to compel him to account does not preclude him from presenting a petition as prescribed in the next section. If such petition is presented at or before the return of a citation in and as prescribed in either of the foregoing sections of this title, the citation issued thereon need not be directed to petitioner in the special proceeding pending against the executor or administrator, and the two proceedings must be consolidated. The surrogate may, in his discretion, and on such terms as may be just, direct the consolidation of any two or more of such proceedings pending before him, and such consolidation does not affect any power of the surrogate which might be exercised in either proceeding.

Am'd by L. 1893, ch. 686; L. 1901, ch. 408; L. 1911, ch. 432, in effect Sept. 1, 1911.

§ 2728. [Am'd, 1893, 1911, 1912.] Executors, etc., may petition for judicial settlement; citation thereupon.

In either of the following cases an executor or administrator may present to the surrogate's court his account and a written petition duly verified, praying that his account may be judicially settled; and that the surties in his official bond or the legal representatives of such surety and all creditors or persons claiming to be creditors of the decedent, except such, as by vouchers annexed to the account filed, appear to have been paid, and the decedent's husband or wife, next of kin and legatees, if any; or, if either of those persons had died, his executor or administrator, if any, and the attorney-general in a case where decedent died intestate as to any part of his estate, leaving no known heirs or next of kin, shall be cited to attend the settlement; but where the decedent leaves a will which has been duly admitted to probate, it shall not be necessary to cite the decedent's next of kin, unless they are also legatees.

1. Where one year has elapsed since letters were issued to such executor or administrator.

2. Where notice requiring all persons having claims against the deceased to exhibit the same with the vouchers thereof to such executor or administrator has been duly published according to law. If one of two or more co-executors or co-administrators presents his account and a petition for a judicial settlement of his separate account, it must pray that his co-executors or co-administrators may also be cited. Upon the presentation of accounts and a petition, as prescribed in this section, the surrogate must issue a citation accordingly. On the return of a citation, issued as prescribed in this section, the surrogate must take the account, and hear the allegations and proofs of the parties, respecting the same. Any party may contest the account, with respect to a matter affecting his interest in the settlement and distribution of the estate. And any party may contest an intermediate account rendered under section twenty-seven hundred and twenty-five of this act in case the same shall not be consolidated pursuant to section twenty-seven hundred and twenty-seven of this act. A creditor, or a person interested in the estate, although not cited, is entitled to appear on the hearing, and thus make himself a party to the proceeding. When letters issued to an executor or administrator have been revoked, he may present to the surrogate's court a written petition, duly verified, praying that his account be judicially settled, and that his successor, if a successor has been appointed, and the other persons specified in this section be cited to attend the settlement.

Am'd by L. 1905, ch. 426; L. 1911, chs. 329 and 404; L. 1912, ch. 233, in effect Apr. 9, 1912.

§ 2729. [Am'd, 1893, 1901.] Affidavit to account; vouchers; examination of accounting party.

To each account, filed with the surrogate, as prescribed in this article, must be appended the affidavit of the accounting party, to the effect that the account contains, according to the best of his knowledge and belief, a full and true statement of all his receipts and disbursements on account of the estate of the decedent; and of all money and other property belonging to the estate, which have come to his hands, or which have been received by any other person, by his order or authority, for his use; and that he does not know of any error or omission in the account, to the prejudice of any creditor of, or person interested in, the estate of the decedent. On an accounting by an executor or administrator, the accounting party must produce and file a voucher for every payment, except in one of the following cases:

1. He may be allowed, without a voucher, any proper item of expenditure, not exceeding twenty dollars, if it is supported by his own uncontradicted oath, stating positively the fact of payment, and specifying when and to whom the payment was made; but all the items so allowed against an estate, on all the accountings of all the executors or administrators, shall not exceed five hundred dollars.

2. If he proves, by his own oath or another's testimony, that he did not take a voucher when he made the payment; or that the voucher then taken by him has been lost or destroyed; he may be allowed any item, the payment of which he satisfactorily proves by the testimony of the person to whom he made it; or, if that person is dead, or cannot, after diligent search, be found, by any competent evidence, other than his own oath, or that of his wife. But an allowance cannot be made, as specified in this section, unless the surrogate is satisfied that the charge is correct and just. The surrogate may, at any time, make an order requiring the accounting party to make and file his account; or to attend and be examined under oath, touching his receipts and disbursements; or touching any other matter relating to his administration of the estate, or any act done by him under color of his letters, or after the decedent's death, and before the letters were issued; or touching any personal property, owned or held by the decedent, at the time of his death. No profit shall be made by an executor or administrator by the increase, nor shall he sustain any loss by the decrease, without his fault, of any part of the estate; but he shall account for such increase, and be allowed for such decrease on the settlement of his accounts. On the judicial settlement of the account of an executor or administrator, the surrogate may allow the accounting party, for property of the decedent, perished or lost without the fault of the accounting party.

L. 1893, ch. 686.

3. [Added, 1901.] Every executor or administrator shall pay, out of the first moneys received, the reasonable funeral expenses of decedent, and the same shall be preferred to all debts and claims against the deceased. If the same be not paid within sixty days after the grant of letters testamentary or of administration, the person having a claim for such funeral expenses may present to the surrogate's court a duly verified petition praying that the executor or administrator may be cited to show cause why he should not be required to make such payment and a citation shall be issued accordingly. If upon the return of such citation it shall appear that the executor or administrator has received moneys belonging to the estate which are applicable to the payment of the claims for funeral expenses, the surrogate shall, unless the validity of the claim and the reasonableness of its amount are admitted by such executor or administrator, take proof as to such facts, and if satisfied that such claim is valid shall fix and determine the amount due thereon and shall make an order directing the payment within ten days after the service of such order with notice of entry thereof, upon such executor or administrator of such claim or such proportion thereof as the money in the hands of the executor or administrator applicable thereto, may be sufficient to satisfy. If it shall appear that no money has come into

the hands of the executor or administrator the proceeding shall be dismissed without costs and without prejudice to a further application or applications showing that since such dismissal the executor or administrator has received money belonging to the estate. Such application shall be made upon a duly verified petition stating the facts upon which the belief of the petitioner that there are moneys in the hands of such executor or administrator applicable to the payment of his claim, is based. Upon such further application the issuance of the citation shall be in the discretion of the surrogate and no such application shall be made less than three months after the granting or denial of any previous application. If upon any accounting it shall appear that an executor or administrator has failed to pay a claim for funeral expenses, the amount of which has been fixed and determined by the surrogate as above set forth or upon such accounting he shall not be allowed for the payment of any debt or claim against the decedent until said claim has been discharged in full; but such claim shall not be paid before expenses of administration are paid.

Subd. 3 added by L. 1901, ch. 293. In effect Sept. 1, 1901.

§ 2730. [Am'd, 1895, 1905.] Commissions of executor or administrator.

On the settlement of the account of an executor or administrator, the surrogate must allow to him for his services, and if there be more than one, apportion among them according to the services rendered by them respectively, over and above his or their expenses: For receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five per centum. For receiving and paying out any additional sums not amounting to more than ten thousand dollars, at the rate of two and one-half per centum. For all sums above eleven thousand dollars, at the rate of one per centum. In all cases such allowance must be made for their necessary expenses actually paid by them as appears just and reasonable. If the gross value of the personal property of the decedent amounts to one hundred thousand dollars or more each executor or administrator is entitled to the full compensation on principal and income allowed herein to a sole executor or administrator, unless there are more than three, in which case the compensation to which three would be entitled must be apportioned among them according to the services rendered by them, respectively, and a like apportionment shall be made in all cases where there shall be more than one executor or administrator. Where the will provides a specific compensation to an executor or administrator he is not entitled to any allowance for his services, unless by a written instrument filed with the surrogate, he renounces the specific compensation. Where successive or different letters are issued to the same person on the estate of the same decedent, including a case where letters testamentary, or letters of general administration, are issued to a person who has been previously appointed a temporary administrator, he is entitled to compensation in one capacity only, at his election, except that where he has received compensation in one capacity he is entitled to the excess, if any, of the compensation allowed by law, above the sum which he has already received in the other capacity.

L. 1895, ch. 595; L. 1905, ch. 328. In effect April 25, 1905.

§ 2731. [Am'd, 1895.] Determination of claim by surrogate; suspension of statute of limitations in certain cases.

On the judicial settlement of the account of an executor or administrator, he may prove any debt owing to him by the decedent. Where a contest arises between the accounting party and any of the other parties respecting property alleged to belong to the estate, but to which the accounting party lays claim either individually or as the representative of the estate, or respecting a debt, alleged to be due by the accounting party to the decedent, or by the decedent to the accounting party, the contest must, except where the claim is made in a representative capacity, in which case it may, be tried and determined in the same manner as any other issue arising in the surrogate's court.

From the death of the decedent until the first judicial settlement of the accounts of the executor or administrator, the running of the statute of limitations, against a debt due from the decedent to the accounting party, or any other cause of action in favor of the latter against the decedent, is suspended, unless the accounting party was appointed on the revocation of former letters issued to another person, in which case the running of the statute is so suspended, from the grant of letters to him, until the first judicial settlement of his account. After the first judicial settlement of the account of an executor or administrator, the statute of limitations begins again to run against a debt due to him from the decedent, or any other cause of action in his favor against the decedent.

L. 1895, ch. 505.

§ 2732. [Repealed by L. 1909, ch. 18. See Consolidated Laws, tit. Decedent Estate Law, § 98.]

§ 2733. [Am'd, 1893, 1909.] Adjustment of advancements.

Where there is a surplus of personal property to be distributed, and the advancement, as provided in section ninety-nine of the decedent estate law, consisted of personal property, or where a deficiency in the adjustment of an advancement of real property is chargeable on personal property, the decree for distribution, in the surrogate's court, must adjust all the advancements which have not been previously adjusted by the judgment of a court of competent jurisdiction. For that purpose, if any person to be affected by the decree, is not a party to the proceeding, the surrogate must cause him to be brought in by a supplemental citation.

L. 1893, ch. 686. Amended by L. 1909, ch. 65. Also partly repealed by L. 1909, ch. 18. See Consolidated Laws, tit. Decedent Estate Law, § 99. See note 77 of notes of Board of Statutory Consolidation at end of code.

§ 2734. [Repealed by L. 1909, ch. 18. See Consolidated Laws, tit. Decedent Estate Law, § 100.]

§§ 2735-2741. [Repealed, L. 1893, ch. 686.]

§ 2742. Effect of judicial settlement of account.

A judicial settlement of the account of an executor or admin-

istrator, either by the decree of the surrogate's court, or upon an appeal therefrom, is conclusive evidence, against all the parties who were duly cited or appeared, and all persons deriving title from any of them at any time, of the following facts and no others:

1. That the items allowed to the accounting party, for money paid to creditors, legatees, and next of kin, for necessary expenses, and for his services, are correct.

2. That the accounting party has been charged with all the interest for money received by him, and embraced in the account, for which he was legally accountable.

3. That the money charged to the accounting party, as collected, is all that was collectible, at the time of the settlement, on the debts stated in the account.

4. That the allowances made to the accounting party, for the decrease, and the charges against him for the increase, in the value of property, were correctly made.

§ 2743. [Am'd, 1895, 1898, 1906.] Decree for payment and distribution.

Where an account is judicially settled, as prescribed in this article, and any part of the estate remains and is ready to be distributed to the creditors, legatees, next of kin, husband, or wife of the decedent, or their assigns, the decree must direct the payment and distribution thereof to the persons so entitled, according to their respective rights. In case of whole or partial intestacy the decree must direct immediate payment and distribution to creditors, next of kin, husband or wife of the decedent, or their assigns, where the executor or administrator has petitioned voluntarily for judicial settlement of his account as, and in the case provided in subdivision two of section twenty-seven hundred and twenty-eight of this article; but such decree shall not direct the payment of any legacy prior to the expiration of one year after the granting of letters upon such estate, unless the will otherwise directs. If any person, who is a necessary party for that purpose, has not been cited or has not appeared, a supplemental citation must be issued, as prescribed in section twenty-seven hundred and twenty-seven of this act. Where the validity of the debt, claim or distributive share is admitted or has been established upon the accounting or other proceeding in the surrogate's court or other court of competent jurisdiction, the decree must determine to whom it is payable, the sum to be paid by reason thereof and all other questions concerning the same. With respect to the matters enumerated in this section the decree is conclusive as a judgment upon each party to the special proceeding who was duly cited or appeared, and upon every person deriving title from such party.

L. 1895, ch. 595; L. 1898, ch. 565; L. 1906, ch. 515. In effect Sept. 1, 1906.

§ 2744. Id.; when specific property may be delivered.

In either of the following cases, the decree may direct the delivery of an unsold chattel, or the assignment of an uncollected demand, or any other personal property, to a party or parties, entitled to payment or distribution, in lieu of the money value of the property:

1. Where all the parties interested, who have appeared, manifest their consent thereto by a writing filed in the surrogate's office.

2. Where it appears that a sale thereof, for the purpose of payment or distribution, would cause a loss to the parties entitled thereto.

The value must be ascertained, if the consent does not fix it, by an appraisement under oath, made by one or more persons appointed by the surrogate for the purpose.

2 R. S. 95, § 72 (2 Edm. 99), *am'd*; L. 1870, ch. 30.

§ 2745. *Id.*; when money may be retained.

Where an admitted debt of the decedent is not yet due, and the creditor will not accept present payment, with a rebate of interest; or where an action is pending between the executor or administrator and a person claiming to be a creditor of the decedent; the decree must direct that a sum, sufficient to satisfy the claim, or the proportion to which it is entitled, together with the probable amount of the interest and costs, be retained in the hands of the accounting party; or be deposited in a safe bank, or trust company, subject to the surrogate's order; or be paid into the surrogate's court, for the purpose of being applied to the payment of the claim, when it is due, recovered or settled; and that so much thereof, as is not needed, for that purpose, be afterwards distributed according to law.

2 R. S. 96, § 74 (2 Edm. 99).

§ 2746. [*Am'd*, 1886, 1900, 1909, 1911, 1913.] *Id.*; share of infant.

When a legacy or distributive share is payable to an infant, the decree may, in the discretion of the surrogate's court, direct it, or so much of it as may be necessary, to be paid to his general guardian, to be applied to his support and education; or when it does not exceed two hundred and fifty dollars, the decree may order it to be paid to his father or to his mother or to some competent person with whom the infant resides or who has some interest in his welfare, for the use and benefit of such infant. Said court may, in its discretion, by its decree, direct any legacy or distributive share, or part of a legacy or distributive share, not paid or applied as aforesaid, which is payable to an infant, to be paid to the general guardian of such infant, upon his executing and depositing with the surrogate in his office, a bond running to such infant, with two or more sufficient sureties duly acknowledged and approved by the surrogate, in double the amount of such legacy or distributive share, conditioned that such general guardian shall faithfully apply such legacy or distributive share, and render a true and just account of the application thereof, in all respects, to any court having cognizance thereof, when thereunto required, the sureties in which bond shall justify as required in this act, unless the surrogate shall determine that the general bond given by the guardian is ample and of sufficient amount to cover such legacy or distributive share. The said court may, in its discretion, from time to time, authorize or direct such general guardian to expend such part of such legacy or distributive share, in the support, maintenance and education of such infant as it deems necessary. On such infant's coming twenty-one years of age, he shall be entitled to receive, and his general guardian shall pay or deliver to him, under the direction of the surrogate's court, the securities so taken, and the interest or other moneys that may have been paid to or received by such general guardian, after deducting therefrom such amounts as have been paid or expended in pursuance of the orders and decrees of said court, so made as aforesaid and the legal commissions of such guardian:

and the said general guardian shall be liable to account in and under the direction of the surrogate's court, to his ward, for the same; in case of the death of said infant, before coming of age, the said securities and moneys, after making the deductions aforesaid, shall go to his executors or administrators, to be applied and distributed according to law, and the general guardian shall in like manner be liable to account to such administrator or executor. If there be no general guardian, or if the surrogate's court do not order or decree the payment or disposition of the legacy or distributive share in some of the ways above described, then the legacy or distributive share, or part of the same not disposed of as aforesaid, whether the same consists of money or securities, shall, by the order or decree of the surrogate's court, be paid and delivered to and deposited in said court, by paying and delivering the same to and depositing it with the county treasurer of the county, to be held, managed, invested, collected, reinvested and disposed of by him, as prescribed and required by section twenty-five hundred and thirty-seven of this act. The regulations contained in the general rules of practice, as specified in subdivision eight of section four of the state finance law, and the provisions of title three of chapter eight of this act apply to money, legacies and distributive shares paid to and securities deposited with the county treasurer, as prescribed in this section; except that the surrogate's court exercises with respect thereto, or with respect to a security in which any of the money has been invested, or upon which it has been loaned, the power and authority conferred upon the supreme court by section seven hundred and forty-seven of this act.

2 R. S. 96, § 80, am'd; L. 1886, ch. 358; L. 1900, ch. 554. Am'd by L. 1909, ch. 65, § 3. See note 78 of notes of Board of Statutory Consolidation at end of code. Am'd by L. 1911, ch. 328; L. 1913, ch. 10. In effect Sept. 1, 1913.

§ 2747. Legacy, etc., to unknown person to be paid into State treasury.

Where the person entitled to a legacy or distributive share is unknown, the decree must direct the executor or administrator to pay the amount thereof into the treasury of the State, for the benefit of the person or persons who may thereafter appear to be entitled thereto. The surrogate, or the supreme court, upon the petition of a person claiming to be so entitled, and upon at least fourteen days' notice to the attorney-general, accompanied with a copy of the petition, may by a reference, or by directing the trial of an issue by a jury, or otherwise, ascertain the rights of the persons interested, and grant an order directing the payment of any money, which appears to be due to the claimant, but without interest, and deducting all expenses incurred by the State with respect to the decedent's estate. The comptroller, upon the production of a certified copy of the order, must draw his warrant upon the treasury, for the amount therein directed to be paid; which must be paid by the State treasurer, to the person entitled thereto.

Id., § 81, am'd; L. 1877, ch. 456.

§ 2748. When legacy, etc., to be paid to county treasurer.

The decree must also direct the executor or administrator to pay to the county treasurer a legacy or distributive share, which

is not paid to the person entitled thereto, at the expiration of two years from the time when the decree is made, or when the legacy or distributive share is payable by the terms of the decree. The money, so paid to the county treasurer, can be paid out by him only by the special direction of the surrogate; or pursuant to the judgment of a court of competent jurisdiction.

Id., part of § 81.

TITLE V.

Disposition of the decedent's real property, for the payment of debts and funeral expenses. Distribution of the proceeds.

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§ 2749. [Am'd, 1894.] What property subject to this title.

Real property, of which a decedent died seized, and the interest of a decedent in real property, held by him under a contract for the purchase thereof, made either with him, or with a person from whom he derived his interest, may be disposed of, for the payment of his debts and funeral expenses, or for the payment of judgment liens existing thereon at his death, as prescribed in this title; except where it is devised, expressly charged with the payment of debts or funeral expenses, or is exempted from levy and sale by virtue of an execution, as prescribed in title second of chapter thirteen of this act. The expression "funeral expenses," as used in this title, includes a reasonable charge for a suitable headstone.

L. 1894, ch. 735.

§ 2750. [Am'd, 1894, 1909.] Petition, when and by whom presented.

At any time within three years after letters were first duly granted within the state, upon the estate of a decedent, an executor or administrator, whether sole or joined in the letters with another other than a temporary administrator, or a person holding a judgment lien upon decedent's real property at the time of his death, or any other creditor of the decedent, other than a creditor by a mortgage, which is a lien upon the decedent's real property, or any person having a claim for the funeral expenses of the decedent, may present to the surrogate's court, from which letters were issued, a written petition, duly verified, praying for a decree directing the disposition of the decedent's real property, or interest in real property, specified in the last section, or so much thereof as is necessary for the payment of his debts or funeral expenses, or, if so decreed as hereinafter provided, for the payment of any judgment liens existing upon such land, or some portion thereof, at decedent's death, by a mortgage, lease or sale at public or private sale thereof; and that the parties named in the petition and all other necessary parties, as prescribed in the subsequent sections of this title, may be cited to show cause why such a decree should not be made.

Am'd by L. 1894, ch. 735; L. 1909, ch. 183. In effect Sept. 1, 1909. See § 1844, subd. 1.

§ 2751. [Am'd, 1887.] Creditor's time to apply extended in certain cases.

The time, during which an action is pending in a court of record, between a creditor and an executor or administrator of the estate, is not a part of the time limited in the last section, for presenting a petition, founded upon a debt, which was in controversy in the action; if the creditor has, before the expiration of the time so limited, filed in the clerk's office of the county where the real property is situated, a notice of the pendency of the action; specifying the names of the parties, the object of the action, and, if the creditor's debt is made the foundation of a counterclaim, the nature of the counterclaim; containing a description of the property in that county to be affected thereby; and stating that it will be held as security for any judgment obtained in the action. A notice so filed must be recorded and indexed, and may be cancelled, as prescribed, with respect to the notice of pendency of an action, in article nine of title first of chapter fourteen of this act. It may also be cancelled in like manner, or a specified portion of the property affected thereby, may be discharged from the lien thereof, by the order of the court in which the action is pending, made upon the application of a person having an interest in the real property, upon notice to the creditor, and upon such terms as justice requires. Whenever an executor, administrator or creditor of a deceased person shall have commenced, or shall hereafter commence, an action in any court of competent jurisdiction of this State for the purpose of setting aside any fraudulent conveyance of, or incumbrance upon, any real estate of such deceased person, and such action shall have been decided in favor of such executor, administrator or creditor, such executor, administrator or creditor may, at any time within three years after the final determination of such action, have and maintain an action or proceeding against the proper parties, in any court of competent jurisdiction of this State, for a sale of such real estate, and for a distribution of the proceeds of such real estate among the creditors of such deceased person,

and other persons entitled to the same as may be directed by the judgment in such action.

L. 1887, ch. 423.

§ 2752. [Am'd, 1894.] Contents of petition.

The petition must set forth the following matters, as nearly as the petitioner can, upon diligent inquiry, ascertain them:

1. [Am'd, 1904.] The amount of the unpaid debts and funeral expenses of the decedent and that the personal estate is inadequate for the payment thereof.

L. 1904, ch. 730. In effect Sept. 1, 1904.

2. A general description of all the decedent's real property, and interest in real property, within the state, which may be disposed of as prescribed in this title; a statement of the value of each distinct parcel; whether it is improved or not; whether it is occupied or not; and, if occupied, the name of each occupant; whether it is incumbered by a mortgage lien or liens together with a statement of the amount due or claimed to be due thereon. Where the petition describes an interest in real property, specified in section two thousand seven hundred and forty-nine of this act, the value of the interest must be stated, and also the value of, and the other particulars, specified in this section, relating to the real property to which the interest attaches.

3. The names of the husband or wife, and of all the heirs and devisees of the decedent, and also every other person claiming under them, or either of them, stating who, if any, are infants; the age of each infant, and the name of his general guardian, if any; and also, if the petition is presented by a creditor or judgment lienor, the name of each executor or administrator.

4. If the petition is presented by an executor or administrator, the amount of personal property which has come to his hands, and those of his coexecutors or coadministrators, if any; the application thereof, and the amount which may yet be realized therefrom.

L. 1894, ch. 735.

with 1916 ch. 546
§ 2753. [Am'd, 1894.] Proceedings where some of the facts are unknown.

If, upon diligent inquiry, any of the matters required to be set forth, as prescribed in the last section, cannot be ascertained by the petitioner, that fact must be shown to the surrogate's satisfaction, and the surrogate must, thereupon, inquire into the matter, as prescribed in article first of title second of this chapter. If the petition is presented by a creditor or judgment lienor, the surrogate may, by order, require the executor or administrator to render such an account or other statement, as he deems necessary for the purpose of the inquiry.

L. 1894, ch. 735.

§ 2754. [Am'd, 1894, 1911.] Citation thereupon.

Where the surrogate is satisfied that all the facts, specified in the last section but one, have been ascertained, as far as they can be upon diligent inquiry, and it appears to him that the debts, judgment, liens and funeral expenses, or either, cannot be paid, without resorting to the real property, or interest in real property, he must issue a citation according to the prayer of the petition. If, upon the inquiry, it appears to the surrogate, that any heir or devisee, or person claiming an interest in the property under an heir or devisee, is not named in the petition, the cita-

tion must also be directed to him. Where the surrogate is unable to ascertain to his satisfaction whether the decedent left, surviving him, any person, who would be entitled to succeed to the real property or interest in real property, as heir, or who would be entitled to the real property or interest in real property affected by a will, if the person had died intestate, or person claiming an interest in the property under an heir or such devisee, or if it shall appear to the surrogate that the decedent left no known heirs-at-law or next of kin, the citation must also be directed to the attorney-general. Unless the executor or administrator has caused to be published, as prescribed by law, a notice requiring creditors to present their claims, and the time for the presentation thereof, pursuant to the notice, has elapsed, the citation must be directed, generally to all other creditors of the decedent, as well as the creditors named.

Am'd by L. 1894, ch. 785; L. 1911, ch. 437, in effect Sept. 1, 1911.

*(as added 5/19/16 Ch. 588
69 Feb 2 1916 Ch. 1)*

§ 2755. [Am'd, 1894, 1904, 1910.] Hearing.

Upon the return of the citation the surrogate must proceed to hear the allegations and proofs of the parties. A creditor of the decedent, including one whose claim is not yet due, or a person having a claim for unpaid funeral expenses, although not named in the citation, may appear and thus make himself a party to the special proceeding. An heir or devisee, or a person claiming under an heir or devisee, of the property in question, although not named in the citation, may contest the necessity of applying the property to the payment of debts, judgment liens or funeral expenses, or the validity of a debt, due or unpaid, represented as existing against the decedent, or the reasonableness of the funeral expenses; may interpose any defense to the whole or any part thereof; and, for that purpose, may make himself a party to the special proceeding, but a judgment heretofore or hereafter recovered against the executor or administrator upon a claim against decedent shall be prima facie evidence and proof of the claim against the real property of decedent, and the burden of disproving such judgment, or of proving that the claim upon which it was rendered is invalid, or that the judgment was obtained by collusion shall be upon the party disputing or objecting to the same, if such party shall have filed written objections thereto. The admission or allowance by the executor or administrator of a claim or debt of any creditor against the decedent shall, for the purpose of such proceeding, be deemed an establishment thereof, unless objection be made thereto by a party to the special proceeding. Where such a defense arises under the statute of limitation, an act or admission by the executor or administrator does not prevent the running of the statute, or revive the debt, so as to affect, in any manner, the real property, or interest in real property in question, or to permit the creditor to participate in the fund arising therefrom.

L. 1894, ch. 735; L. 1904, ch. 750; L. 1910, ch. 581. In effect July 1, 1910.

§ 2756. [Am'd, 1904.] What proof necessary for a decree.

A decree directing the disposition of real property or of an interest in real property can be made only where after due examination the following facts have been established to the satisfaction of the surrogate.

1. That the proceedings have been in conformity to this title.
2. That the personal estate of the decedent is insufficient for the payment of his debts and funeral expenses.

L. 1904, ch. 750. In effect Sept. 1, 1904. Formerly § 2759.

and other persons entitled to the same as may be directed by the judgment in such action.

L. 1887, ch. 423.

§ 2752. [Am'd, 1894.] Contents of petition.

The petition must set forth the following matters, as nearly as the petitioner can, upon diligent inquiry, ascertain them:

1. [Am'd, 1904.] The amount of the unpaid debts and funeral expenses of the decedent and that the personal estate is inadequate for the payment thereof.

L. 1904, ch. 750. In effect Sept. 1, 1904.

2. A general description of all the decedent's real property, and interest in real property, within the state, which may be disposed of as prescribed in this title; a statement of the value of each distinct parcel; whether it is improved or not; whether it is occupied or not; and, if occupied, the name of each occupant; whether it is incumbered by a mortgage lien or liens together with a statement of the amount due or claimed to be due thereon. Where the petition describes an interest in real property, specified in section two thousand seven hundred and forty-nine of this act, the value of the interest must be stated, and also the value of, and the other particulars, specified in this section, relating to the real property to which the interest attaches.

3. The names of the husband or wife, and of all the heirs and devisees of the decedent, and also every other person claiming under them, or either of them, stating who, if any, are infants; the age of each infant, and the name of his general guardian, if any; and also, if the petition is presented by a creditor or judgment lienor, the name of each executor or administrator.

4. If the petition is presented by an executor or administrator, the amount of personal property which has come to his hands, and those of his coexecutors or coadministrators, if any; the application thereof, and the amount which may yet be realized therefrom.

L. 1894, ch. 735.

am'd 1894
1916 ch. 546
§ 2753. [Am'd, 1894.] Proceedings where some of the facts are unknown.

If, upon diligent inquiry, any of the matters required to be set forth, as prescribed in the last section, cannot be ascertained by the petitioner, that fact must be shown to the surrogate's satisfaction, and the surrogate must, thereupon, inquire into the matter, as prescribed in article first of title second of this chapter. If the petition is presented by a creditor or judgment lienor, the surrogate may, by order, require the executor or administrator to render such an account or other statement, as he deems necessary for the purpose of the inquiry.

L. 1894, ch. 735.

§ 2754. [Am'd, 1894, 1911.] Citation thereupon.

Where the surrogate is satisfied that all the facts, specified in the last section but one, have been ascertained, as far as they can be upon diligent inquiry, and it appears to him that the debts, judgment, liens and funeral expenses, or either, cannot be paid, without resorting to the real property, or interest in real property, he must issue a citation according to the prayer of the petition. If, upon the inquiry, it appears to the surrogate, that any heir or devisee, or person claiming an interest in the property under an heir or devisee, is not named in the petition, the cita-

tion must also be directed to him. Where the surrogate is unable to ascertain to his satisfaction whether the decedent left, surviving him, any person, who would be entitled to succeed to the real property or interest in real property, as heir, or who would be entitled to the real property or interest in real property affected by a will, if the person had died intestate, or person claiming an interest in the property under an heir or such devisee, or if it shall appear to the surrogate that the decedent left no known heirs-at-law or next of kin, the citation must also be directed to the attorney-general. Unless the executor or administrator has caused to be published, as prescribed by law, a notice requiring creditors to present their claims, and the time for the presentation thereof, pursuant to the notice, has elapsed, the citation must be directed, generally to all other creditors of the decedent, as well as the creditors named.

Am'd by L. 1894, ch. 735; L. 1911, ch. 437, in effect Sept. 1, 1911.

*(Am'd 2.5.1916 ch. 588
added 2.1916 ch. 588)*
§ 2755. [Am'd, 1894, 1904, 1910.] Hearing.

Upon the return of the citation the surrogate must proceed to hear the allegations and proofs of the parties. A creditor of the decedent, including one whose claim is not yet due, or a person having a claim for unpaid funeral expenses, although not named in the citation, may appear and thus make himself a party to the special proceeding. An heir or devisee, or a person claiming under an heir or devisee, of the property in question, although not named in the citation, may contest the necessity of applying the property to the payment of debts, judgment liens or funeral expenses, or the validity of a debt, due or unpaid, represented as existing against the decedent, or the reasonableness of the funeral expenses; may interpose any defense to the whole or any part thereof; and, for that purpose, may make himself a party to the special proceeding, but a judgment heretofore or hereafter recovered against the executor or administrator upon a claim against decedent shall be prima facie evidence and proof of the claim against the real property of decedent, and the burden of disproving such judgment, or of proving that the claim upon which it was rendered is invalid, or that the judgment was obtained by collusion shall be upon the party disputing or objecting to the same, if such party shall have filed written objections thereto. The admission or allowance by the executor or administrator of a claim or debt of any creditor against the decedent shall, for the purpose of such proceeding, be deemed an establishment thereof, unless objection be made thereto by a party to the special proceeding. Where such a defense arises under the statute of limitation, an act or admission by the executor or administrator does not prevent the running of the statute, or revive the debt, so as to affect, in any manner, the real property, or interest in real property in question, or to permit the creditor to participate in the fund arising therefrom.

L. 1894, ch. 735; L. 1904, ch. 750; L. 1910, ch. 381. In effect July 1, 1910.

§ 2756. [Am'd, 1904.] What proof necessary for a decree.

A decree directing the disposition of real property or of an interest in real property can be made only where after due examination the following facts have been established to the satisfaction of the surrogate.

1. That the proceedings have been in conformity to this title.
2. That the personal estate of the decedent is insufficient for the payment of his debts and funeral expenses.

L. 1904, ch. 750. In effect Sept. 1, 1904. Formerly § 2759.

§ 2757. [Am'd, 1904, 1911.] Decree to mortgage, lease or sell.

If it shall appear to the satisfaction of the surrogate that the personal estate of the decedent is insufficient for the payment of his debts and funeral expenses, the surrogate shall make a decree empowering the executor or administrator to mortgage, lease or sell the whole or such part of the real property or interest of the decedent in real property as the surrogate shall deem necessary for the payment thereof. The surrogate may limit the amount to be sold and afterward extend the power to other parcels and direct the order of the sale of parcels and may direct whether the same be mortgaged, leased, or sold, for the purpose of preserving all the rights and equities of the parties and preventing any unnecessary disposition of such real property; and may limit the amount to be raised thereby. The decree must describe the property to be sold with common certainty. If it appears that one or more distinct parcel of which the decedent died seized has been devised by him or sold by his heirs the decree must provide that the several distinct parcels be sold in the following order:

1. Property which descended to the decedent's heirs and which has not been sold by them.
2. Property so descended which has been sold by them.
3. Property which has been devised which has not been sold by the devisee.
4. Property so devised which has been sold by the devisee.

If it shall appear to the satisfaction of the surrogate that the decedent left no known heirs-at-law, or if the surrogate is unable to determine whether there are heirs-at-law entitled to inherit, the sale must be directed to be held at public auction, and due notice of the sale shall be directed and given to the attorney-general.

Am'd by L. 1904, ch. 730; L. 1911, ch. 435, in effect Sept. 1, 1911. From former §§ 2700, 2781 and 2763.

§ 2758. [Am'd, 1894, 1904.] Duty of executor or administrator to execute decree after filing bond.

It shall be the duty of the executor or administrator to execute the power conferred upon him by a decree directing that property be mortgaged, leased or sold; but he must first execute and file with the surrogate his bond, with two or more sureties, to the people of the state in a penalty fixed by the surrogate not less than twice the sum to be raised, or the value of the real property, or interest in real property, directed to be sold. The bond must be conditioned for the faithful performance of the duties imposed upon the principal by the decree and for the accounting by the principal for all moneys received by him whenever he is required so to do by a court of competent jurisdiction.

L. 1894, ch. 735; L. 1904, ch. 750. In effect Sept. 1, 1904.

§ 2759. [Am'd, 1894, 1904.] Proceedings upon failure to execute decree or file bond.

Where there are two or more executors or administrators, if either of them fails, within such time as the surrogate deems reasonable, to give, or to join with his coexecutors or coadministrators in giving, a bond as prescribed in the last section, the surrogate may direct those who have given the bond to proceed to execute the decree. But if a sole executor or administrator, or all the executors or administrators, so fail, such failure shall be deemed ground for the revocation of his or their letters and the surrogate shall, upon the application of any person interested, revoke such letters and grant administration to such person en-

titled as will execute such decree. He may revoke letters so granted from time to time, as the case requires, to obtain the proper execution of the decree. A person to whom letters are so granted shall have all the powers under the decree which were given to the executor or administrator at the time it was made; and must give the bond required by such decree, as well as the bond required to be given upon issuing letters to him.

L. 1894, ch. 735; L. 1904, ch. 750. In effect Sept. 1, 1904. From former § 2757.

§ 2760. [Am'd, 1895, 1904.] Execution of decree not affected by death, et cetera.

The death, removal, or disqualification, before the complete execution of a decree, of all the executors or administrators does not suspend or affect the execution thereof; but the successor of the person who has died, been removed, or become disqualified, must proceed to complete all unfinished matters, as his predecessors might have completed the same; and he must give such security for the due performance of his duties as the surrogate prescribes.

L. 1895, ch. 213; L. 1904, ch. 750. In effect Sept. 1, 1904. From former § 2770.

§ 2761. [Am'd, 1894, 1904.] Effect of decree; manner of executing same, applying proceeds of sale and accounting for same.

The executor or administrator must proceed to execute the decree in the same manner, and the execution thereof shall have the same effect, as if he were acting as executor of the decedent under a like power contained in a will of said decedent duly executed and proved. He shall apply the proceeds of the real property mortgaged, leased or sold in the same manner as if he had acted under such a power of sale contained in a will and all persons interested in the execution of the decree shall have the same remedies for the enforcement of the decree and the application of the proceeds that they would have had if the executor or administrator were acting under such a power. The executor or administrator may account for such proceeds and may be compelled to account therefor and for his acts under such decree and shall be entitled to commissions upon the settlement of his accounts as if he had acted under such a power.

L. 1894, ch. 735; L. 1904, ch. 750. In effect Sept. 1, 1904.

§ 2762. [Repealed by L. 1904, ch. 750. In effect Sept. 1, 1904, provided, however, that, in cases where the decree for the disposition of decedent's real property, for the payment of debts and funeral expenses shall have been entered prior to the time this act takes effect, all subsequent proceedings shall be in accordance with the provisions of the statutes then existing; and to that extent said sections shall be considered as still in force.]

§ 2763. [Am'd, 1904.] Purchasers title not affected by certain irregularities.

The title of a purchaser in good faith at a sale pursuant to a decree made as prescribed in this title is not, nor is the validity of a mortgage or lease made as prescribed in this title, in any way

affected, where a petition was presented and the proper persons were duly cited and a decree authorizing a mortgage, lease or sale was made as prescribed in this title, by any omission, error, defect or irregularity occurring between the return of the citation and the making of the decree, except so far as the same would affect the title of a purchaser at a sale made pursuant to the directions contained in a judgment rendered by the supreme court.

L. 1904, ch. 750. In effect Sept. 1, 1904. From former § 2764.

§ 2764. [Am'd, 1894, 1904.] Allowance on bid to creditor purchasing.

If a creditor of the decedent becomes the purchaser of any of the decedent's real property, the surrogate may, upon his application, direct the amount of his claim to be allowed, in the first instance, upon the purchase price; and such purchaser shall only be required to pay the balance at the time of the sale. But, in case the proceeds of the decedent's real property shall be insufficient to satisfy the costs and expenses of administration and the debts and funeral expenses of the decedent, the purchasing creditor shall be allowed and credited, upon the judicial settlement of the accounts of the executor or administrator, only the amount he may be entitled to receive upon his claim and shall then pay the difference between the amount originally allowed and the amount he is entitled to receive. In case any purchaser has credit on his bid, as aforesaid, no deed shall be delivered to him until the judicial settlement of the accounts of the executor or administrator nor until he shall have paid the entire amount required under the provisions of this section.

L. 1894, ch. 735; L. 1904, ch. 760. In effect Sept. 1, 1904.

§ 2765. [Am'd, 1894, 1904.] Sale to be refused if bond be given.

A decree empowering an executor or administrator to mortgage, lease or sell shall not be granted if any of the persons interested in the estate give bonds to the surrogate in such sum and with such sureties as he directs and approves, with condition to pay all the debts, legacies and expenses of administration so far as the goods, chattels, rights and credits of the deceased are insufficient therefor, within such time as the surrogate may direct.

L. 1894, ch. 735; L. 1904, ch. 760. In effect Sept. 1, 1904.

2768 and R. 1916
ch. 4
§§ 2766-2770. [Repealed by L. 1904, ch. 750. In effect Sept. 1, 1904, provided, however, that, in cases where the decree for the disposition of decedent's real property, for the payment of debts and funeral expenses shall have been entered prior to the time this act takes effect, all subsequent proceedings shall be in accordance with the provisions of the statutes then existing; and to that extent said sections shall be considered as still in force.]

mis. 115
ch. 274
§ 2771. What credit allowed on sale.

The surrogate may, in the order directing the execution of the decree, or in a separate order made before the sale, allow a sale to

be made upon a credit, not exceeding three years, for not more than three-fourths of the purchase-money, to be secured by the purchaser's bond, and his mortgage on the property sold, except where the sale is that of an interest under a contract; in which case, the order may prescribe the security to be given.

§ 2772-2773. [Repealed by L. 1904, ch. 750. In effect Sept. 1, 1904, provided, however, that, in cases where the decree for the disposition of decedent's real property, for the payment of debts and funeral expenses shall have been entered prior to the time this act takes effect, all subsequent proceedings shall be in accordance with the provisions of the statutes then existing; and to that extent said sections shall be considered as still in force.]

§ 2774. Who not to purchase.

An executor or administrator upon the estate, a freeholder appointed to execute a decree, or a general or special guardian of an infant, who has an interest in any of the real property to be sold, shall not directly, or indirectly, purchase, or be, or at any time before confirmation, become interested in a purchase at the sale; except that a guardian may, when authorized so to do by the order of the surrogate, purchase in his name of office for the benefit of his ward. A violation of this section renders the purchase void.

§ 2775-2776. [Repealed by L. 1904, ch. 750. In effect Sept. 1, 1904, provided, however, that, in cases where the decree for the disposition of decedent's real property, for the payment of debts and funeral expenses shall have been entered prior to the time this act takes effect, all subsequent proceedings shall be in accordance with the provisions of the statutes then existing; and to that extent said sections shall be considered as still in force.]

§ 2777. When conveyance not to affect purchaser or mortgagee from heir, etc.

A conveyance of real property, made pursuant to this title, does not affect, in any way, the title of a purchaser or mortgagee, in good faith and for value, from an heir or devisee of the decedent, unless letters testamentary or letters of administration, upon the estate of the decedent, were granted, by a surrogate's court having jurisdiction to grant them, upon a petition therefor, presented within four years after his death.

§ 2778-2781. [Repealed by L. 1904, ch. 750. In effect Sept. 1, 1904, provided, however, that, in cases where the decree for the disposition of decedent's real property, for the payment of debts and funeral expenses shall have been entered prior to the time this act takes effect, all subsequent proceedings shall be in accordance with the provisions of the statutes then existing; and to that extent said sections shall be considered as still in force.]

§ 2782. Contract for lands; effect of conveyance of decedent's interest.

A conveyance of the decedent's interest in all the real property held by him under a contract for the purchase thereof operates as an assignment of the contract to the purchaser; and vests in him, his heirs and assigns, all the right, title, and interest of all the persons entitled, at the time of the sale, in and to the decedent's interest in the real property.

§ 2783. Id.; effect of conveyance of part.

A conveyance of the decedent's interest in a part only of the real property, held under such a contract, transfers to the purchaser all the decedent's right, title, and interest in and to the part so sold; and all rights, which would be acquired thereto, by the executor or administrator, or by any person entitled, at the time of the sale, to the interest of the decedent therein, by perfecting the title to the property contracted for, pursuant to the contract. Upon fully complying with the contract, the purchaser has the same right to enforce performance thereof, with respect to the part conveyed to him; and the executor or administrator, or his assignee, has the same right to enforce performance, with respect to the residue, as the decedent would have had, if he was living. Any title acquired by the executor or administrator, or his assignee, with respect to the part not sold, must be held in trust for the use of the persons entitled to the decedent's interest, subject to the dower of the widow, if any.

§ 2784. [Repealed by L. 1904, ch. 750. In effect Sept. 1, 1904, provided, however, that, in cases where the decree for the disposition of decedent's real property, for the payment of debts and funeral expenses shall have been entered prior to the time this act takes effect, all subsequent proceedings shall be in accordance with the provisions of the statutes then existing; and to that extent said sections shall be considered as still in force.]

§ 2785. Purchaser's title not affected by certain irregularities, etc.; presumption, where records have been removed.

Where the records of the surrogate's court have been heretofore, or are hereafter, removed from one place to another, in either the same or another county, and twenty-five years have elapsed after a sale or other disposition of real property, or of an interest in real property, as prescribed in this title, the due appointment of a guardian for each infant party to the special proceeding must be presumed, and can be disproved only by affirmative record evidence to the contrary.

§§ 2786-2797. [Repealed by L. 1904, ch. 750. In effect Sept. 1, 1904, provided, however, that, in cases where the decree for the disposition of decedent's real property, for the payment of debts and funeral expenses shall have been entered prior to the time this act takes effect, all subsequent proceedings shall be in accordance with the provisions of the statutes then existing; and to that extent said sections shall be considered as still in force.]

§ 2798. [Am'd, 1893.] Surplus money on foreclosure and other sales; when paid to surrogate.

Where real property, or an interest in real property, liable to be disposed of as prescribed in this title, is sold, in an action or a special proceeding, specified in the last section, to satisfy a mortgage or other lien thereupon, which accrued during the decedent's life-time; and letters testamentary or letters of administration, upon the decedent's estate, were, within four years before the sale, issued from a surrogate's court of the State, having jurisdiction to grant them; the surplus money must be paid into the surrogate's court from which the letters issued pursuant to the provisions of section twenty-five hundred and thirty-seven of this code, and the receipt of the county treasurers shall be a sufficient discharge to the person paying such money. If the sale was made pursuant to the directions contained in a judgment or order, the surplus remaining after payment of all the liens upon the property, chargeable upon the proceeds, which existed at the time of the decedent's death, must be so paid. If the sale was made in any other manner, the surplus exceeding the lien to satisfy which the property was sold, and the costs and expenses, must, within thirty days after the receipt of the money from which it accrues, be so paid over by the person receiving that money.

L. 1893, ch. 686. See § 2408. See also Rule 61.

§ 2799. [Am'd, 1881, 1904.] Id.; how distributed.

Where money is paid into a surrogate's court, as prescribed in the last section, and a petition for the disposition of property, as prescribed in this title, is pending before him; or is presented at any time before the distribution of the money; the decree may provide that the money be paid to the executor or administrator to be applied by him as if it was the proceeds of the decedent's real property, sold pursuant to the decree. If such a petition is not pending or presented, or if a decree for the disposition of the decedent's property is not made thereupon, a verified petition, praying for a decree, directing the distribution of the money among the persons entitled thereto, may be presented by any of those persons. Each person, who would be entitled to share in the distribution of the proceeds of a sale, must be cited to show cause, why such a decree should not be made. Service of the citation may be made upon all the persons designated therein, by publishing the same in two newspapers designated as prescribed in article first of title second of this chapter, at least once in each of the four successive weeks immediately preceding the return day thereof, except that personal service must be made upon the husband, wife, heirs and devisees of the decedent, and also upon every other person claiming under them, or either of them who resides in this state. Upon the return of the citation, the rights and priorities of the persons interested must be established, and a decree for distribution must be made.

L. 1867, ch. 658, § 2 (7 Edm. 142), am'd; L. 1870, ch. 170 (7 Edm. 664); L. 1904, ch. 730. In effect Sept. 1, 1904.

§ 2800. [Am'd, 1905.] Right of dower to be considered in sale.

Where the widow of the decedent, or a party to the proceeding, has an existing right of dower in the real estate directed to be sold the court must consider and determine whether a more

advantageous sale can be made of such real estate by including the sale of such right of dower; and, if it shall be determined by the court that a larger sum will be realized on such sale, applicable to the payment of debts and funeral expenses, by including in such sale the right of dower, the interest of the party entitled thereto shall pass thereby; and the purchaser, his heirs and assigns, shall hold the property free and discharged from any claim by virtue of that right. The regulations and provisions of article two title one of chapter fourteen of this act, prescribing the rules of practice in relation to the right of dower in actions for the partition of real estate, so far as the same may be applicable, shall govern and control the disposition of moneys realized on such sale which shall belong to the owner of said right of dower.

L. 1905, ch. 430. In effect May 16, 1905.

§ 2801. [Am'd, 1894, 1904.] Restitution for assets subsequently discovered.

Where a decree has been made for the application of the proceeds of real property to the payment of the decedent's debts, or funeral expenses as prescribed in this title, and assets, which should have been applied thereto, are afterwards discovered; or, for any other reason, money or other personal property of the decedent, which should have been applied thereto, afterwards comes to the hands of the executor, administrator, legatee or next of kin, the heir, devisee or other person aggrieved may maintain an action to procure reimbursement therefrom.

L. 1894, ch. 735; L. 1904, ch. 750. In effect Sept. 1, 1904.

§ 2801-a. [Added, 1905.] Conveyance of real estate by executor or administrator to holder of contract of sale made by decedent.

When a person dies seized of the legal title to lands in this state, and another person claims to hold the beneficial interest in an executory contract made by the decedent for the sale and conveyance of such lands to the vendee therein named, or to his successors in interest, the execution and delivery of a deed of such real estate by the executor or administrator of the decedent's estate, to the holder of said contract, having the effect of conveying all the right, title and interest of the decedent at the time of his death in and to said lands, may be authorized and compelled upon the application of such executor or administrator, upon the conditions and in the manner hereinafter provided. Upon receiving written notice of any such claim, subscribed by the claimant and requesting that proceedings be instituted under the provisions of this section, and containing particulars as to the date of the contract, the amount of the purchase price, the time or times when installments thereof were or will become due and payable, the sum, if any, admitted to be still due or unpaid thereon, a description of the lands in question and a statement of any other condition applying to the vendee, the executor or administrator may, in his discretion, apply to the surrogate from whose court his letters were issued, for an order authorizing and directing him to execute a deed of such lands to the person en-

titled thereto upon such terms as the court may prescribe. The executor or administrator may, in his discretion, accept from the claimant a deposit of money to secure the estate for any costs and expenses of the application; such money to be retained by the executor or administrator to the extent of any costs or expenses thus paid or incurred only in the event that the claimant neglects unreasonably to tender performance of his part of the contract, or to be ready and willing to perform when requested, pursuant to the order, if any, to be entered on such application. The application shall be by petition, duly verified, which shall set forth the facts hereinabove provided to be contained in said notice, and such other facts, in relation to said matter as may have come to the knowledge of the executor or administrator, together with the names of the decedent's heirs, devisees and surviving husband or wife, if any, and of all persons claiming under them or either of them, so far as known, and shall pray for a citation to all such heirs, devisees, wife, widow or persons, requiring them to show cause before said surrogate why an order should not be entered authorizing such conveyance. Upon the return of such citation and after hearing the proofs in support of the petition, or in opposition thereto, the surrogate shall make such order as justice requires. If it is found that the enforcement of said contract at law would be subject to a valid defense, in favor of any party to said proceeding, the petition shall be dismissed. If it is found that such contract is valid and in force and that the vendor had not, in his lifetime, effectually conveyed his interest in said lands in fulfillment thereof, the order shall direct such conveyance to be made by the executor or administrator, upon receiving the balance of the purchase price, when due, if there be any such unpaid balance, which amount shall be specified in the order, or upon the compliance by the claimant with any other condition imposed on him by the contract. Under such order, if the purchase money on the contract is not due and the claimant elects to pay the whole amount thereof, before maturity, the executor or administrator shall receive the same and shall thereupon execute and deliver the deed hereinabove provided for. A conveyance made in pursuance of such order shall be binding on all of said persons in interest who were duly cited in the proceeding. An order dismissing the petition shall not prejudice the right of the claimant under said contract to a civil action for specific performance nor to any other remedy then existing at law or in equity; but the delivery and acceptance of a deed of conveyance executed in pursuance of an order granted as prescribed in this section shall be deemed a complete fulfillment of such contract. An order directing a conveyance under the provisions of this section may be enforced, at the instance of the person entitled to such conveyance, by contempt proceedings in the manner provided for

the enforcement of a decree under section twenty-five hundred and fifty-five of this act, provided it is shown that such person tendered performance of his part of the contract, or was ready and able to perform when requested, within a reasonable time after the order was entered. Upon such a proceeding costs and disbursements may be allowed and included in the order, payable from the estate, in the sums specified in section twenty-five hundred and sixty-one of this act.

Added by L. 1908, ch. 502. In effect Sept. 1, 1908.

TITLE VI.

Provisions relating to a testamentary trustee.

- Sec. 2802. Intermediate accounting; when voluntary.
 2803. Id.; when compulsory.
 2804. Petition to compel payment of debt, legacy, etc.
 2805. Id.; proceedings upon return of citation.
 2806. Id.; other persons interested to be cited.
 2807. When surrogate may compel judicial settlement.
 2808. Who may apply therefor.
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§ 2802. [Am'd, 1885.] Intermediate accounting; when voluntary.

Any trustee created by any last will and testament, or appointed by any competent authority to execute any trust created by such last will and testament, may at any time file an intermediate account, and may also annually render and finally judicially settle his accounts before the surrogate of the county having jurisdiction of the estate or trust, in the manner provided by law for the final judicial settlement of the accounts of executors and administrators, and may for that purpose obtain and serve in the same manner the necessary citations requiring all persons interested to attend such final settlement; and the decree of the surrogate on such final settlement may be appealed from in the manner provided for an appeal from a decree of a surrogate's court on the final settlement of the accounts of an executor or administrator, and the like proceedings shall be had on such appeal; in all such annual accountings of such trustees, the surrogate before whom such accounting may be had shall allow to the trustee or trustees the same compensation for his or their services, by way of commission, as are allowed by law to executors and administrators, besides their just and reasonable expenses therein; and also the additional allowance provided for in section twenty-five hundred and sixty-two of this act; the decree of the surrogate on such final annual settlement of an account provided for in this section, or the final determination, decree or judgment of the appellate tribunal in case of appeal, shall have the same force and effect as the decree or judgment of any other court of competent jurisdiction on the final settlement of such accounts, and of the matters relating to such trust which shall have been embraced in such accounts, or litigated or determined on such settlement.

Based on L. 1866, ch. 115 (6 Edm. 700), and L. 1867, ch. 782, § 1 (7 Edm. 167); L. 1871, ch. 482 (9 Edm. 94); L. 1885, ch. 518.

§ 2803. Id.; when compulsory.

Upon the petition of a person interested, absolutely or contingently, in the estate or fund in the hands of a testamentary trustee.

tee, or in the application thereof, or of the income or other proceeds thereof, the surrogate may, in his discretion, make, at any time, an order requiring a testamentary trustee to render an intermediate account.

Based on L. 1866, ch. 115 (6 Edm. 700), and L. 1867, ch. 782, § 1 (7 Edm. 167); L. 1871, ch. 482 (9 Edm. 94); L. 1885, ch. 518.

§ 2804. Petition to compel payment of debt, legacy, etc.

Where a person is entitled by the terms of the will to the payment of money, or the delivery of personal property by a testamentary trustee, he may present to the surrogate's court a written petition, duly verified, setting forth the facts which entitle him to the payment or delivery, and praying for a decree, directing payment or delivery accordingly; and that the testamentary trustee may be cited to show cause why such a decree should not be made. If the petitioner is so entitled, only upon the happening of a contingency, or after the expiration of a certain time, he must show in his petition that his right to the money or other property has become absolute. Upon the presentation of the petition, the surrogate must issue a citation accordingly.

Id.

§ 2805. *Id.*; proceedings upon return of citation.

Upon the return of a citation, issued as prescribed in the last section, if the testamentary trustee files a written answer, duly verified, setting forth facts, which show that it is doubtful, whether the petitioner's claim is valid and legal, and denying its validity or legality, absolutely or upon his information and belief, a decree must be made dismissing the petition, without prejudice to an action in behalf of the petitioner for an accounting; otherwise, the surrogate must hear the allegations and proofs of the parties, and must make such a decree in the premises as justice requires. In a proper case, the decree may require the testamentary trustee, who is unable to deliver personal property, to which the petitioner is entitled, to pay the value thereof.

Id.

§ 2806. *Id.*; other persons interested to be cited.

Where it appears, upon the presentation of a petition as prescribed in the last section but one, that a decree made pursuant to the prayer thereof, might affect the rights of other persons with respect to the estate or fund held by the testamentary trustee, the citation must also be directed to those persons. Where that fact appears, upon the return of the citation, or upon the hearing, and it also appears presumptively that the petitioner is entitled to a decree, all the persons, whose rights may be so affected, must be brought in by supplemental citation before a decree is made.

Id.

§ 2807. When surrogate may compel judicial settlement.

In either of the following cases, the surrogate's court may, from time to time, compel a judicial settlement of the account of a testamentary trustee:

1. Where one year has expired since the will was admitted to probate.
2. Where the trustee has been removed, or, for any other reason, his powers have ceased.
3. Where the trusts, or one or more distinct and separate trusts, created by the terms of the will, have been executed, or are ready

to be executed; so that the persons beneficially interested are, by the terms of the will, or by operation of law, entitled to receive any money or other personal property from the trustee.

§ 2808. Who may apply therefor.

A petition, praying for a judicial settlement, as prescribed in the last section, and that the testamentary trustee may be cited to show cause, why he should not render and settle his account, may be presented, by any person beneficially interested in the execution of any of the trusts; or by any person in behalf of an infant so beneficially interested; or by a surety in the bond of the testamentary trustee, given as prescribed in this title, or by the legal representative of such a surety. Upon the presentation of the petition, the surrogate must issue a citation accordingly, unless the account of the testamentary trustee has been judicially settled, within a year before the petition is presented; in which case, the surrogate may, in his discretion, entertain, or decline to entertain, the petition.

§ 2809. Proceedings upon return of citation.

Sections 2727 and 2728 of this act apply to the proceedings upon a citation, issued as prescribed in the last section, and to the testamentary trustee to whom the citation is directed.

§ 2810. Judicial settlement on petition of trustee.

When one year has expired since the probate of the will, or when the trusts, or one or more distinct and separate trusts, created by the will, have been, or are ready to be, fully executed, a testamentary trustee may present to the surrogate's court a petition, duly verified, setting forth the facts, and praying that his account may be judicially settled; and that all the persons who are entitled, absolutely or contingently, by the terms of the will, or by operation of law, to share in the fund, or in the proceeds of property held by the petitioner, as a part of his trust, may be cited to attend the settlement. Thereupon the surrogate must issue a citation accordingly. Sections 2729, 2780, and 2731 of this act apply to the proceedings upon the return of a citation, issued as prescribed in this section, and to the testamentary trustee whose account is to be settled. Any person, although not named in the citation, who is beneficially interested in the estate or fund which came to the petitioner's hands, or in the proceeds thereof, or in the application of that estate or fund, or of the proceeds thereof, is entitled to appear upon the hearing, and thus make himself a party to the special proceeding.

§ 2811. Certain provisions of title fourth made applicable.

Sections 2734 to 2737, both inclusive, sections 2739 to 2741, both inclusive, and sections 2743, 2744, and 2746 of this act, apply to and regulate the like matters, where a testamentary trustee accounts, as prescribed in this title; except as otherwise prescribed in the next two sections. To each account, filed as prescribed in this title, must be annexed an affidavit, in the form prescribed in section 2733 of this act, for the affidavit to be annexed to the account of an executor or administrator; except that the expression, "the trusts created by the will", with such other description of the trust, as is necessary to identify

it, must be substituted in place of the words, "the estate of the decedent".

§ 2812. Surrogate to determine controversies; proportion may be retained.

Upon a judicial settlement of the account of a testamentary trustee, a controversy which arises, respecting the right of a party to share in the money or other personal property to be paid, distributed, or delivered over, must be determined in the same manner as other issues are determined. If such a controversy remains undetermined, after the determination of all other questions upon which the distribution of the fund, or the delivery of the personal property depends, the decree must direct that a sum, sufficient to satisfy the claim in controversy, or the proportion to which it is entitled, together with the probable amount of the interest and costs, and, if the case so requires, that the personal property in controversy, be retained in the hands of the accounting party; or that the money be deposited in a safe bank or trust company, subject to the surrogate's order, for the purpose of being applied to the payment of the claim, when it is due, recovered, or settled; and that so much thereof, as is not needed for that purpose, be afterwards distributed according to law.

§ 2813. Effect of decree.

A decree, made upon a judicial settlement of the account of a testamentary trustee, as prescribed in this title, or the judgment rendered upon an appeal from such a decree, has the same force, as a judgment of the supreme court to the same effect, as against each party who was duly cited or appeared, and every person who would be bound by such a judgment, rendered in an action between the same parties.

L. 1866, ch. 115 (6 Edm. 700).

§ 2814. Resignation of trust.

A testamentary trustee may, at any time, present to the surrogate's court a written petition, duly verified, praying that his account may be judicially settled; that a decree may thereupon be made, allowing him to resign his trust, and discharging him accordingly; and that all persons who are entitled, absolutely or contingently, by the terms of the will or by operation of law, to share in the fund or estate, or the proceeds of any property held by the petitioner as a part of his trust, may be cited to show cause, why such a decree should not be made. The petition must set forth the facts upon which the application is founded; and it must, in all other respects, conform to a petition presented for a judicial settlement of the account of a testamentary trustee, as prescribed in this title. The surrogate may, in his discretion, entertain or decline to entertain the petition. If he entertains it, the proceedings must be, in all respects, the same as upon a petition for a judicial settlement of the petitioner's account, except that, upon the hearing, the surrogate must first determine, whether sufficient reasons exist for granting the prayer of the petition; and, if he determines that they exist, he must make an order accordingly, and allowing the petitioner to account, for the purpose of being discharged. Upon the petitioner's fully accounting, and paying all money belonging to the trust, and delivering all books, papers, and other property of the trust,

in his hands, either into the surrogate's court, or as the surrogate directs, a decree may be made, accepting his resignation and discharging him accordingly.

See L. 1870, ch. 359, § 2.

§ 2815. Petition for security from testamentary trustee.

Any person, beneficially interested in the execution of the trust, may present to the surrogate's court a written petition, duly verified, setting forth, either upon his knowledge, or upon his information and belief, any fact, respecting a testamentary trustee, the existence of which, if it was interposed as an objection to granting letters testamentary to a person named as executor in a will, would make it necessary for such a person to give security, in order to entitle himself to letters; and praying for a decree, directing the testamentary trustee to give security for the performance of his trust; and that he may be cited to show cause, why such a decree should not be made. Upon the presentation of such a petition, the surrogate must issue a citation accordingly. Upon the return of the citation, a decree, requiring the testamentary trustee to give such security, may be made, in a case where a person so named as executor can entitle himself to letters testamentary, only by giving a bond; but not otherwise.

§ 2816. Security; how given.

The security, given as prescribed in the last section, must be a bond to the same effect, and in the same form, as an executor's bond. Each provision of this chapter, applicable to the bond of an executor, or to the rights, duties, and liabilities of the parties thereto, or any of them, including the release of the sureties, and the giving of a new bond, apply to the bond so given, and to the parties thereto.

§ 2817. Removal of testamentary trustee.

In either of the following cases, a person beneficially interested in the execution of the trust, may present to the surrogate's court a written petition, duly verified, setting forth the facts, and praying for a decree removing a testamentary trustee from his trust; and that he may be cited to show cause, why such a decree should not be made:

1. Where, if he was named in a will as executor, letters testamentary would not be issued to him, by reason of his personal disqualification or incompetency.

2. Where, by reason of his having wasted or improperly applied the money or other property in his charge, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the property committed to his charge, or by reason of other misconduct in the execution of his trust, or dishonesty, drunkenness, improvidence, or want of understanding, he is unfit for the due execution of his trust.

3. Where he has failed to give a bond, as required by a decree, made as prescribed in the last two sections; or has wilfully refused, or without good cause neglected, to obey a direction of the surrogate, contained in any other decree, or in an order, made as prescribed in this title; or any provision of law, relating to the discharge of his duty.

2 R. S. 730, ch. 1, § 7.

§ 2818. [Am'd, 1884, 1903.] Appointment of successor.

When a person named in a will as sole testamentary trustee dies prior to the probate of the will, or by an instrument in writing renounces his appointment, or when, a sole testamentary trustee dies, or becomes a lunatic, or is by a decree of the surrogate's court removed or allowed to resign, and the trust has not been fully executed, the same court may appoint his successor, unless such an appointment would contravene the express terms of the will. Where one or two or more persons named in a will as testamentary trustees dies prior to the probate of the will, or by an instrument in writing, renounces his or their appointment, or where one of two or more testamentary trustees dies or becomes a lunatic, or is by a decree of the surrogate's court removed or allowed to resign, a successor shall not be appointed, except where such appointment is necessary in order to comply with the express terms of the will, or unless the same court, or the supreme court, shall be of the opinion that the appointment of a successor would be for the benefit of the cestui que trust. Unless and until a successor is appointed the remaining trustee or trustees may proceed and execute the trust as fully as if such trustee (or trustees) had not died, renounced, become a lunatic, been removed or resigned. Where a decree removing a trustee or discharging him upon his resignation does not designate his successor, or the person designated therein does not qualify, the successor must be appointed and must qualify in the manner prescribed by law for the appointment and qualification of an administrator with the will annexed.

L. 1870, ch. 395, § 3; 1 R. S. 780, ch. 1, §§ 68, 71; L. 1884, ch. 408; L. 1903, ch. 370. In effect May 6, 1903.

§ 2819. Proceedings where testamentary trustee is also executor or administrator.

Where the same person is a testamentary trustee, and also the executor of the will, or an administrator upon the same estate, proceedings taken by or against him, as prescribed in this title, do not affect him as executor or administrator, or the creditors of, or persons interested in, the general estate, except in one of the following cases:

1. Where he presents a petition, praying for the revocation of his letters, he may also, in the same petition, set forth the facts, upon showing which he would be allowed to resign as testamentary trustee; and may thereupon pray for a decree allowing him so to resign, and for a citation accordingly.

2. Where a person presents a petition, praying for the revocation of letters issued to an executor or administrator; and any of the facts set forth in the petition are made, by the provisions of this title, sufficient to entitle the same person to present a petition, praying for the removal of a testamentary trustee: the petitioner may pray for a decree, removing the person complained of in both capacities, and for a citation accordingly.

In either case, proceedings upon the petition for the resignation or removal, as the case requires, of the testamentary trustee, and for the judicial settlement of his account, may be taken, as prescribed in this title, in connection with, or separately from,

the like proceedings upon the petition for the revocation of the letters, as the surrogate directs.

§ 2820. Application of this title.

The provisions of this title apply to a trust created by the will of a resident of the State, or relating to real property, situated within the State, without regard to the residence of the trustee, or the time of the execution of the will.

TITLE VII.

Provisions relating to a guardian.

- Article 1. Appointment, removal, and resignation of a general guardian.
 2. Supervision and control of a general guardian. Settlement of his accounts.
 3. Guardians appointed by will or deed.

ARTICLE FIRST.

Appointment, removal and resignation of a general guardian.

- Sec. 2821. Power of court to appoint guardians.
 2822. Petition for appointment, by infant over fourteen.
 2823. Contents of petition: citation.
 2824. Id.; where petitioner is a married woman.
 2825. Appointment of guardian.
 2826. Guardian to be nominated by infant.
 2827. Appointment of temporary guardian for infant under fourteen.
 2828. Term of office of temporary guardian.
 2829. Inquiry as to value of property.
 2830. Qualification of guardian of property.
 2831. Id.; of guardian of person.
 2832. When letters may be revoked for misconduct, etc.
 2833. Citation: hearing: decree.
 2834. Suspension of guardian: effect thereof.
 2835. Application by guardian for revocation of letters.
 2836. Proceedings thereupon.
 2837. Ward or new guardian may require accounting.
 2838. Application for ancillary letters to foreign guardian.
 2839. Proceedings thereupon.
 2840. Effect of ancillary letters.
 2841. Application of the last section to former guardians.

§ 2821. Power of court to appoint guardians.

The surrogate's court has the like power and authority to appoint a general guardian, of the person or of the property, or both, of an infant, which the chancellor had, on the thirty-first day of December, eighteen hundred and forty-six. It has also power and authority to appoint a general guardian, of the person or of the property, or both, of an infant whose father or mother is living, and to appoint a general guardian, of the property only, of an infant married woman. Such power and authority must be exercised in like manner as they were exercised by the court of chancery, subject to the provisions of this act. The same person may be appointed guardian of an infant in both capacities; or the guardianship of the person and of the property may be committed to different persons.

2 R. S. 151, § 6 (2 Edm. 157); L. 1870, ch. 341 (7 Edm. 716); L. 1871, ch. 708 (9 Edm. 132). See Rules 52-54.

§ 2822. [Am'd, 1909.] Petition for appointment, by infant over fourteen.

In either of the following cases, an infant of the age of fourteen years or upwards, may present, to the surrogate's court of the county in which he resides; or, if he is not a resident of the state, to the surrogate's court of the county in which any of his property, real or personal, is situated; a written petition, duly verified, setting forth the facts upon which the jurisdiction of the court depends, and praying for a decree appointing a general guardian, either of his person, or of his property, or both, as the case requires; and, if necessary, that the persons, entitled by law to be cited upon such an application, may be cited to show cause, why such a decree should not be made:

1. Where such a general guardian has not been duly appointed, either by a court of competent jurisdiction of the state, or by the will or deed of his father or mother, admitted to probate or authenticated, and recorded, as prescribed in section twenty-eight hundred and fifty-one of this act.

2. Where a general guardian so appointed has died, become incompetent or disqualified; or refuses to act; or has been removed; or where his term of office has expired. Where the petitioner is a non-resident married woman, and the petition relates to personal property only, it must affirmatively show that the property is not subject to the control or disposition of her husband, by the law of the petitioner's residence. Where an infant in one of the cases mentioned in this section has refused, or for ten days has failed, to present the petition, the surrogate, upon notice to be given in such manner as he shall direct, to the infant and the persons who would be entitled by law to be cited upon the application of the infant, shall proceed to the appointment of a general guardian of the property of the infant in the same manner as if the infant had duly presented the petition.

2 R. S. 150, § 4 (2 Edm. 157); L. 1870, ch. 59 (7 Edm. 589); L. 1871, ch. 32 (9 Edm. 58). Am'd by L. 1909, ch. 231. In effect Sept. 1, 1909.

§ 2823. Contents of petition; citation.

A petition, presented as prescribed in the last section, must also state whether or not the father and mother of the petitioner are known to be living. If either of them is known to be living, and the petition does not pray that the father, or, if he is dead, that the mother, may be appointed the general guardian, it must set forth the circumstances which render the appointment of another person expedient; and must pray that the father, or, if he is dead, that the mother, of the petitioner may be cited to show cause, why the decree should not be made. A citation, issued to the father of the petitioner, must be served at least ten days before it is returnable. Where the case is within subdivision second of the last section, the petition must pray that the person formerly appointed general guardian may be cited; unless it is shown that he is dead. The surrogate must inquire, and ascertain as far as practicable, what relatives of the infant

reside in his county; and he may, in his discretion, cite any relative or class of relatives of the infant, residing in that county or elsewhere, to show cause why the prayer of the petition should not be granted.

L. 1870, ch. 341 (7 Edm. 716).

§ 2824. Id.; where petitioner is a married woman.

The last section applies, where the petitioner is a married woman; except that her husband must also be cited, and that the surrogate may, in his discretion, make a decree, appointing a guardian of her property, without citing her father or her mother.

§ 2825. Appointment of guardian.

Upon the return of the citation, the surrogate must make such a decree in the premises, as justice requires. He may, in his discretion, hear allegations and proofs from a person not a party. Where a citation is not issued, the surrogate must, upon the presentation of the petition, inquire into the circumstances. For the purpose of such an inquiry, or of an inquiry into the amount of security to be required of the guardian, he may issue a subpoena, requiring any person to attend before him, to testify respecting any matter involved therein. If he is satisfied that the allegations of the petition are true in fact, and that the interests of the infant will be promoted by the appointment of a general guardian, either of his person or of his property, he must make a decree accordingly, except that a guardian of the person of a married woman shall not be appointed. In a proper case, he may appoint a general guardian in one capacity, without a citation and issue a citation, to show cause against the appointment of a general guardian in the other capacity.

2 R. S. 151, § 6 (2 Edm. 137).

§ 2826. Guardian to be nominated by infant.

A guardian, appointed upon the application of an infant of the age of fourteen years, or upwards, as prescribed in this article, must be nominated by the infant, subject to the approval of the surrogate.

2 R. S. 150, § 4 (2 Edm. 137).

§ 2827. Appointment of temporary guardian for infant under fourteen.

A relative of an infant under fourteen years of age, or any other person in behalf of such an infant, may present, to the surrogate's court of the county in which the infant resides; or, if he is not a resident of the State, to the surrogate's court of the county in which any of the infant's property, real or personal, is situated; a written petition, duly verified, setting forth the facts, upon which the jurisdiction of the court depends, and praying for a decree appointing a guardian of the person, or of the

property, or both, of the infant, to serve until the infant attains the age of fourteen years, and a successor to the guardian is appointed. The cases in which such a guardian may be appointed, the contents of the petition, and the proceedings thereupon, are the same, as prescribed in the foregoing sections of this article, with respect to the appointment of a general guardian, upon the petition of an infant of the age of fourteen years or upwards; except that the surrogate must nominate, as well as appoint, the temporary guardian.

2 R. S. 151, § 5 (2 Edm. 157).

§ 2828. Term of office of temporary guardian.

The term of office of a guardian, appointed as prescribed in the last section, expires when the infant attains the age of fourteen years. But after the infant attains that age, the person so appointed continues to retain all the powers and authority, and is subject to all the duties and liabilities, of a guardian of the person, or of the property, or both, pursuant to his letters; until his successor is appointed and has qualified, or until his letters are revoked, for some other cause, by a decree of the surrogate's court; and his sureties are responsible accordingly.

Id., § 10.

§ 2829. Inquiry as to value of property.

Where a general guardian of the property of an infant is appointed, as prescribed in this article, the surrogate must inquire into the infant's circumstances, and must ascertain, as nearly as practicable, the value of his personal property, and of the rents and profits of his real property.

Id., part of § 6.

§ 2830. [Am'd, 1881, 1892.] Qualification of guardian of property.

Before letters of guardianship of an infant's property are issued by the surrogate's court, the person appointed must, besides taking an official oath, as prescribed by law, execute to the infant, and file with the surrogate, his bond, with at least two sureties, in a penalty, fixed by the surrogate, not less than twice the value of the personal property, and of the rents and profits of the real property; conditioned that the guardian will, in all things, faithfully discharge the trust reposed in him, and obey all lawful directions of the surrogate touching the trust; and that he will, in all respects, render a just and true account of all money and other property received by him, and of the application thereof, and of his guardianship, whenever he is required so to do, by a court of competent jurisdiction; but the surrogate may, in his discretion, limit the amount of the bond to not less than twice the value of the personal property and of the rents and profits of the real property for the term of three years. But in case where it appears to be impracticable to give a bond sufficient to cover the

whole amount of the infant's personal property the surrogate may, in his discretion, accept security, to be approved by the surrogate, not less than twice the amount of the particular portion of the infant's property which the guardian will be authorized under the letters to receive; and issue letters thereon limited to the receiving and administering only such personal property for which double the security has been given, and restraining the guardian from receiving any other personal property of the infant until the further order of the surrogate on additional further satisfactory security.

2 R. S. 151, § 8; L. 1892, ch. 559.

§ 2831. Id.; of guardian of person.

Before letters of guardianship of an infant's person are issued by the surrogate's court, the person appointed must take the official oath as prescribed by law. The surrogate may also require him to execute to the infant a bond, in a penalty fixed by the surrogate, and with or without sureties, as to the surrogate seems proper; conditioned, that the guardian will in all things faithfully discharge the trust reposed in him, and duly account for all money or other property which may come to his hands, as directed by the surrogate's court.

§ 2832. When letters may be revoked for misconduct, etc.

In either of the following cases, the ward, or any relative or other person in his behalf, or the surety of a guardian, may, at any time, present to the surrogate's court, a written petition, duly verified, setting forth the facts, and praying for a decree, revoking letters of guardianship, either of the person, or of the property, or both; and that the guardian complained of may be cited to show cause, why such a decree should not be made:

1. Where the guardian is disqualified by law, or is, for any reason, incompetent to fulfil his trust.

2. Where, by reason of his having wasted or improperly applied the money or other property in his charge, or invested money in securities authorized by law, or otherwise improvidently managed or injured the real or personal property of the ward, or by reason of other misconduct in the execution of his office, or his dishonesty, drunkenness, improvidence, or want of understanding, he is unfit for the due execution of his office.

3. Where he has wilfully refused, or, without good cause, neglected, to obey any lawful direction of the surrogate, contained in a decree or an order; or any provision of law, relating to the discharge of his duty.

4. Where the grant of letters to him was obtained, by a false suggestion of a material fact.

5. Where he has removed, or is about to remove, from the State.

6. In the case of the guardian of the person, where the infant's welfare will be promoted by the appointment of another guardian.

2 R. S. 151, § 14; L. 1837, ch. 460, §§ 34, 45 (4 Edm. 493, 495).

§ 2833. Citation; hearing; decree.

Upon the presentation of a petition, as prescribed in the last section, the surrogate must inquire into the matter; and, for that purpose, he may issue a subpoena to any person, requiring him to attend and testify in the premises. If the surrogate is satisfied that there is probable cause to believe, that the allegations of the petition are true, he must issue a citation to the guardian complained of; and, upon the return thereof, if the material allegations of the petition are established, he must make a decree, revoking the guardian's letters accordingly; except that, where the case is within subdivision third or fourth of this last section, he must dismiss the proceedings, under the like circumstances and upon the like terms, as prescribed in sections 2686 and 2687 of this act, where a similar complaint is made against an executor or administrator.

Id. §§ 14 and 16, am'd.

§ 2834. Suspension of guardian, effect thereof.

Upon issuing a citation as prescribed in the last section, the surrogate may, in his discretion, make an order suspending the guardian, wholly or partly, from the exercise of his powers and authority, during the pendency of the special proceeding. A certified copy of an order so made must accompany the citation, and be served therewith; but, from the time when it is made, the order is binding upon the guardian and upon all other persons, without service thereof, subject to the exceptions and limitations prescribed in sections 2603 and 2604 of this act, with respect to a decree revoking letters.

L. 1837, ch. 460, § 61 (4 Edm. 497).

§ 2835. Application by guardian for revocation of letters.

A guardian, appointed as prescribed in this title, may, at any time, present to the surrogate's court a written petition, duly verified, setting forth the facts upon which the application is founded, and praying that his account may be judicially settled; that a decree may thereupon be made, revoking his letters, and discharging him accordingly; and that the ward may be cited to show cause why such a decree should not be made. The surrogate may, in his discretion, entertain or decline to entertain the application.

Id., part of §§ 51 and 52.

§ 2836. Proceedings thereupon.

If the surrogate entertains an application, made as prescribed in the last section, he must issue a citation, as prayed for in the petition; and he may also require notice of the application to be given to such other persons, and in such a manner, as he deems proper. Upon the return of the citation, a guardian ad litem for the ward must be appointed; and the surrogate may also, in his discretion, allow any person to appear and contest the application, in the interest of the ward. Upon the hearing, the surrogate

must first determine whether sufficient reasons exist for granting the prayer of the petition. If he determines that they exist, and that the interests of the ward will not be prejudiced by the resignation of the guardian, the surrogate must make an order accordingly, and allowing the petitioner to account, for the purpose of being discharged. Upon his fully accounting, and paying all money which is found to be due from him to the ward, and delivering all books, papers, and other property of the ward in his hands, either into the surrogate's court, or in such a manner as the surrogate directs, a decree may be made, revoking the petitioner's letters, and discharging him accordingly.

L. 1837, ch. 460, part of §§ 52, 53, 54, 55 and 56.

§ 2837. Ward or new guardian may require accounting.

Notwithstanding the discharge of a guardian, as prescribed in the last section, his successor or the ward may compel a judicial settlement of his account, as prescribed in article second of this title, in the same manner and with like effect, as if the decree discharging him had not been made. With respect to all matters connected with his trust, his sureties continue to be liable, until his account is judicially settled accordingly.

Id., part of § 56 (4 Edm. 496).

§ 2838. [Am'd, 1892, 1897, 1900.] Application for ancillary letters to foreign guardians.

1. Where an infant, who resides without the State and within the United States, is entitled to property within the State, or to maintain an action in any court thereof, a general guardian of his property, who has been appointed by a court of competent jurisdiction, within the State or territory where the ward resides, and has there given security, in at least twice the value of the personal property, and of the rents and profits of the real property, of the ward, may present, to the surrogate's court having jurisdiction, a written petition, duly verified, setting forth the facts, and praying for ancillary letters of guardianship accordingly. The petition must be accompanied with exemplified copies of the records and other papers, showing that he has been so appointed, and has given the security required in this section, which must be authenticated in the mode prescribed in section forty-five of the decedent estate law, for the authentication of records and papers, upon an application for ancillary letters testamentary, or ancillary letters of administration.

2. Where an infant who resides without the State and within a foreign country is entitled to personal property within the State, or to maintain an action, or special proceeding in any court thereof respecting such personal property, a general guardian of his property, authorized to act as such within the foreign country where the ward resides, may apply to the surrogate's court of the county where such personal property or any part thereof is situated, for ancillary letters of guardianship on the personal estate of such infant, and the person so authorized must present to the surrogate's court having jurisdiction a written petition duly verified, setting forth the facts and praying for

ancillary letters of guardianship on the personal estate of such infant. The petition must be accompanied with the exemplified copies of the records and other papers showing the appointment of such foreign guardian, or where such foreign guardian has not been appointed by any court with other proof of his authority to act as such guardian within such foreign country, and also with proof that pursuant to the laws of such foreign country, such foreign guardian is entitled to the possession of the ward's personal estate. Exemplified copies of the records, where used pursuant to this subdivision, must be authenticated by the seal of the court, or officer, by which or by whom such foreign guardian was appointed, or the officer having the custody of the seal or of the record thereof, and the signature of a judge of such court, or the signature of such officer and of the clerk of such court or officer, if any; and must be further authenticated by the certificate, under the principal seal of the department of foreign affairs, or the department of justice of such country, attested by the signature or seal of a United States consul.

L. 1870, ch. 59, part of § 1 (7 Edm. 589); L. 1892, ch. 576; L. 1897, ch. 492. Am'd by L. 1903, ch. 65, § 3. See note 79 of notes of Board of Statutory Consolidation at end of code.

§ 2839. [Am'd, 1892.] Proceedings thereupon.

Where the surrogate is satisfied, upon the papers presented, as prescribed in the last section, that the case is within that section, and that it will be for the ward's interest, that ancillary letters of guardianship should be issued to the petitioner, he may make a decree granting ancillary letters accordingly. Such a decree may be made without a citation, or the surrogate may cite such persons as he thinks proper, to show cause, why the prayer of the petition should not be granted. But before the ancillary letters are issued, the surrogate must inquire, whether any debts are due from the ward's estate to residents of the State; and if so, he must require payment thereof.

Id., part of § 1; L. 1892, ch. 576.

§ 2840. Effect of ancillary letters.

Ancillary letters of guardianship are issued as prescribed in the last section, without security and without an oath of office. If issued in a case provided for in subdivision one,* of section twenty-eight hundred and thirty-eight, they authorize the person to whom they are issued to demand and receive the personal property, and the rents and profits of the real property of the ward; to dispose of them in like manner as a guardian of the property appointed as prescribed in this article; to remove them from the State, and to maintain or defend any action or special proceeding in the ward's behalf. If issued in a case provided for in subdivision two of section twenty-eight hundred and thirty-eight, such ancillary letters of guardianship authorize the person to whom they are issued to demand and receive the personal estate of the ward, and to dispose of it in like manner as a guardian of property appointed as prescribed in this article, and to maintain or defend any action or special proceeding respecting such personal estate in the ward's behalf. But in neither case do such letters authorize such ancillary guardian to receive from a resident, guardian, executor, or administrator, or from a testamentary trustee, subject to the jurisdiction of a surrogate's court, money or other property be-

* So in the original.

longing to the ward, in a case where letters have been issued to a guardian of the infant's property, from a surrogate's court of a county within the State, upon an allegation that the infant was a resident of that county, except by the special direction, made upon good cause shown, of the surrogate's court from which the principal letters were issued, or unless the principal letters have been duly revoked.

Id., remainder of § 1.

§ 2841. Application of the last section to former guardians.

The last section applies to letters granted, before this chapter takes effect, by a surrogate's court of the State, to a guardian appointed by a court of another State, or a territory of the United States, upon presentation of an exemplified transcript of the record of his appointment.

ARTICLE SECOND.

Supervision and control of a general guardian. Settlement of his account.

Sec. 2842. Guardian to file annual inventory and account.

2843. Affidavit to be annexed thereto.

2844. Annual examination of guardian's accounts.

2845. Proceedings when account defective, etc.

2846. Surrogate may direct as to infant's maintenance.

2847. When judicial settlement of guardian's account compelled.

2848. Id.; as to guardian of person.

2849. When guardian may compel judicial settlement.

2850. Citation; proceedings thereupon.

§ 2842. [Am'd, 1913.] Guardian to file annual inventory and account.

A general guardian of an infant's property, appointed by a surrogate's court, must, in the month of January of each year, as long as any of the infant's property, or of the proceeds thereof, remains under his control, file in the surrogate's court the following papers:

See § 2341, ante.

1. An inventory, containing a full and true statement and description of each article or item of personal property of his ward, received by him, since his appointment, or since the filing of the last annual inventory, as the case requires; the value of each article or item so received; a list of the articles or items remaining in his hands; a statement of the manner in which he has disposed of each article or item, not remaining in his hands; and a full description of the amount and nature of each investment or money made by him.

2. A full and true account, in form of debtor and creditor, of all his receipts and disbursements of money, during the preceding year; in which he must charge himself with any balance remaining in his hands, when the last account was rendered, and must distinctly state the amount of the balance remaining in his hands, at the conclusion of the year, to be charged to him in the next year's account.

3. The names and residences of the sureties on his undertaking; if natural persons whether they are living; and whether the security of the undertaking has become impaired.

L. 1837, ch. 460, § 57 (4 Edm. 497), am'd. See § 2855, post. Am'd, L. 1913, ch. 533. In effect Sept. 1, 1913.

§ 2843. Affidavit to be annexed thereto.

With the inventory and account, filed as prescribed in the last section, must be filed an affidavit, which must be made by the guardian, unless, for good cause shown in the affidavit, the surrogate permits the same to be made by an agent or attorney, who is cognizant of the facts. The affidavit must state, in substance, that the inventory and account contain, to the best of the affiant's knowledge and belief, a full and true statement of all the guardian's receipts and disbursements, on account of the ward; and of all money and other personal property of the ward, which have come to the hands of the guardian, or have been received by any other person by his order or authority, or for his use, since his appointment, or since the filing of the last annual inventory and account, as the case requires; and of the value of all such property; together with a full and true statement and account of the manner, in which he has disposed of the same, and of all the property remaining in his hands, at the time of filing the inventory and account; and a full and true description of the amount, and

nature of each investment made by him, since his appointment, or since the filing of the last annual inventory, and account, as the case requires; and that he does not know of any error or omission in the inventory or account, to the prejudice of the ward. The surrogate must annex a copy of this and the last section, to all letters of guardianship of the property of an infant issued from his court.

L. 1837, ch. 460, §§ 57 and 58. See § 2855, post.

§ 2844. [Am'd, 1881.] Annual examination of guardian's accounts.

In the month of February of each year, and thereafter until completed, the surrogate must, for the purposes specified in the next section, examine or cause to be examined, under his direction, all inventories and accounts of guardians filed since the first day of February of the preceding year. The examination may be made by the clerk of the surrogate's court, or by a person specially appointed by the surrogate to make it, who must, before he enters upon the examination, subscribe and take, before the surrogate, and file, with the clerk of the surrogate's court, an oath faithfully to execute his duties, and to make a true report to the surrogate. Where the surrogate seasonably certifies in writing to the board of supervisors, or, in the county of New-York, to the board of aldermen, that the examination required by this section cannot be made by him, or by the clerk of the surrogate's court, or by any clerk, employed in his office and paid by the county, the board must provide for the compensation of a suitable person to make the examination.

Id., part of § 58. See § 2855, post.

§ 2845. Proceedings when account defective, etc.

If it appears to the surrogate, upon an examination made as prescribed in the last section, that a general guardian of an infant's property, appointed by letters issued from his court, has omitted to file his annual inventory or account, or the affidavit relating thereto, as prescribed in the last section but one; or if the surrogate is of the opinion, that the interest of the ward requires that the guardian should render a more full or satisfactory inventory or account; the surrogate must make an order, requiring the guardian to supply the deficiency, and also, in his discretion, requiring the guardian personally to pay the expense of serving the order upon him. Where the guardian fails to comply with such an order, within three months after it is made; or where the surrogate has reason to believe that sufficient cause exists for the guardian's removal, the surrogate may, in his discretion, appoint a fit and proper person special guardian of the ward, for the purpose of filing a petition in his behalf, for the removal of the guardian, and prosecuting the necessary proceedings for that purpose.

Id., § 60. See § 2855, post.

§ 2846. Surrogate may direct as to infant's maintenance.

Upon the petition of the general guardian of an infant's person or property; or of the infant; or of any relative or other person in his behalf; the surrogate, upon notice to such persons, if any, as he thinks proper to notify, may make an order, directing the application, by the guardian of the infant's property, to the support and education of the infant, of such a sum as to the surrogate seems proper, out of the income of the infant's property; or, where the income is inadequate for that purpose, out of the principal.

§ 2847. When judicial settlement of guardian's account compelled.

A written petition, duly verified, praying for the judicial settlement of the account of a general guardian of an infant's property, and that he may be cited to attend the settlement thereof, may be presented to the surrogate's court, in either of the following cases:

1. By the ward, after he has attained his majority.
 2. By the executor or administrator of a ward, who has died.
 3. By the guardian's successor, including a guardian appointed after the reversal of a decree, appointing the person so required to account.
 4. By a surety in the official bond of a guardian whose letters have been revoked; or by the legal representative of such surety.
- Citation under this subdivision must be directed to both the guardian and the ward.

See L. 1890, ch. 62.

§ 2848. [Am'd, 1881.] Id.; as to guardian of person.

A petition, for the judicial settlement of the account of a general guardian of an infant's person, may be presented, as prescribed in the last section, or by the general guardian of the infant's property; but, upon the presentation thereof, proof must be made to the surrogate's satisfaction, that the guardian so required to account has received money or property of the ward, for which he has not accounted; or which he has not paid, or delivered, to the general guardian of the infant's property; and a guardian of the estate only of a minor shall be, for the purposes of this chapter, deemed a general guardian.

§ 2849. [Am'd, 1893.] When guardian may compel judicial settlement.

A guardian may present to the surrogate's court a written petition, duly verified, praying for a judicial settlement of his account, and a discharge from his duties and liabilities, in any case, where a petition for a judicial settlement of his account may be presented by any other person, as prescribed in either of the last two sections. The petition must pray that the person, who might have so presented a petition and also the sureties in his official bond of such guardian or the legal representatives of such surety, may be cited to attend the settlement.

L. 1893, ch. 304.

§ 2850. [Am'd, 1882, 1887.] Citation; proceedings thereupon.

Upon the presentation of a petition, as prescribed in either of the last three sections, the surrogate must issue a citation accordingly. Section 2727, sections 2733 to 2738, both inclusive, and sections 2741 and 2744 of this act, apply to a guardian accounting, as prescribed in this article, and regulate the proceedings upon such an accounting. The accounting party must annex to every account produced and filed by him, an affidavit, in the form prescribed in this article, for the affidavit to be annexed by him to his annual inventory and account. A guardian designated, in this title, is entitled to the same compensation as an executor or administrator

§ 1887, ch. 143.

ARTICLE THIRD.

Guardians appointed by will or deed.

Sec. 2851. Will or deed containing appointment to be proved, etc., and recorded.

2852. Testamentary guardian; qualification, letters, etc.

2853. When security required from guardian appointed by will or deed.

2854. What security to be given.

2855. Inventory and intermediate account may be required.

2856. When surrogate may compel judicial settlement of account.

2857. Effect of decree.

2858. Removal of guardian appointed by will or deed.

2859. Resignation of such a guardian.

2860. Appointment of successor.

§ 2851. Will or deed containing appointment to be proved, etc., and recorded.

A person shall not exercise, within the State, any power or authority, as guardian of the person or property of an infant, by virtue of an appointment contained in the will of the infant's father or mother, being a resident of the State, and dying after this chapter takes effect, unless the will has been duly admitted to probate, and recorded in the proper surrogate's court, and letters of guardianship have been issued to him thereupon; or by virtue of an appointment contained in a deed of the infant's father or mother, being a resident of the State, executed after this chapter takes effect, unless the deed has been acknowledged or proved, and certified, so as to entitle it to be recorded, and has been recorded in the office for recording deeds in the county, in which the person making the appointment resided, at the time of the execution thereof. Where a deed containing such an appointment is not recorded, within three months after the death of the grantor, the person appointed is presumed to have renounced the appointment; and if a guardian is afterwards duly appointed by a surrogate's court, the presumption is conclusive.

Substituted for L. 1877, ch. 206, §§ 4, 5, 6, and 7. See, also, 2 R. S. 150, §§ 1-3.

§ 2852. Testamentary guardian; qualification, letters, etc.

Where a will, containing the appointment of a guardian, is admitted to probate, the person appointed guardian must, within thirty days thereafter, qualify as prescribed in section 2504 of this act; otherwise he is deemed to have renounced the appointment. But the surrogate may extend the time so to qualify, upon good cause shown, for not more than three months. And any person interested in the estate may, before letters of guardianship are issued, file an affidavit, setting forth, with respect to the guardian so appointed, any fact which is made by law an objection to the issuing of letters testamentary to an executor. Sections 2636 to 2638 of this act, both inclusive, apply to such an affidavit, and to the proceedings thereupon. A person appointed guardian by will may, at any time before he qualifies, renounce the appointment by a written instrument, under his hand, filed in the surrogate's office.

L. 1877, ch. 206, §§ 4, 5, 6 and 7.

§ 2853. When security required from guardian appointed by will or deed.

Where a guardian of an infant's person or property has been appointed by will or by deed, the infant, or any relative or other

person in his behalf, may present, to the surrogate's court in which the will was admitted to probate; or to the surrogate's court of the county in which the deed was recorded; a written petition, duly verified, setting forth, either upon his knowledge, or upon his information and belief, any fact, respecting the guardian, the existence of which, if it was interposed as an objection to granting letters testamentary to a person named as executor in a will, would make it necessary for such a person to give a bond, in order to entitle himself to letters; and praying for a decree, requiring the guardian to give security for the performance of his trust; and that he may be cited to show cause why such a decree should not be made. Upon the presentation of such a petition, and proof of the facts therein alleged, to the satisfaction of the surrogate, he must issue a citation accordingly. Upon the return of the citation, a decree requiring the guardian to give security may be made, in the discretion of the surrogate, in a case where a person so named as executor, can entitle himself to letters testamentary only by giving a bond; but not otherwise.

§ 2854. What security to be given.

The security to be given, as prescribed in the last two sections, must be a bond to the same effect, and in the same form, as the bond of a general guardian, appointed by the surrogate's court. Each provision of this chapter, applicable to the bond of such a guardian, and to the rights, duties and liabilities of the parties thereto, or any of them, including the release of the sureties, and the giving of a new bond, applies to the bond so given, and the parties thereto.

§ 2855. [Am'd, 1896.] Inventory and intermediate account may be required.

Upon the petition of the ward, or of any relative or other person in his behalf, the surrogate's court having jurisdiction to require security, as prescribed in the last three sections, may, at any time, in the discretion of the surrogate, make an order requiring a guardian appointed by will or by deed, to render and file an inventory and account, in the same form, and verified in the same manner as the inventory and account required to be filed annually by a guardian appointed by a surrogate's court, as prescribed in article second of this title. The order may also require such an inventory and account to be filed, in the month of January of each year thereafter. Sections twenty-eight hundred and forty-two to twenty-eight hundred and forty-five of this act, both inclusive, apply to such an inventory and account, and to the filing thereof, as if the guardian had been appointed by the surrogate's court. The provisions of section twenty-eight hundred and forty-six of this act shall apply to a guardian appointed by will or deed with the same effect as if such guardian had been mentioned in said section, and the proceedings therein prescribed may be had in the case of any such guardian in the same manner as if he were a general guardian.

L. 1896, ch. 61. In effect Sept. 1, 1896. See §§ 2842-2845, ante.

§ 2856. [Am'd, 1891.] When surrogate may compel judicial settlement of account.

The surrogate's court, having jurisdiction to require security, may compel a judicial settlement of the account of a guardian, appointed by will or by deed, in any case where it may compel

a judicial settlement of the account of a general guardian; and the proceedings to procure such a settlement are the same, as if the guardian so appointed by will or by deed had been a general guardian. A guardian appointed by will or by deed may present to the surrogate's court, a written petition, duly verified, praying for a judicial settlement of his account, and a discharge from his duties and liabilities, in any case where a petition for a judicial settlement of his account may be presented by any other person as prescribed in this article. The petition must pray that the person who might have so presented a petition may be cited to attend the settlement. Upon the presentation of such petition the surrogate must issue a citation accordingly. Sections 2733 to 2737, both inclusive, and sections 2741 and 2744 of this act apply to a guardian accounting as prescribed in this article, and regulate the proceedings upon such an accounting. A guardian designated in this title is entitled to the same compensation as a general guardian.

§ 2857. Effect of decree.

A decree, made upon a judicial settlement of the account of a guardian appointed by will or by deed, as prescribed in this article, or the judgment rendered upon appeal from such decree, has the same force, as a judgment of the supreme court to the same effect.

See § 2813, ante.

§ 2858. Removal of guardian appointed by will or deed.

Upon the petition of the ward, or of any relative or other person in his behalf, the surrogate's court having jurisdiction to require security from a guardian appointed by will or by deed, may remove such a guardian, in any case where a testamentary trustee may be removed, as prescribed in title sixth of this chapter; and the proceedings upon such a petition are the same, as prescribed in that title for the removal of a testamentary trustee. Where a citation is issued, upon a petition for the removal of such a guardian, he may be suspended from the exercise of his powers and authority, as if he had been appointed by the surrogate's court.

L. 1874, ch. 489 (9 Edm. 900). See §§ 2815 and 2824, ante.

§ 2859. Resignation of such a guardian.

A guardian appointed by will or by deed, may be allowed to resign his trust, by the surrogate's court, having jurisdiction to require security from him. The proceedings for that purpose, and the effect of a decree made thereupon, are the same, as where a guardian appointed by the surrogate's court presents a petition praying that his letters may be revoked, as prescribed in article first of this title.

See §§ 2835, 2836 and 2837, ante.

§ 2860. Appointment of successor.

Where a sole guardian, appointed by will or by deed, has been, by the decree of the surrogate's court, removed or allowed to resign, a successor may be appointed by the same court, with the effect prescribed in section 2605 of this act; unless such an appointment would contravene the express terms of the will or deed.

See § 2818, ante.

CHAPTER XIX.

Courts of Justices of the Peace, and Proceedings Therein.

TITLE I.—Jurisdiction and General Powers.

TITLE II.—Commencement of Action; Appearance of Parties; Provisional Remedies.

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TITLE IV.—Proceedings Between the Joinder of Issue and the Trial.

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TITLE VI.—Judgment; and Docketing the Same.

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TITLE VIII.—Appeals.

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TITLE X.—Action or Special Proceeding, Relating to an Animal Straying upon the Highway.

TITLE XI.—Provisions Specially Relating to Courts of Justices of the Peace in the City of Brooklyn.

TITLE XII.—Miscellaneous Provisions.

TITLE I.

Jurisdiction and general powers.

Sec. 2861. Justice's jurisdiction must be specially conferred by law.

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§ 2861. Justice's jurisdiction must be specially conferred by law.

A justice of the peace has such jurisdiction in civil actions and special proceedings, as is specially conferred upon him by statute, and no other.

See Co. Proc., § 53.

§ 2862. [Am'd, 1896, 1906.] General civil jurisdiction.

Except as otherwise prescribed in the next section, a justice of the peace has jurisdiction of the following civil actions:

1. An action to recover damages upon or for breach of a contract, express or implied, other than a promise to marry, where the sum claimed does not exceed two hundred dollars.

2. An action to recover damages for a personal injury, or an injury to property, where the sum claimed does not exceed two hundred dollars.

3. An action for a fine or penalty, not exceeding two hundred dollars.

4. An action upon a bond conditioned for the payment of money, where the sum claimed to be due does not exceed two hundred dollars; the judgment to be rendered for the sum actually due. Where the sum secured by the bond is to be paid in instalments, an action may be brought for each instalment, as it becomes due.

5. An action upon a surety bond, taken, by any justice of the peace.

6. [Am'd, 1906.] An action upon a judgment, either foreign or domestic rendered in any inferior court, not of record, where the sum claimed does not exceed two hundred dollars. An action upon a judgment, foreign or domestic rendered in a court of record, where the sum claimed does not exceed fifty dollars.

L. 1906, ch. 246. In effect Sept. 1, 1906.

7. An action to recover one or more chattels, with or without damages for the taking, withholding, or detention thereof, where the value of the chattel, or of all the chattels, as stated in the affidavit made on the part of the plaintiff, does not exceed two hundred dollars.

8. An action to recover damages for an escape from the jail liberties, as provided by chapter two, title two, articles four and five of this act, where the sum claimed does not exceed fifty dollars.

Co. Proc. § 52, am'd. Subd. 8 added, L. 1896, ch. 303.

§ 2863. [Am'd, 1882, 1895, 1909.] No jurisdiction in certain cases.

But a justice of the peace cannot take cognizance of a civil action, in either of the following cases:

1. Where the people of the State are a party, except for one or more fines or penalties not exceeding two hundred dollars.

2. Where the title to real property comes in question, as prescribed in title third of this chapter.

3. Where the action is to recover damages for an assault, battery, false imprisonment, libel, slander, criminal conversation, seduction, or malicious prosecution, or where it is brought under sections eighteen hundred and thirty-seven, nineteen hundred and two, or nineteen hundred and sixty-nine of this act, or sections twenty-eight or one hundred and one of the decedent estate law.

4. Where, in a matter of account, the sum total of the accounts of both parties proved to the satisfaction of the justice, exceeds four hundred dollars.

5. Where the action is brought against an executor or administrator as such, except where the amount of the claim is less than the sum of fifty dollars, and the claim has been duly presented to the executor or administrator and rejected by him.

Id., § 54: L. 1895, ch. 527. Am'd by L. 1909, ch. 63, § 3. See note 80 of notes of Board of Statutory Consolidation at end of code.

§ 2864. Confession of judgment.

A justice of the peace has also jurisdiction to render judgment, upon the confession of a defendant, as prescribed in title sixth of this chapter, where the sum confessed does not exceed five hundred dollars.

Id., § 53, subd. 9.

§ 2865. [Am'd, 1882.] Actions by and against officers, etc.; and by executors, etc.

An action, cognizable by a justice of the peace, may be brought by or against a corporation; by or against a natural person in his own right; by or against a town or county officer in his official character; or by an executor or administrator, trustee of an express trust, or a receiver in supplementary proceedings.

2 B. S. 226, § 5 (2 Edm. 241); L. 1847, ch. 470, § 45 (4 Edm. 580).

§ 2806. [Am'd, 1911.] Tavern-keepers disqualified.

A justice of the peace who is an innholder or tavern-keeper engaged in the liquor traffic or at whose inn or tavern liquor is sold, has no power or jurisdiction under any provision of this chapter; but if a judgment has been actually rendered by him, before he became so disqualified, he may give a transcript thereof, or issue execution thereupon, or satisfy the judgment, upon payment thereof.

L. 1847, ch. 140 (4 Edm. 548). Am'd by L. 1911, ch. 600, in effect Sept. 1, 1911.

§ 2807. Members of legislature not compelled to act.

A justice of the peace, who is a member of the senate or assembly, is not obliged to take cognizance of a civil action or special proceeding; but he may take cognizance thereof, in his discretion.

2 B. S. 226, § 7 (2 Edm. 242), am'd.

§ 2808. [Am'd, 1897, 1899.] Justices to hold court; general powers.

A justice of the peace must hold, within his town or city, a court for the trial of any action or special proceeding, of which he has jurisdiction, brought before him; but such a court shall not be held in a room in any part of which trafficking in liquors is authorized or in any adjoining room. He must hear, try and determine the same according to law and equity, and for that purpose, where special provision is not otherwise made by law, the court is vested with all the necessary powers possessed by the supreme court.

Id., § 1, am'd; L. 1897, ch. 404; L. 1899, ch. 105. In effect Sept. 1, 1899.

§ 2809. [Am'd, 1893, 1895, 1903.] In what town, etc., action must be brought.

An action must be brought before a justice of a town or city wherein one of the parties resides, or a justice of an adjoining town or city in the same county, except in one of the following cases:

1. Where the defendant has absconded from his residence, it may be brought before a justice of the town or city in which the defendant, or a portion of his property, is at the time of the commencement of the action.

2. [Am'd, 1895.] Where the plaintiff is not a resident of the county, or if there are two or more plaintiffs when all are non-residents thereof, it must be brought in the town where the defendant resides, or in any adjoining town thereto.

L. 1895, ch. 159.

3. Where the defendant is a non-resident of the county, it may be brought before a justice of the town or city, in which he is at the time of the commencement of the action.

4. Where it is specially prescribed by law, that a particular action may be brought before a justice of the town, city, county, or district, where an offense was committed, or where property is found.

5. [Added, 1893; am'd, 1898, 1903.] In any town adjoining an incorporated city, no justice of such town shall have jurisdiction of any action brought against a resident of such adjoining city, unless one of the parties plaintiff in such action is a resident of such town.

L. 1893, ch. 74; L. 1898, ch. 112; L. 1903, ch. 521. In effect Sept. 1, 1903.

A defendant designated in section 2879, section 2880, or section 2881 of this act, is deemed, for the purposes of this section, a resident of the town or city where the person, to whom a copy of the summons is delivered, resides.

§ 2870. Criminal contempt.

A justice of the peace has power to punish, for a criminal contempt, a person guilty of either of the following acts:

1. Disorderly, contemptuous, or insolent behavior towards him, while engaged in the trial of an action, the rendering of a judgment, or any other judicial proceeding; where such behavior directly tends to interrupt the proceedings, or to impair the respect due to his authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt his official proceedings.

3. Resistance wilfully offered, in his presence, to the execution of his lawful mandate..

He has not power to punish, for a criminal contempt, in any other case.

2 R. S. 273, § 274 (2 Edm. 281).

§ 2871. Id.; how punished.

Punishment, for a contempt, specified in the last section, may be by fine not exceeding twenty-five dollars, or by imprisonment in the county jail not exceeding five days, or both, in the discretion of the justice. Where a person is committed to prison for the non-payment of such a fine, he must be discharged at the expiration of ten days; but where he is also committed for a definite time, the ten days must be computed from the expiration of the definite time.

Id., § 275, am'd.

§ 2872. Offender to be heard.

A person shall not be punished by a justice of the peace, for a contempt, until an opportunity has been given him to be heard in his defence. And, for that purpose, the justice must issue a warrant, directed, generally, to any constable of the county, requiring the constable to bring the offender before him.

Id., § 276, am'd.

§ 2873. Record of conviction.

A justice, who convicts a person of a contempt, must, within ten days after the conviction, make up, subscribe, and file in the county clerk's office, a record thereof, stating therein the particular circumstances of the offence, and the punishment awarded by him upon the conviction.

Id., § 277, am'd.

§ 2874. Requisites of commitment.

A warrant of commitment for a contempt must set forth the particular circumstances of the offence; otherwise it is void.

Id., § 278.

§ 2875. Fine to be paid to overseer or superintendent of the poor.

An officer, who collects or receives a fine, imposed by a justice of the peace for a contempt, must, within ten days thereafter, pay the money, for the benefit of the poor, to the overseer or superintendent of the poor of the town, city, or district, wherein the fine was imposed; or, where there is no such officer, to the officer or officers performing corresponding functions under another name; unless the board of supervisors has directed the payment of fines and penalties to the supervisor of the town in a case where it is authorized by law so to do.

TITLE II.**Commencement of action; appearance of parties; provisional remedies.**

- Article 1. Commencement of action.
 2. Appearance of parties.
 3. Order of arrest
 4. Attachment of property.
 5. Replevin.

ARTICLE FIRST.*Commencement of action.*

- Sec. 2876. Action; how commenced.
 2877. Contents of summons.
 2878. Service of summons.
 2879. Id.; upon a corporation.
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 2881. Id.; relating to express companies.
 2882. Last two sections qualified.
 2883. Second and third summons; effect thereof.
 2884. Where name of defendant is unknown.
 2885. Return of summons.

§ 2876. Action; how commenced.

An action is commenced before a justice of the peace, either by the voluntary appearance and joinder of issue by the parties, or by the service of a summons.

2 R. S. 227, §§ 11, 12 and 13 (2 Edm. 248).

§ 2877. [Am'd, 1904.] Contents of summons.

The summons must be directed, generally, to any constable of the county where the justice resides; and it must command him to summon the defendant to appear before the justice, at a place specified therein, to answer the complaint of the plaintiff in a civil action. Where the summons is accompanied with an order to arrest the defendant, it must be made returnable immediately upon the arrest of the defendant, within twelve days after the day when it was issued; in every other case, it must be returnable at a time therein specified, not less than six nor more than twelve days after the day when it was issued. A summons shall not be made returnable on a legal holiday.

Id., § 14, am'd; L. 1904, ch. 99. In effect Sept. 1, 1904.

§ 2878. Service of summons.

Personal service of the summons must be made by delivering a copy thereof to the defendant; except where it is specially prescribed in this chapter that personal service may be made by delivering a copy to another person. Where service of a summons is personal, it must be made at least six days before the time of appearance specified therein; except where it is accompanied with an order of arrest.

Id., § 15, am'd.

§ 2879. [Am'd, 1904.] Id.; upon a corporation.

Where the defendant to be served is a corporation, or person, company or partnership doing business in another county than that in which he or it resides, the summons may be personally served upon it or him by delivering a copy thereof to an officer, managing agent or person to whom a copy of the summons in an action brought against the corporation in the supreme court might be delivered as prescribed in sections four hundred and

thirty-one and four hundred and thirty-two of this act, or, to any director, managing agent or trustee of the corporation, person, partnership or company by whatever official title he or it is called.

Co. Proc., § 64; L. 1847, ch. 470, § 45 (4 Edm. 587); L. 1904, ch. 527. In effect April 29, 1904.

§ 2880. [Am'd, 1900.] Id.; special provision relating to railroad corporations.

Where the defendant to be served is a railroad corporation, and no officer thereof resides in the county, to whom a copy of the summons may be delivered, as prescribed in the last section, it may be personally served, by delivering a copy thereof to a local superintendent of repairs, freight agent, agent to sell tickets, or station keeper of the corporation, residing in the county; unless, at least thirty days before it was issued, the corporation had filed, in the office of the clerk of the county, a written instrument, designating a person residing in the county, upon whom process to be issued by a justice of the peace against it, may be served; in which case, the summons may be personally served by delivering a copy to the person so designated.

L. 1854, ch. 292, § 14, 15 (3 Edm. 645); L. 1900, ch. 511. In effect Sept. 1, 1900.

§ 2881. [Am'd, 1895, 1905.] Id.; relating to express, insurance and telegraph companies.

Where the defendant to be served is a corporation, association, partnership or person doing business in the state as an express company, an insurance company, or a telegraph company, and no person resides in the county to whom a copy of the summons may be delivered, as prescribed in the foregoing sections of this article, it may be personally served on the express company by delivering a copy thereof to any local or general agent to receive freight or parcels, route agent, or messenger of the defendant, residing in the county, and on any insurance company by delivering a copy thereof to any local or general agent of the defendant, residing in the county, and on any telegraph company by delivering a copy thereof to any office manager of the defendant, residing in the county; unless at least thirty days before it was issued, the defendant had filed in the office of the clerk of the county, a written instrument, designating a person residing in the county, upon whom process to be issued by a justice of the peace against the defendant may be served; in which case the summons may be personally served by delivering a copy thereof to the person so designated.

L. 1895, ch. 349; L. 1905, ch. 211. In effect Sept. 1, 1905.

§ 2882. Last two sections qualified.

Where a person has been designated, as prescribed in either of the last two sections, and the designation has been revoked, or it appears, by affidavit or the return of the constable, to whom a summons has been duly delivered for service, that the person designated is dead, or has ceased to reside within the county; or that he cannot, after due diligence, be found within the county, so as to deliver a copy of the summons to him; the original summons, or the second or third summons, issued as prescribed in the next section, may be served as if the designation had not been made. Such a designation may be revoked by a writing, executed and filed in like manner as required for the purpose of making the designation.

§ 2883. Second and third summons; effect thereof.

Where it appears, by the return of the constable, to whom a summons has been duly delivered for service, that it was not served, for any cause, a second summons may be issued by the same justice, in the same action, within twenty days after the first summons was issued; and, upon the like return thereof, a third summons may be issued, within twenty days after the second was issued. The second or the third summons, as the case may be, relates back to the time when the first summons was issued; and with respect to all proceedings before actual service, the service thereof has the same effect, as if the first summons had been seasonably served. For the purpose of issuing a new summons, as prescribed in this section, a previous summons may be returned upon the sixth, or any subsequent day, before the return day thereof.

§ 2884. Where name of defendant is unknown.

Where the plaintiff is ignorant of the name, or part of the name of a defendant, that defendant may be designated in the summons, and in any other process or proceeding in the action, by a fictitious name, or by so much of his name as is known, adding a description, identifying the person intended. The person so designated must thereupon be regarded as a defendant in the action, and as sufficiently described therein for all purposes. When his name, or the remainder of his name, becomes known, the justice, before whom the action is pending, must amend the proceedings already taken, by the insertion of the true or full name, in place of the fictitious name, or part of a name; and all subsequent proceedings must be taken under the name so inserted.

2 R. S. 274, § 282 (2 Edm. 289).

§ 2885. Return of summons.

A constable, who serves a summons, must, at or before the time when the same is returnable, make and deliver to the justice a written return thereof, under his hand, stating the time when, and the manner in which, he served it. A constable who fails seasonably to serve a summons, delivered to him for service, must make a written return thereof under his hand, stating that it was not served, and the reason why he failed to serve it.

2 R. S. 228, § 16 (2 Edm. 244).

ARTICLE SECOND.

Appearance of parties.

Sec. 2886. Parties may appear in person or by attorney.

2887. Guardian ad litem for infant plaintiff.

2888. Id.: for infant defendant.

2889. When constable, or law partner or clerk of justice may not act as attorney.

2890. Authority of attorney; how proved.

2891. Plaintiff to prove his case, except where a verified complaint is served.

2892. Defendant may offer to compromise; proceedings thereupon.

2893. Justice to wait one hour.

§ 2886. Parties may appear in person or by attorney.

A party to an action before a justice of the peace, who is of full age, may appear and prosecute or defend the same, in person or by attorney, at his election, unless he has been judicially declared to be incompetent to manage his affairs.

2 R. S. 232, §§ 39 and 41 (2 Edm. 248).

§ 2887. Guardian ad litem for infant plaintiff.

Before a summons is issued in behalf of, or an issue is joined without summons by, an infant plaintiff, the justice must appoint a competent and responsible person, nominated by the plaintiff or his general guardian, to appear as his guardian for the purpose of the action. The written consent of the person so appointed must be filed with the justice, before his appointment. The guardian so appointed is responsible for the costs.

Id., § 40 (2 Edm. 248).

§ 2888. Id.: for infant defendant.

After the service and return of a summons against an infant defendant, no other proceeding shall be taken in the action until a person has been appointed to appear as his guardian for the purpose of the action. Upon the nomination of the defendant, the justice must appoint a proper person for that purpose. If the defendant does not appear upon the return of the summons, or if he neglects or refuses to nominate, the justice may, on the application of the plaintiff, appoint any proper person as his guardian. The written consent of the person so appointed, must be filed with the justice before his appointment. The guardian so appointed is not responsible for any costs.

Id., §§ 42 and 43.

§ 2889. [Am'd. 1909.] When constable or law partner or clerk of justice may not act as attorney.

Subject to the provisions of sections two hundred and seventy-one and two hundred and seventy-two of the penal law, any person, other than the constable who served the summons or the venire, or the law partner or clerk of the justice, may be the attorney for a party to an action before a justice of the peace.

Id., § 44; L. 1864, ch. 421 (6 Edm. 295). Am'd by L. 1909, ch. 65.
§ 3. See note 81 of notes of Board of Statutory Consolidation at end of code.

§ 2890. Authority of attorney; how proved.

The attorney's authority may be conferred orally or in writing, but the justice shall not suffer a person to appear as an attorney, unless his authority is admitted by the adverse party, or proved by the affidavit or oral testimony of himself, or another.

Id., § 45.

§ 2891. [Am'd, 1906.] Plaintiff to prove his case, except where a verified complaint is served.

If a defendant fails to appear and answer, the plaintiff cannot recover without proving his case, except in an action which has been commenced by the service of a summons and verified complaint as provided by section twenty-nine hundred and thirty-six of this code; in such action, in case the defendant fails to answer said complaint, as provided by section twenty-nine hundred and thirty-eight of this code, at the time of the return of said summons he shall be deemed to have admitted the allegations of the complaint as true, and the court shall, upon filing the summons and complaint, with due proof of service thereof, enter judgment for the plaintiff and against the defendant, for the amount demanded in such complaint, with costs, without further proof.

Co. Proc., § 64, subd. 8; L. 1906, ch. 201. In effect Sept. 1, 1906.

§ 2892. Defendant may offer to compromise; proceedings thereupon.

Except in an action to recover a chattel, the defendant may, upon the return of the summons and before answering, file with the justice a written offer to allow judgment to be taken against him for a sum therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more of the defendants against whom a separate judgment may be taken. If the plaintiff thereupon, before taking any other proceeding in the action, files with the justice a written acceptance of the offer, the justice must render judgment accordingly. If an acceptance is not filed, the offer cannot be given in evidence upon the trial; but, if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, and must pay the defendant's costs from that time.

Id., part of subd. 15.

§ 2893. Justice to wait one hour.

Upon the return of a summons duly served, the justice must wait one hour, after the time specified therein for its return, unless the parties sooner appear.

2 R. S. 233, § 46 (2 Edm. 249), am'd.

ARTICLE THIRD.

Order of arrest.

Sec. 2894. Order of arrest; in what cases it may be granted.

2895. Id.; in what actions.

2896. Id.; upon what papers.

2897. Id.; its contents.

2898. Duty of constable.

2899. Return. When plaintiff notified must appear.

2900. Constable to keep defendant in custody.

2901. Motion to discharge from arrest.

2902. Effect of discharging defendant.

2903. When plaintiff must prove extrinsic facts.

2904. Privilege from arrest.

§ 2894. Order of arrest; in what cases it may be granted.

At the time when the summons is issued, in an action specified in the next section, the justice who issues the summons must, upon the application of the plaintiff, and upon compliance by him with the provisions of this article, grant an order for the arrest of the defendant, in either of the following cases:

1. Where the defendant to be arrested is not a resident of the county.

2. Where the plaintiff is not a resident of the county; or, if there are two or more plaintiffs, where all are non-residents thereof.

3. Where it appears to the satisfaction of the justice by the affidavit of the plaintiff or another person, that the defendant is about to depart from the county, with intent not to return thereto.

But such an order cannot be granted, where the defendant, against whom it is applied for, is a female.

2 R. S. 228, § 17 (2 Edm. 244); 2 R. S. 253, § 158 (2 Edm. 270).

§ 2895. Id.; in what actions.

An order of arrest shall not be granted, except where the action is brought for one or more of the following causes:

1. To recover a fine or penalty.

2. To recover damages for a personal injury, of which a justice of the peace has jurisdiction; an injury to property, including the wrongful taking, detention, or conversion of personal property; misconduct or neglect in office, or in a professional employment; fraud; or deceit. But this subdivision does not apply to a claim for damages in an action to recover a chattel.

3. To recover for money received, or to recover a chattel: where it appears that the money was received, or that the chattel was embezzled or fraudulently misapplied, by a public officer, or by an attorney, solicitor, or counsellor, or by an officer or agent of a corporation or banking association, in the course of his employment; or by a factor, agent, broker, or other person in a fiduciary capacity.

Substituted for L. 1831, part of §§ 30 and 31 (4 Edm. 472).

§ 2896. Id.; upon what papers.

Where it appears to the justice, by the affidavit of the plaintiff or another person, that a sufficient cause of action exists, against the defendant, and that the case is within the provisions of the last two sections, he must grant the order of arrest. But before granting it, he must require a written undertaking to the defend-

ant, on the part of the plaintiff, with one or more sureties, approved by the justice, to the effect that, if the defendant recovers judgment, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking which must be at least one hundred dollars.

Substituted for 2 R. S. 227, 228, part of §§ 17 and 19 (2 Edm. 244).

§ 2897. Id.; its contents.

The order must be subscribed by the justice and indorsed upon or attached to the summons. It must briefly recite the ground of arrest; and it must direct the constable, who serves the summons, to arrest the defendant; to bring him forthwith before the justice; and to notify the plaintiff of the arrest, if he can do so with reasonable diligence.

Id., § 20, am'd.

§ 2898. Duty of constable.

The constable must, at the time of serving the summons, execute the order of arrest, by arresting the defendant, and taking him forthwith before the justice. If the justice is absent, or unable to try the action, the constable must forthwith take the defendant before another justice of the same town or city; who must take cognizance of the action, and proceed therein, as if the summons had been issued, and the order of arrest had been granted by him.

Id., § 21, am'd.

§ 2899. Return. When plaintiff notified must appear.

The constable, executing the order of arrest, must forthwith deliver to the justice the order, and a written return thereto, under his hand, stating the manner in which he has executed it and either that he has notified the plaintiff, or that he could not do so, with reasonable diligence. If he returns that he has notified the plaintiff, the latter must appear within one hour after the defendant is brought before the justice; otherwise judgment of nonsuit must be rendered against him.

Id., § 22, am'd.

§ 2900. Constable to keep defendant in custody.

The constable executing the order, or another constable, by direction of the justice, must keep the defendant in custody, until he is discharged by the order of the justice, or judgment is rendered in his favor; but the detention shall not, in any case, exceed twelve hours from the time when the defendant is brought before the justice; unless, within that time, a venire is issued, or the trial of the action is commenced, or unless either is delayed with the express assent of the defendant.

Id., § 25, am'd.

§ 2901. Motion to discharge from arrest.

A defendant, arrested as prescribed in this article, may, without notice, upon the appearance of the plaintiff before the justice, or at any time afterwards before judgment, upon two days' notice given personally to the plaintiff, or to his agent or attorney who appeared for him before the justice, apply to the justice for an order, discharging him from the arrest. The application may be founded upon the papers upon which the order of arrest

was granted, and upon the complaint, if it has been made. The justice must grant the application, where it appears that the case is not within the provisions of sections 2894 and 2895 of this act. The justice must also, upon the defendant's application, grant an order discharging him from arrest, if the plaintiff fails to take out, from the justice, an execution upon a judgment in his favor, before the expiration of one hour after he is entitled thereto.

§ 2902. Effect of discharging defendant.

The discharge of the defendant from arrest, before judgment as prescribed in the last section, or in section 2903 of this act, does not affect the jurisdiction of the justice over the action, which must proceed, as if it had been commenced in the ordinary manner. His discharge from arrest, after judgment, as prescribed in the last section, does not affect the execution.

§ 2903. When plaintiff must prove extrinsic facts.

Where an order of arrest has been granted and executed, in a case specified in subdivision third of section 2895 of this act, the plaintiff cannot recover upon a default, and the defendant is entitled to judgment upon a trial, unless the plaintiff establishes all the matters of fact, which are required, by that subdivision to entitle him to an order of arrest.

§ 2904. Privilege from arrest.

This article does not abridge or otherwise affect a privilege from arrest given by law, or a right of action for the breach thereof. A privileged person is entitled to be discharged from arrest, by the order of the justice before whom he is brought, upon proof, by affidavit, of the facts entitling him to a discharge; or he may apply for and obtain an order for his discharge, as prescribed in section 564 of this act.

ARTICLE FOURTH.

Attachment of property.

- Sec. 2905. In what actions, warrant of attachment may be granted.
 2906. What must be shown to procure a warrant.
 2907. Warrant; form and contents thereof.
 2908. Undertaking.
 2909. Warrant; how executed.
 2910. Service of summons and warrant upon defendant.
 2911. Undertaking by defendant; re-delivery to him.
 2912. Claim by third person; bond and delivery thereupon.
 2913. Action upon bond.
 2914. When defendant may prosecute bond.
 2915. Return of warrant.
 2916. Motion to vacate or modify warrant, etc.
 2917. Effect of vacating warrant.
 2918. Proceedings where summons not personally served.

§ 2905. In what actions, warrant of attachment may be granted.

In an action brought before a justice of the peace a warrant of attachment against the property of one or more defendants must be granted, upon the application of the plaintiff, as prescribed in this article, where the action is brought upon a judgment, or to recover for one or more of the following causes:

1. Breach of a contract, express or implied.
2. Wrongful conversion of personal property.
3. Any other injury to personal property, in consequence of negligence, fraud, or other misconduct.

Substitute for 2 R. S. 230, part of §§ 26, 27 and 28 (2 Edm. 245); L. 1831, ch. 300, § 34 (4 Edm. 473).

§ 2906. What must be shown to procure a warrant.

To entitle the plaintiff to such a warrant, he must show, by affidavit, to the satisfaction of the justice as follows:

1. That a sufficient cause of action exists against the defendant, to recover damages for one or more of the causes specified in the last section. If the action is upon a judgment, or to recover for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

2. That the defendant is either a foreign corporation; or not a resident of the State; or, if the defendant is a natural person, and a resident of the State, that he has departed, or is about to depart, from the county where he last resided, with intent to defraud his creditors, or to avoid the service of a summons; or keeps himself concealed, with the like intent; or, if the defendant is a natural person, or a domestic corporation, that he or it has removed, or is about to remove, property from the county where the defendant, being a natural person, last resided, or, being a corporation, last kept its principal office, or from the county in which the action is brought, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property, with the like intent; or that the defendant, being a natural person of full age, and a resident of the State, has been continuously without the United States for the space of six months or more, immediately before the application, and either that he has not made a designation of a person, upon whom to serve a summons in his behalf, as prescribed in section 430 of this act, or that service upon the person so

designated cannot be made, with due diligence, in the county where the person making the designation resides.

The affidavit must be filed with the justice, when the warrant is granted.

2 R. S. 230, part of §§ 26, 27 and 28 (2 Edm. 245).

§ 2907. Warrant; form and contents thereof.

The warrant must be granted by the justice who issues the summons, at the time when the summons is issued; and it must be indorsed thereupon, or annexed thereto. It must be subscribed by the justice, and must briefly recite the ground of the attachment. It must require the constable, to whom the summons is delivered, to attach, on or before a day specified therein, which must be at least six days before the return day of the summons, and safely to keep, as much of the defendant's goods and chattels, within his county, as will satisfy the plaintiff's demand, with the costs and expenses, and to make return of his proceedings thereon to the justice, at the time when the summons is returnable. The amount of the plaintiff's demand must be specified in the warrant, as stated in the affidavit.

Id., § 30, am'd.

§ 2908. Undertaking.

Before granting the warrant, the justice must require a written undertaking to the defendant, on the part of the plaintiff, with one or more sureties, approved by the justice, to the effect that, if the defendant recovers judgment, or the warrant of attachment is vacated, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least two hundred dollars; and that if the plaintiff recovers judgment, he will pay to the defendant all money received by him from property taken by virtue of the warrant of attachment, or upon any bond given therefor, over and above the amount of the judgment, and interest thereupon.

Id., § 29, am'd.

§ 2909. [Am'd, 1903.] Warrant; how executed; perishable property may be sold.

The constable to whom the warrant of attachment is delivered, must execute it at least six days before the return day of the summons, by levying upon and taking into his custody so much of the goods and chattels of the defendant, not exempt from levy and sale by virtue of an execution, including money and bank notes, which he finds within his county, as will satisfy the plaintiff's demand, with the costs and expenses. He must safely keep the property attached, to be disposed of as prescribed in this article, and must immediately make an inventory thereof, stating therein the estimated value of each item or article. Provided, however, if property attached is perishable, the justice who issued the warrant may, by an order made and entered upon his docket, and with or without notice, as the urgency of the case in his opinion requires, direct the constable to sell such property at public auction, and thereupon the constable must sell it accordingly. A certified copy of the order directing the sale shall be delivered to such constable. Such order must prescribe the time and place of the sale, and notice thereof must be given in such manner and for such time as directed by the order. The constable shall retain in his hands the proceeds of such sale until the final determination of the action.

Id., § 31, am'd; L. 1881, ch. 300, § 36 (4 Edm. 473); L. 1903, ch. 322. In effect May 4, 1903

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§ 2910. Service of summons and warrant upon defendant.

The constable must, immediately after making the inventory, and at least six days before the return day of the summons, serve the summons, together with the warrant of attachment and inventory, upon the defendant, by delivering to him personally a copy of each, if he can, with reasonable diligence, be found within the county; or, if he cannot be so found, by leaving a copy of each, certified by the constable, at the last place of residence of the defendant in the county, with a person of suitable age and discretion; or, if such a person cannot be found there, by posting it on the outer door, and also depositing another copy in the nearest post-office, inclosed in a sealed post-paid wrapper, directed to the defendant at his residence; or, if the defendant has no place of residence in the county, by delivering it to the person in whose possession the property attached is found.

2 R. S. 230, § 31, am'd as in § 2909, ante.

§ 2911. Undertaking by defendant; re-delivery to him.

The defendant, or his attorney or agent in his behalf may, at any time before judgment is rendered in the action, execute and deliver to the constable an undertaking to the plaintiff, in a sum specified therein, at least twice the value of the property attached, as stated in the inventory; with one or more sureties, approved by the constable, or by the justice who issued the warrant; and to the effect that, if judgment is rendered against the defendant, and an execution is issued thereupon, within six months after the giving of the undertaking, the property attached shall be produced to satisfy the execution. Thereupon the constable must re-deliver the property to the defendant.

Id., §§ 32, 34, am'd.

§ 2912. Claim by third person; bond and delivery thereupon.

If a person, not a party to the action, claims any property attached, which is not reclaimed by the defendant, as prescribed in the last section, he may, at any time after the seizure, and before execution is issued upon a judgment rendered in the action, execute, and file with the justice, a bond to the plaintiff, with one or more sureties, approved by the constable or by the justice; in a penalty at least twice the value of the property claimed; and conditioned that, in an action upon the bond, to be commenced within three months thereafter, the claimant will establish that he was the general owner of the property claimed, at the time of the seizure; or, if he fails so to do, that he will pay to the plaintiff the value thereof, with interest. The constable must thereupon deliver the property claimed to the claimant.

Id., part of §§ 33, 34, am'd.

§ 2913. Action upon bond.

A judgment for the plaintiff, in an action upon a bond given as prescribed in the last section, must award to him the value of the property seized and delivered to the claimant, with interest thereupon from the time of the delivery. If the amount so recovered exceeds the amount, which the plaintiff recovers, in the action in which the warrant of attachment was issued, he is liable to the defendant in that action for the excess.

Id., part of §§ 36 and 37.

§ 2914. When defendant may prosecute bond.

If the warrant of attachment is vacated or annulled, the defendant may maintain an action, upon the bond specified in the

last two sections, in his own name, in the same manner and with the like effect, as the plaintiff might have done, if the warrant had remained in full force.

2 E. S. 230, § 38, am'd.

§ 2915. Return of warrant.

The constable executing the warrant of attachment must, at the time when and place where it is returnable, make a return thereto, under his hand, stating all his proceedings thereupon. He must deliver to the justice, with the return, each bond or undertaking delivered to him, pursuant to any of the foregoing provisions of this article, and a certified copy of the inventory of the property attached. The return must state the manner in which the warrant and inventory were served, and, if they were served otherwise than by delivering a copy thereof to the defendant personally, the reason therefor, and the name of the person to whom the copy was delivered, unless his name is unknown to the constable; in which case, the return must describe him so as to identify him, as nearly as may be.

Id., § 35, as am'd; L. 1831, ch. 300, § 36 (4 Edm. 473).

§ 2916. Motion to vacate or modify warrant, etc.

A defendant whose property has been attached, may, upon the return of the summons, apply to the justice, who issued the warrant of attachment, to vacate or modify it, or to increase the plaintiff's security. Such an application may be founded upon the papers upon which the warrant was granted; or upon proof, by affidavit, on the part of the defendant; or upon both. If it is founded upon proof on the part of the defendant, it may be opposed by new proof, by affidavit, upon the part of the plaintiff, tending to sustain any ground for the attachment, recited in the warrant, but no other. The justice may, upon the return of the summons, or at any other time to which the action is adjourned, vacate the warrant of attachment upon his own motion, if he deems the papers, upon which it was granted, insufficient to authorize it.

§ 2917. Effect of vacating warrant.

Vacating the warrant of attachment does not affect the jurisdiction of the justice to hear and determine the action, where the defendant has appeared generally in the action; or where the summons was personally served upon him; or where judgment may be taken against him, as being indebted jointly with another defendant, who has been thus summoned, or has thus appeared. In every other case, the justice, who vacates a warrant of attachment against the property of a defendant, must dismiss the action as to him.

§ 2918. Proceedings where summons not personally served.

Where the defendant has not appeared, and the summons has not been personally served upon him, and property of the defendant has been duly attached by virtue of a warrant, which has not been vacated, the justice must proceed to hear and determine the action; but, in an action subsequently brought, the judgment is only presumptive evidence of indebtedness, and the defendant is not barred from any counterclaim against the plaintiff. The execution, issued upon a judgment so rendered, must require the constable to satisfy it out of the property so attached, without containing a direction to satisfy it out of any other property.

L. 1831, ch. 300, § 39 (4 Edm. 474).

ARTICLE FIFTH.*Replevin.*

- Sec. 2919.** When action for a chattel may be brought.
2920. Plaintiff may procure replevin; affidavit and undertaking.
2921. Requisition.
2922. Id.; how executed. Service of summons, etc.
2923. Return of constable.
2924. Defendant may except to sureties; proceedings thereon.
2925. Defendant may reclaim chattel; proceedings thereon.
2926. Justification of sureties.
2927. When and to whom constable must deliver chattel.
2928. Penalty for wrong delivery by constable.
2929. Claim of title by third person.
2930. Defendant may demand judgment for return.
2931. Proceedings in the action; action upon undertaking.
2932. Proceedings when summons not personally served.
2933. When action not affected by failure to replevy.

§ 2919. When action for a chattel may be brought.

An action to recover a chattel, with or without damages for the wrongful taking, withholding, or detention thereof, can be brought before a justice of the peace of the county in which the chattel is found, in a case, and subject to the qualifications, specified in sections 1689, 1690, 1691, and 1692, and subdivision seventh of section 2862 of this act.

Substituted for Co. Proc., § 53, subd. 10, am'd; L. 1800, ch. 131, § 4.

§ 2920. Plaintiff may procure replevin; affidavit and undertaking.

The plaintiff may, at the same time when the summons is issued, but not afterwards, require the chattel to be replevied, as prescribed in this article. For that purpose, he must deliver to the justice an affidavit and an undertaking, similar, in all respects, to the affidavit and undertaking required to be delivered to a sheriff, as prescribed in sections 1695, 1697, 1699, and 1712 of this act; except that the sureties in the undertaking must be approved by the justice.

L. 1831, ch. 300, §§ 2, 3 and 4 (2 Edm. 235; 5 Id. 134).

§ 2921. Requisition.

Upon receiving the affidavit and undertaking, the justice must indorse upon or attach to the affidavit a written requisition, subscribed by him, requiring the constable, to whom the summons is delivered, to replevy the property described in the affidavit, on or before a day specified in the requisition, which must be at least six days before the return day of the summons. The affidavit and requisition must be delivered to the constable, with the summons.

Id., part of § 4, am'd.

§ 2922. Id.; how executed. Service of summons, etc.

The constable must execute the requisition, as a sheriff is required to execute a requisition, in an action brought to recover a chattel, as prescribed in sections 1700, 1701, and 1702 of this act; except that he must serve the summons, affidavit, and requisition within the time and in the manner prescribed, by section 2910 of this act, for the service of a summons, warrant of attachment, and inventory.

Id., part of § 5.

§ 2923. Return of constable.

The constable must, on or before the return day of the summons, make a return to the requisition, under his hand, stating all his proceedings thereupon; and file it, with the affidavit and requisition, with the justice. The return must state the manner in which the summons, affidavit, and requisition were served; and, if they were served otherwise than by delivering the requisite copies to the defendant personally, the reason therefor, and the name of the person to whom the copies were delivered, unless his name is unknown to the constable; in which case, the return must describe him so as to identify him, as nearly as may be.

L. 1831, ch. 300, part of § 5.

§ 2924. Defendant may except to sureties; proceedings thereon.

At any time after the chattel has been replevied, and at least two days before the return day of the summons, the defendant, unless he requires a return of the chattel, may serve upon the plaintiff, or upon the constable, a written notice that he excepts to the plaintiff's sureties; otherwise he is deemed to have waived all objections to them. If such a notice is served, the sureties must justify upon the return of the summons; or the plaintiff must then give a new undertaking, to the same effect as the original undertaking, with other sureties, who must then appear and justify before the justice.

Id., § 6, am'd.

§ 2925. Defendant may reclaim chattel; proceedings thereon.

At any time before the return day of the summons, the defendant may, if he does not except to the plaintiff's sureties, serve upon the justice a notice that he requires the return of the chattel replevied. With the notice he must deliver to the justice an affidavit and undertaking, similar, in all respects, to those required to be given by a defendant upon requiring a return of a chattel, as prescribed in sections 1704 and 1712 of this act, omitting the provision in the undertaking, "or if the action abates in consequence of the defendant's death." The sureties in the undertaking must justify before the justice upon the return of the summons. If the plaintiff has stated separately in his affidavit the value of one or more chattels or classes of chattels, as prescribed in section 1697 of this act, the defendant may require a delivery of part of the property replevied, as prescribed in that section.

Id., § 7.

§ 2926. Justification of sureties.

Except as otherwise expressly prescribed in this article, the examination and qualifications of the sureties, and the allowance of the undertaking, upon a justification pursuant to either of the last two sections, must be the same as upon a justification of bail, as prescribed in sections 579, 580, and 581 of this act, substituting the justice for the judge; but after such allowance, the undertaking must be filed with the justice. The constable is thereupon exonerated from liability.

Id., § 8.

§ 2027. When and to whom constable must deliver chattel.

If the defendant neither excepts to the plaintiff's sureties, nor requires the return of a chattel, within the time prescribed for that purpose; or if he fails to procure the allowance of his undertaking; or if the plaintiff, after the defendant has excepted to his sureties, duly procures the allowance of his undertaking, the constable must, except in the case specified in the next section but one, immediately deliver the chattel to the plaintiff. If the plaintiff, after the defendant has excepted to his sureties, fails to procure the allowance of his undertaking; or if the defendant, after he has required the return of the chattel, procures the allowance of his undertaking, the constable must immediately deliver the chattel to the defendant.

Substituted for L. 1831, ch. 300, part of § 7.

§ 2028. Penalty for wrong delivery by constable.

A constable who delivers to either party, without the consent of the other, a chattel replevied by him, except as prescribed in the last section, or, by virtue of an execution issued upon a judgment in the action, forfeits to the party aggrieved the sum of one hundred dollars; and is also liable to him for all damages which he sustains thereby.

§ 2029. Claim of title by third person.

The provisions, regulating the proceedings, where a person, not a party, claims property which has been replevied, and the rights of such a person, and of the sheriff, as prescribed in sections 1709, 1710, 1711, and 1712 of this act, apply to a like case in an action, brought as prescribed in this article, substituting the constable for the sheriff; except that service of a notice and of a copy of the claimant's affidavit, upon the plaintiff's attorney, as prescribed in section 1709, must be made, either upon the plaintiff personally, or upon the attorney who appears for him before the justice; and that the sum specified in the undertaking, given by the plaintiff to the constable, need not exceed, in any case, three hundred dollars.

Id., § 9. See Co. Proc., § 210.

§ 2030. Defendant may demand judgment for return.

Where a chattel has been replevied, and the defendant has not required the return thereof, pending the action, as prescribed in the foregoing sections of this article, he may in his answer, demand judgment for the return thereof, either with or without damages for the taking, withholding, or detention.

Id., * 11.

§ 2031. Proceedings in the action; action upon undertaking.

Section 1373, section 1731, excluding subdivision first thereof, and sections 1722, 1726, 1730, 1732, 1733, 1734, and 1735 of this act, substituting the constable for the sheriff, apply to the proceedings in an action in a justice's court to recover a chattel, and to an action against the sureties in an undertaking given therein, except as otherwise specially prescribed in this chapter.

Substituted for Id., § 10.

§ 2932. Proceedings when summons not personally served.

Where the defendant does not appear, and the summons has not been personally served upon him, and a chattel, or part of a chattel, to recover which the action is brought, has been replevied, and the proceedings thereupon have been duly taken, as prescribed in this article; the justice must proceed to hear and determine the action, with respect to that chattel or part of a chattel; or, if the action is brought to recover two or more chattels, with respect to those which have been replevied; in like manner and with like effect as if the summons had been personally served.

L. 1831, ch. 300, § 12, am'd.

§ 2933. When action not affected by failure to replevy.

Where the summons has been personally served upon the defendant, or where he appears, the justice must proceed to hear and determine the action, although the plaintiff has not required the chattel to be replevied, or the constable has not been able to replevy it.

TITLE III.

Pleadings; including counterclaims, and proceedings upon answer of title.

- Sec. 2934. When issue to be joined.
 2935. Pleadings.
 2936. Complaint.
 2937. What causes of action may be joined.
 2938. Answer.
 2939. Demurrer.
 2940. General rules of pleading.
 2941. Account, or instrument for payment of money.
 2942. Court may require items to be exhibited.
 2943. Immaterial variance to be disregarded.
 2944. Amendment of pleadings.
 2945. Counterclaims.
 2946. Id.; where executor or trustee is a party.
 2947. Consequence of neglect to plead counterclaim.
 2948. The last section qualified.
 2949. Judgment upon counterclaim.
 2950. Judgment when accounts exceed \$400.
 2951. Answer of title.
 2952. Undertaking thereupon.
 2953. In what court new action to be brought.
 2954. When action before justice to be discontinued.
 2955. Effect of failure to give undertaking.
 2956. When title comes in question on plaintiff's own showing.
 2957. Pleadings in new action. Undertaking before justice, when applicable.
 2958. Answer of title as to one of several causes of action.

§ 2934. [Am'd, 1893.] When issue to be joined.

At the place, and within one hour after the time, specified in the summons for the return thereof; or, where an order of arrest is granted and executed, within twelve hours after the defendant is brought before the justice; or, where no summons is issued, at the time when the parties voluntarily appear to join issue, the pleadings of the parties must be made, and issue must be joined. Where both parties appear upon the return of the summons, an issue must be joined before an adjournment is had, except when the defendant refuses or neglects to plead. Where an issue of fact or an issue of law is joined in a justice's court, or before a justice of the peace in the city of Brooklyn, or in any of the towns in the county of Kings, in which the judgment demanded by either party in his pleadings exceeds the sum of one hundred dollars; or, when in an action to recover a chattel or chattels the value of which as fixed by either party in his pleadings or affidavits exceeds one hundred dollars, the defendant may, after issue joined and before an adjournment is granted upon his application, apply to the justice before whom the action is brought for an order removing the action into the county court of the county of Kings. Such an order must be granted upon the defendant filing with the justice an undertaking in a sum fixed by the justice, not exceeding twice the amount of the damages claimed or twice the value of the chattel or of all the chattels claimed, as stated in the pleading or affidavits, with one or more sureties, approved by the justice, to the effect that the defendant will pay to the plaintiff the amount of any judgment, including costs, that may be recovered against him in the county court in the action so removed. From the time of the granting of the order the county court of Kings county has cognizance of the action, and the same shall be tried and determined by said county court as if originally brought therein. The

justice must forthwith deliver to the clerk of the county court all processes, pleadings and other papers in the action which must be filed, entered and recorded, as the case requires, in the latter office. Costs in an action so removed shall be the same as in an original action commenced in said county court.

L. 1893, ch. 380.

§ 2935. Pleadings.

The pleadings in a justice's court are:

1. The plaintiff's complaint.
2. The defendant's answer.
3. The defendant's demurrer to the complaint, or to one or more distinct causes of action, separately stated therein.
4. The plaintiff's demurrer to one or more counterclaims stated in the answer.

Co. Proc., § 64, subd. 1.

§ 2936. [Am'd, 1906.] Complaint.

The complaint must state, in a plain and direct manner, the facts constituting the cause of action. In an action arising on contract for the recovery of money only, or on an account, the plaintiff or his agent, at or before the time of the issuing of the summons, may make a written complaint as above provided, specifying the amount actually due the plaintiff from the defendant, and praying judgment for the amount so due, which said complaint shall be signed by the plaintiff or his agent and verified in the manner and as provided by section five hundred and twenty-six of this code. Said summons and complaint shall be attached and shall be served upon the defendant by delivering to and leaving with him, personally, true copies thereof, not less than six nor more than twelve days before the return day of said summons; and the official certificate of the constable making such service shall be sufficient evidence thereof.

Id., subd. 3; L. 1906, ch. 291. In effect Sept. 1, 1906.

§ 2937. What causes of action may be joined.

The plaintiff may unite, in the same complaint, two or more causes of action, where they all arise out of:

1. The same transaction, or transactions connected with the same subject of action; or
2. Contract, express or implied; or
3. Personal injuries, and injuries to property, or either.

But it must appear, upon the face of the complaint, that all the causes of action so united belong to one of the foregoing subdivisions of this section; that they are consistent with each other; that they require the same judgment; and, except as otherwise prescribed by law, that they affect all the parties. Where a cause of action, for which a defendant might be arrested, is united with a cause of action, for which he cannot be arrested, an execution against the person of the defendant cannot be issued upon the judgment.

§ 2938. [Am'd, 1906.] Answer.

The answer may contain a general denial of each allegation of the complaint, or a specific denial of one or more of the material allegations thereof. It may also set forth, in a plain and direct manner, new matter, constituting one or more defenses or counterclaims. In case the defendant appears and answers in an action in which a verified complaint has been served, his answer

shall be in writing and shall be verified as above provided for the verification of the complaint.

Co. Proc., subd. 4, § 64; L. 1906, ch. 201. In effect Sept. 1, 1906.

§ 2939. Demurrer.

In a case specified in subdivision third or fourth of section 2935 of this act, a party may demur to the pleading of the adverse party, or, if it is a complaint, to one or more distinct and separate causes of action, where it is not sufficiently explicit to be understood; or where it does not state facts sufficient to constitute a cause of action, or counterclaim, as the case may be. If the court deems the demurrer well founded, it must permit the pleading to be amended; and if the party fails so to amend, the defective pleading, or part of a pleading demurred to, must be disregarded. If the court deems the demurrer not well founded, it must permit the party making it to plead over, at his election.

Co. Proc., § 64, subd. 6 and 7.

§ 2940. General rules of pleading.

A pleading, except as otherwise prescribed in section 2951 of this act, may be oral or written. If it is oral, the substance thereof must be entered by the justice in his docket-book; if it is written, it must be filed by him, and a reference to it made in his docket-book. A pleading is not required to be in any particular form; but it must be so expressed, as to enable a person of common understanding to know what is intended.

Id., subd. 2 and 5, am'd.

§ 2941. Account, or instrument for payment of money.

For the purpose of setting forth a cause of action, defence, or counterclaim, founded upon an account, or upon an instrument for the payment of money only, it is sufficient for the party to deliver the instrument, or a copy of the account to the court, and to state that there is due to him thereupon, from the adverse party, a specified sum, which he claims to recover or to set off.

Id., subd. 9.

§ 2942. Court may require items to be exhibited.

The court may, upon the request of either party, made when issue is joined, require the adverse party to exhibit his account or demand, or to state the nature thereof, as far as it is in his power so to do, at that or another specified time; and in case of his default, it may preclude him from giving evidence of such parts thereof, as have not been so exhibited or stated.

Id., subd. 14.

§ 2943. Immaterial variance to be disregarded.

A variance, between an allegation in a pleading and the proof, must be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled thereby, to his prejudice.

Id., subd. 10.

§ 2944. Amendment of pleadings.

The court must, upon application, allow a pleading to be amended, at any time before the trial, or during the trial, or upon appeal, if substantial justice will be promoted thereby. Where a party amends his pleading after joinder of issue, or pleads over upon the decision of a demurrer, and it is made to appear to the

satisfaction of the court, by oath, that an adjournment is necessary to the adverse party, in consequence of the amendment or pleading over, an adjournment must be granted. The court may also, in its discretion, require, as a condition of allowing an amendment, the payment of costs to the adverse party.

Id., subd. 11.

§ 2945. Counterclaims.

Sections 501 and 502 of this act apply to a counterclaim in an action brought in a justice's court; except that such a counterclaim cannot be interposed, unless it is of such a nature, that a justice's court has jurisdiction of a cause of action founded thereon.

Substituted for 2 R. S. 234, § 50 (2 Edm. 250, 251).

§ 2946. Id.; where executor or trustee is a party.

Sections 505 and 506 of this act apply to a counterclaim in an action against a person sued in a representative capacity, or in favor of an executor or administrator, except that the defendant cannot take judgment against the plaintiff, upon a counterclaim, for a sum exceeding two hundred dollars.

2 R. S. 234, §§ 55 and 56.

§ 2947. Consequence of neglect to plead counterclaim.

Where the defendant, in an action to recover damages upon or for breach of a contract, neglects to interpose a counterclaim, consisting of a cause of action in his favor to recover damages for a like cause, which might have been allowed to him upon the trial of the action, he, and every person deriving title thereto through or from him, are forever thereafter precluded from maintaining an action to recover the same, or any part thereof.

Id., § 57.

§ 2948. The last section qualified.

But the prohibition contained in the last section does not extend to either of the following cases:

1. Where the amount of the counterclaim is two hundred dollars more than the judgment which the plaintiff recovers.

2. Where the counterclaim consists of a judgment rendered before the commencement of the action, in which it might have been interposed.

3. Where the counterclaim consists of a claim for unliquidated damages.

4. Where the counterclaim consists of a claim, upon which another action was pending, at the time when the action was commenced.

5. Where judgment is taken against the defendant, without personal service of the summons upon him, or an appearance by him.

Id., § 58, am'd; L. 1840, ch. 317 (2 Edm. 252).

§ 2949. Judgment upon counterclaim.

Where a counterclaim is established, which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess,

or so much thereof as is due from the plaintiff, unless it is more than the sum of two hundred dollars. If it is more than two hundred dollars, or if no part of it is due from the plaintiff, the justice must, at the election of the defendant, either:

1. Set off so much of the counterclaim as is sufficient to satisfy the plaintiff's demand, and render judgment for the defendant for his costs; in which case, the defendant may maintain an action for the residue; or,

2. Render a judgment of discontinuance with costs; in which case, the defendant may thereafter maintain an action for the whole.

Where part of the excess is not due from the plaintiff, the judgment does not prejudice the defendant's right to recover, from another person, so much thereof as the judgment does not cancel.

Id., §§ 52, 53, and part of § 58.

§ 2950. Judgment when accounts exceed \$400.

Where, upon the trial of an action, the sum total of the accounts of both parties, proved to the satisfaction of the justice, exceeds four hundred dollars, judgment of discontinuance must be rendered against the plaintiff, with costs.

2 R. S. 234, § 54.

§ 2951. Answer of title.

The defendant may, either with or without other matter of defence, set forth in his answer facts, showing that the title to real property will come in question. Such an answer must be in writing; and it must be signed by the defendant, or his attorney or agent, and delivered to the justice. The justice must, thereupon, countersign the answer, and deliver it to the plaintiff.

Co. Proc., § 55.

§ 2952. Undertaking thereupon.

In the case specified in the last section, the defendant must also deliver to the justice, with the answer, a written undertaking, executed by one or more sureties, approved by the justice; to the effect that, if the plaintiff, within twenty days thereafter, deposits with the justice a summons and complaint in a new action, for the same cause, to be brought in the proper court, as prescribed in the next section, the defendant will, within twenty days after the deposit, give a written admission of the service thereof. Where the defendant was arrested in the action before the justice, the undertaking must further provide, that he will, at all times, render himself amenable to any mandate, which may be issued to enforce a final judgment in the action so to be brought. If the defendant fails to comply with the undertaking, the sureties are liable thereupon, to an amount not exceeding two hundred dollars.

Id., part of § 56, am'd.

§ 2953. In what court new action to be brought.

The court in which a new action is to be brought, as prescribed in the last section, is the supreme court, or the county court of the justice's county, at the plaintiff's election; except that, where the justice is a justice of the peace of the city of Buffalo, it is the superior court of Buffalo.

Id., § 56.

§ 2954. When action before justice to be discontinued.

Upon the delivery of the undertaking to the justice, the action before him is discontinued, and each party must pay his own costs. The costs so paid by either party must be allowed to him, if he recovers costs in the new action, to be brought as prescribed in the last two sections. If the plaintiff fails to deposit with the justice a summons and complaint in the new action, before the expiration of twenty days after the delivery of the undertaking, the defendant may maintain an action against the plaintiff to recover his costs before the justice.

Id., § 57.

§ 2955. Effect of failure to give undertaking.

If the undertaking is not delivered to the justice, he has jurisdiction of the action, and must proceed therein; and the defendant is precluded, in his defence, from drawing the title in question.

Id., § 58.

§ 2956. When title comes in question on plaintiff's own showing.

If, however, it appears, upon the trial, from the plaintiff's own showing, that the title to real property is in question, and the title is disputed by the defendant, the justice must dismiss the complaint, with costs, and render judgment against the plaintiff accordingly.

Co. Proc., § 59.

§ 2957. Pleadings in new action. Undertaking before justice, when applicable.

In the new action, to be brought after an action before a justice is discontinued, by the delivery of an answer and an undertaking, as prescribed in the last six sections of this act, the plaintiff must complain for the same cause of action only, upon which he relied before the justice; and the defendant's answer must set up the same defence only, which he made before the justice. If the action is to recover a chattel, which was replevied in the justice's court, each undertaking, given in the justice's court, continues to be valid in, and is applicable to, the new action.

Id., § 60.

§ 2958. Answer of title as to one of several causes of action.

Where, in an action before a justice, the plaintiff has two or more causes of action, and the defence, that the title to real property will come in question, is interposed as to one or more, but not as to all of them; the defendant may deliver an answer and undertaking as prescribed in sections 2951 and 2952 of this act, with respect to the cause or causes of action only, in which title will so come in question. Whereupon the justice must discontinue the action as to those causes of action only; the plaintiff may commence a new action therefor in the proper court; and the original action must proceed as to the other causes.

Id., part of § 62.

TITLE IV.

Proceedings between the joinder of issue and the trial.

- Article 1.** Adjournments.
 2. Compelling the attendance of a witness.
 3. Commission to take testimony.

ARTICLE FIRST.

Adjournments.

- Sec. 2959.** Adjournment by justice.
 2960. Adjournment on application of plaintiff.
 2961. Adjournment on application of defendant.
 2962. *Id.*; undertaking thereupon.
 2963. Undertaking to procure discharge of defendant from custody.
 2964. When defendant to be discharged.
 2965. Subsequent adjournments.
 2966. Justice may impose conditions upon adjournment.
 2967. Adjournment when warrant to attach absent witness is issued.
 2968. Adjournment not to exceed ninety days.

§ 2959. Adjournment by justice.

At the time of the return of a summons, or of the joinder of issue without process, but at no other time, the justice may, in his discretion and upon his own motion, adjourn the trial of the action not more than eight days, unless the defendant has been arrested; in which case, no such adjournment shall be made.

2 R. S. 238, §§ 67, 68 (2 Edm. 254).

§ 2960. Adjournment on application of plaintiff.

At the time of the return of a summons, or of the joinder of issue without process, the justice must, upon the application of the plaintiff, adjourn the trial of the action, not more than eight days, to a time fixed by the justice. But such an adjournment shall not be granted unless the plaintiff or his attorney, if required by the defendant, makes oath that the plaintiff cannot, for want of some material testimony or witness, specified by him, safely proceed to trial.

Id., part of §§ 69 and 70 (2 Edm. 254, 255).

§ 2961. Adjournment on application of defendant.

At the time of the joinder of issue, the justice must, upon the application of the defendant, adjourn the trial of the action, upon his complying with the following requirements:

1. The defendant or his attorney must, if required by the plaintiff, or by the justice, make oath that he verily believes that the defendant has a good defence to the action, and that he cannot safely proceed to trial, for want of some material testimony or witness, specified by him.

2. If required by the plaintiff, and the defendant has not been arrested in the action, an undertaking must be given to the plaintiff in behalf of the defendant, as prescribed in the next section. But such an undertaking need not be given, where the action is to recover a chattel.

Such an adjournment must be for such a reasonable time, fixed by the justice, as will enable the defendant to procure the testimony or witness.

Id., §§ 74 and 75.

§ 2962. Id.; undertaking thereupon.

The undertaking prescribed in the last section must be executed by one or more sureties, approved by the justice; and must be to the effect that, if the plaintiff recovers judgment in the action; and if, before the expiration of ten days after the plaintiff becomes entitled to an execution upon the judgment, the defendant removes, secretes, assigns, or in any way disposes of any part of his property, liable to levy and sale by virtue of an execution, except for the necessary support of himself and his family, and if an execution upon the judgment is returned wholly or partly unsatisfied; the sureties will, upon demand, pay to the plaintiff the sum due upon the judgment.

L. 1831, ch. 300, § 40 (4 Edm. 474).

§ 2963. Undertaking to procure discharge of defendant from custody.

Where the defendant has been arrested, the trial must be adjourned upon his application, upon the same terms, and in the same manner, as where he has not been arrested; except that the undertaking prescribed in the last section need not be given. A defendant, who procures such an adjournment, must continue, during the time of adjournment, in the custody of the constable; unless he gives an undertaking to the plaintiff, with one or more sureties, approved by the justice, to the effect that, if the plaintiff recovers judgment in the action; and if an execution is issued thereupon against the person of the defendant, within ten days after the plaintiff is entitled to the same; and if a return is made thereto, on or after the return day thereof, that the defendant cannot be found; the sureties will pay to the plaintiff the amount due upon the judgment. If such an undertaking is given, the defendant must be discharged from custody.

2 B. S. 239, 240, part of §§ 71, 77 and 78 (2 Edm. 255).

§ 2964. When defendant to be discharged.

If the trial of an action, in which the defendant has been arrested, is adjourned with the consent of both parties, or upon the application of the plaintiff, the defendant must be discharged from custody.

Id., § 72.

§ 2965. Subsequent adjournments.

The justice must, upon the application of the defendant, grant a second or subsequent adjournment of the trial of the action, upon the defendant's giving security, if required, as prescribed in the foregoing provisions of this article, where he applies for a first adjournment; and upon his proving, by his own oath or otherwise, to the satisfaction of the justice, that he cannot safely proceed to trial for want of some material testimony or witness; and that he has used due diligence to obtain the testimony or witness. But if the defendant has given an undertaking upon a former adjournment, a new undertaking need not be given, unless it is required by the justice, or by the sureties in the former undertaking.

Id., § 75.

§ 2966. Justice may impose conditions upon adjournment.

Upon granting the defendant's application for an adjournment, where the trial has been once adjourned, or where the plaintiff

is a non-resident of the county, the justice may, in his discretion, upon the plaintiff's application, direct that any witness on the part of the plaintiff, who is in attendance, be then examined under oath before the justice. Thereupon the testimony of the witness must be reduced to writing, certified by the justice, and retained by him; to be read upon the trial, with the same effect, and subject to the same objections, as if it was then given orally by the witness.

2 R. S. 239, 240, § 70.

§ 2907. Adjournment when warrant to attach absent witness is issued.

Where, upon a trial, a warrant or attachment is issued to compel the attendance of a witness, who has failed to appear in obedience to a subpoena, the justice may, in his discretion, adjourn the trial, for such a time as he deems necessary for the return of the warrant, not exceeding five days.

§ 2908. Adjournment not to exceed ninety days.

The trial of an action shall not be adjourned to a time beyond ninety days from the joinder of issue, without the consent of both parties, except in one of the following cases:

1. Where a venire has been duly issued, but a jury has not been procured, so that it is necessary to issue a new venire, or to summon one or more talesmen, the trial may be adjourned, not more than two days beyond the ninety days, in order to enable the jury to be procured.

2. Where a jury has not been able to agree upon a verdict, and is discharged, the trial may be adjourned a sufficient time beyond the ninety days, to enable a new jury to be procured, as prescribed in title fifth of this chapter.

3. Where a warrant of attachment has been issued to compel the attendance of a witness, as prescribed in the last section, or a warrant has been issued to commit a recusant witness, as prescribed in title fifth of this chapter, an adjournment made thereupon, as prescribed by law, is not deemed a part of the ninety days.

See 2 R. S. 239, 240, § 73.

ARTICLE SECOND.

Compelling the attendance of a witness.

- Sec. 2069.** When justice may issue subpoena.
2070. Subpoena; how served.
2071. Warrant of attachment against defaulting witness.
2072. Id.; how executed; fees thereupon.
2073. Id.; when witness is in adjoining county.
2074. Fine for refusing to attend, or to testify.
2075. Id.; how imposed.
2076. Minute of conviction.
2077. Execution thereupon.
2078. Money collected; how applied.
2079. Defaulting witness liable for damages.

§ 2069. When justice may issue subpoena.

A justice of the peace may issue a subpoena, to compel a witness to attend, in the county where the justice resides, or in an adjoining county, but not otherwise, for the purpose of testifying upon the trial of an action, pending before himself, or before another justice. The subpoena may require the witness, except as otherwise expressly prescribed by law, to bring with him any book or paper, relating to the merits of the action. But a justice shall not issue a subpoena to compel the attendance of a witness before another justice, unless the person applying therefor proves, by his own oath, or the oath of another person, that an action is actually pending before the other justice.

2 R. S. 239, 240, §§ 80 and 81. See § 8135, post.

§ 2070. Subpoena; how served.

A subpoena may be served by a constable, or by any other person. It must be served by reading it, or stating its contents, to the witness, and by paying and tendering to him his lawful fee for one day's attendance as a witness. Where it is served by a constable, his return thereto, stating the manner of service and the sum paid, is presumptive evidence of the facts therein stated.

Id., § 82.

§ 2071. Warrant of attachment against defaulting witness.

Where it is made to appear, to the satisfaction of the justice, by affidavit or other proof, that a person, duly subpoenaed to attend before him in an action, has refused or neglected to attend as a witness in obedience to the subpoena; and no just cause for the neglect or refusal is shown to exist; and the party, in whose behalf the witness was subpoenaed, or his attorney, makes oath that the testimony of the witness is material; the justice must issue a warrant of attachment, directed generally to any constable of the county, for the purpose of compelling the attendance of the witness.

Id., § 83, am'd; L. 1834, ch. 235.

§ 2072. Id.; how executed; fees thereupon.

Such a warrant of attachment must be executed in the same manner as an order of arrest. The fees of the justice and constable for issuing and serving it, must be paid by the person against whom it is issued, unless he shows a reasonable excuse, to the satisfaction of the justice, for his omission to attend; in which case, the party procuring the warrant must pay them, and,

if he recovers costs, the amount thereof must be allowed to him as part of his costs.

2 R. S. 239, 240, § 84.

§ 2973. Id.; when witness is in adjoining county.

Where the delinquent witness is within an adjoining county, the constable, to whom the warrant of attachment is directed, may arrest the witness in that county, and bring him before the justice. The constable, while he is within the adjoining county for that purpose, has all the powers of a constable of that county, with respect to the warrant so issued to him.

§ 2974. Fine for refusing to attend, or to testify.

A person, duly subpoenaed as a witness, who, without a reasonable excuse, proved by his oath or the oath of another person, fails to attend; or, attending, refuses to testify; must be fined, by the justice before whom the action is pending, for each non-attendance or refusal, such a sum, not less than one dollar nor more than ten dollars, as the justice thinks it reasonable to impose upon him, as a fine therefor.

2 R. S. 239, 240, § 85, am'd.

§ 2975. Id.; how imposed.

The fine may be summarily imposed by the justice, upon the application of the party in whose behalf the witness was subpoenaed, at any time during the trial, when the defaulting witness is present, and has an opportunity to be heard. If it is not imposed during the trial, the justice, at any time within five days after judgment is rendered, must, upon the application of the party, issue a warrant, directed generally to any constable of the county, commanding him to arrest the defaulting witness, and to bring him before the justice, at a time and place therein specified, the time to be not more than twelve days after issuing the warrant, to show cause why a fine should not be imposed upon him.

Id., § 86.

§ 2976. Minute of conviction.

The justice imposing the fine must enter in his docket-book a minute of the conviction, of the cause thereof, of the amount of the fine, and of the costs. The minute is deemed a judgment against the delinquent, in favor of the officer to whom fines are directed to be paid, by section 2875 of this act.

Id., § 87, am'd.

§ 2977. Execution thereupon.

If the whole amount of the fine and costs is not forthwith paid to the justice, he must issue an execution, directed generally to any constable of the county, commanding the constable to collect the sum remaining unpaid, of the goods and chattels of the delinquent, within the county, and, for want thereof, to take him, and convey him to the jail of the county, there to remain until he pays that sum, not exceeding thirty days. Upon the delinquent being committed to jail, the keeper thereof must keep him in close custody therein, until he is entitled to a discharge, as specified in the execution.

Id., § 88.

§ 2978. Money collected; how applied.

The money collected by virtue of the execution must be forthwith paid by the constable to the justice. The justice must, within ten days after he receives a fine, or any part thereof, from the constable or the delinquent, pay the money to the officer, to whom the fines are directed to be paid, by section 2876 of this act, for the use of the poor.

2 R. S. 239, 240, § 89.

§ 2979. Defaulting witness liable for damages.

A person, subpoenaed as prescribed in this article, who neglects or refuses to obey the subpoena, or to testify, is also liable to the party, in whose behalf he was subpoenaed, for all damages which the party sustains by reason of his neglect or refusal.

Id., § 90, am'd.

ARTICLE THIRD.*

Commission to take testimony.

Sec. 2980. Commission to examine witness upon interrogatories.

2981. Id.; orally.

2982. When and how granted.

2983. Adjournment.

2984. Execution and return of commission.

2985. Receipt thereof by justice.

2986. When deposition evidence.

2987. Powers of commissioners.

§ 2980. Commission to examine witness upon interrogatories.

Where the defendant has neglected to appear upon the return of a summons, or has failed to answer the complaint, or where an issue of fact has been joined in an action; and it appears, by affidavit, upon the application of either party, that a witness, not within the county where the action is pending, or an adjoining county, is material in the prosecution or defence of the action, the justice may award a commission to one or more competent persons, authorizing them, or either of them, to examine the witness under oath, upon interrogatories to be settled by the justice, or by the written agreement of the parties, and indorsed upon or annexed to the commission; to take and certify the deposition of the witness; and to return the same by mail, addressed to the justice.

L. 1888, ch. 243, § 2, am'd; L. 1847, ch. 329 (4 Edm. 840).

§ 2981. Id.; orally.

If both parties expressly consent, a commission, granted as prescribed in this article, may issue without written interrogatories, and the deposition may be taken upon oral questions. In that case, section 900 of this act applies to the execution of the commission; and a copy of that section must be annexed thereto. Notice of the time or place of the examination of a witness, by virtue thereof, need not be given.

§ 2982. When and how granted.

The commission may be granted by the justice without notice, upon the application of the plaintiff, made at the return of the summons, or upon the application of either party, made at the time of the joinder of issue. It may also be granted at any time after the joinder of issue, upon the application of either party, accompanied with proof, by affidavit, that six days' written notice of the application has been served upon the adverse party, either personally, or by service upon the attorney, who appeared for him before the justice.

L. 1888, ch. 243, § 3.

§ 2983. Adjournment.

Where a commission is granted upon the application of the plaintiff, he is entitled to one or more adjournments of the trial, as may be necessary to procure the commission to be executed

* This article is made applicable to District Courts in New York city, by Consolidation Act of 1882, ch. 410, § 1368.

and returned; not exceeding the length of time for which the trial might be adjourned upon the application of the defendant.

L. 1841, ch. 138, § 1 (4 Edm. 548).

§ 2984. Execution and return of commission.

The commission must be executed and returned, as prescribed in section 901 of this act; and a copy of that section must be annexed thereto, except that subdivision sixth thereof may be omitted.

Substituted for L. 1838, ch. 243, § 4 (4 Edm. 641).

§ 2985. Receipt thereof by justice.

The justice, to whom the package containing the commission is transmitted by mail, must receive it from the post-office, and open and file it, indorsing thereupon the date of his so doing. It must remain on file with him, until the trial; but either party is entitled to inspect it on file.

§ 2986. When deposition evidence.

Sections 902 and 903 of this act apply to a commission, issued as prescribed in this article; and to the execution thereof. A deposition taken thereunder may be read in evidence upon the trial by either party, and has the effect specified in section 911 of this act.

§ 2987. Powers of commissioners.

Where the commission is executed within the State, the commissioner, or, if there are two or more, a majority of them, have the same power to issue a subpoena, to swear a witness, and to compel his attendance, that a justice of the peace has, in an action pending before him.

L. 1841, ch. 138, § 2 (4 Edm. 546).

TITLE V.

Trial and its incidents.

- Sec. 2988. Effect of failure of defendant to appear.
 2989. When justice to try issue of fact.
 2990. When jury trial may be demanded.
 2991. Drawing jurors.
 2992. *Id.*; in action between two towns, etc.
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 3001. Witness refusing to be sworn, etc. Warrant thereupon.
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 3006. Constable to keep jury; his oath.
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 3008. Jury when to be discharged; new venire.
 3009. Fine to be imposed on defaulting juror.

§ 2988. [Am'd, 1903.] Effect of failure of defendant to appear.

Where the defendant makes default in appearing or pleading, upon the return of a summons, which has been duly served as prescribed in this chapter, the justice must hear the allegations and proofs of the plaintiff, and render judgment according to law and equity, as the very right of the case appears, except in an action commenced by the service of a summons and verified complaint as provided by section twenty-nine hundred and thirty-six of this code, in which case judgment may be entered as provided by section twenty-eight hundred and ninety-one of this code.

2 R. S. 242, § 92 (2 Edm. 259); L. 1906, ch. 291. In effect Sept. 1, 1906.

§ 2989. When justice to try issue of fact.

Where an issue of fact has been joined, if neither party demands a trial by jury, the justice must try the issue hear the allegations and proofs of the parties and render judgment as prescribed in the last section.

Id., § 91.

§ 2990. [Am'd, 1897, 1909.] When jury trial may be demanded.

At the time when an issue of fact is joined either party may demand a trial by jury, and unless so demanded at the joining of issue a jury trial is waived. The party demanding a trial by jury shall thereupon pay to the justice the statutory fees for the attendance of each person to be summoned and for the jurors to serve upon the trial, and also the fees to which the constable is entitled for notifying the persons to be drawn as jurors. The fees so deposited shall be delivered by the justice to the con-

stable serving the venire, and by him shall be paid out as required by law. In default of a deposit as aforesaid the justice shall proceed as if no demand for trial by jury had been made. And the town clerk of every town in this state shall deliver to each of the justices of the peace in his town a certified copy of the list filed with him, in pursuance of section five hundred and five of the judiciary law, and he shall also deliver to each of said justices a certified copy of any such list hereafter filed with him, within ten days after the same shall be filed. The town clerk is entitled to a fee of one dollar for each copy of said list so delivered. Any town clerk who shall neglect to deliver a copy of the list to each of the justices of the town within the time above prescribed, shall forfeit ten dollars for each failure, to be sued for and recovered by the overseers of the poor of said town for the use of the poor of said town.

Id., § 93, am'd: L. 1907, ch. 146. Am'd by L. 1909, ch. 65, § 3. See note 82 of notes of Board of Statutory Consolidation at end of code.

§ 2901. [Am'd, 1909.] Drawing jurors.

When a trial by jury is duly demanded, the justice must forthwith openly draw twelve ballots from a box or other receptacle containing the names of the persons who are returned as jurors of the town to the courts of record of the county upon the last list thereof received by him from the town clerk as jurors to attend and try said cause, on a day to which the cause shall then be adjourned by him, not more than eight days from the joining of issue, unless the parties consent to a longer adjournment, which consent shall be entered in the justice's minutes. The ballots shall be of the same description as those prescribed in section twenty-nine hundred and ninety-four of this act, but they may be, or may previously have been prepared by a justice. If a person whose name is thus drawn, in the judgment of the justice, resides more than three miles from the place of trial, the justice may set aside such juror, and he may excuse any juror who comes within the provisions of section five hundred and forty-four of the judiciary law, and in either case draw another ballot, and continue to do so until twelve are drawn. After the adjournment of the court, at which a jury trial has been had, the justice must deposit the ballots containing the names of those who attended and served, in another box kept by him. The ballots containing the names of those who did not appear and serve must be returned by the justice to the box from which they were taken. If at the time of drawing jurors for the court there is not a sufficient number of ballots remaining in the original box, the justice, upon drawing all the ballots therein, must draw the necessary number from the second box containing the names of those jurors who have before served, as in this section prescribed, and must continue to draw from that box until a new list of jurors is delivered to him by said town clerk.

Am'd by L. 1909, ch. 65, § 3. See note 83 of notes of Board of Statutory Consolidation at end of code.

§ 2902. Id.; in action between two towns, etc.

Where the action is between two towns or cities, or between a town and a city, the venire must direct the constable to notify twelve men of the county, who are qualified and not exempt, as proscribed in the last section, and who are not interested in the matter at issue, to form a jury for the trial of the action.

2 R. S. 242, § 90.

§ 2993. Delivery, execution and return of venire. [

The justice must insert the names of the jurors so drawn, in a venire, and deliver or cause it to be delivered to a constable of the county disinterested between the parties. The constable must, at least three days before the day therein stated, notify each of the persons whose names have been therein inserted, by reading it or stating the substance thereof to the person so served. But the service shall not be affected by the constable's failure, after diligent search, to find any of the persons so named. The constable must make his return upon the venire, certifying that he has so personally served it upon each of the jurors whose names are therein inserted, or if any were not served, stating the reason for such omission. Any constable making a false return upon such venire is guilty of a misdemeanor. Any person so served and not attending at the time and place to which the cause was so adjourned, is guilty of a contempt of court, punishable by a fine not exceeding ten dollars, which the justice may impose forthwith by an entry in his minutes of the imposition of such fine, to be collected by execution issued by the justice as upon a judgment, with costs of the levy, and which fine shall be paid over to the use of the poor of the county by the justice, but upon the presentation of a reasonable and sufficient excuse by or on behalf of the person so fined, the justice may, at any time, remit such fine, or any part thereof.

2 R. S. 242, §§ 97, 98; L. 1847, ch. 470, § 3 (Edm. 591).

§ 2994. Ballots; how prepared.

For the purpose of procuring a jury to try the action, the justice must prepare, or cause to be prepared, ballots, uniform, as nearly as may be, in appearance, by writing the name of each person returned, who attends, upon a separate piece of paper. The constable, in the presence of the justice, must roll up or fold each ballot in the same manner, as nearly as may be, so as to resemble the others, and so that the name is not visible. The ballots must be deposited in a box, or other convenient receptacle.

Id., § 99.

§ 2995. Drawing jurors.

The justice must then openly draw out, one after another, six of the ballots. If a person, whose name is drawn, is challenged and set aside, or is excused, another ballot must be drawn, and so on, successively, until the required number of jurors is obtained. The parties may elect to try the cause by a less number than six jurors, at any time before a witness is sworn. The persons so selected as herein provided, constitute the jury to try the action.

Id., § 100.

§ 2996. Jurors in default.

If a sufficient number of competent jurors do not attend, the justice shall issue an attachment against all defaulting jurors, and shall place the same in the hands of the officer who summoned the same, commanding him forthwith to attach such jurors and to bring them before him at a time specified not more than thirty-six hours thereafter, to which the cause must be adjourned. The juror or jurors so attached shall, in addition to the fine specified in section 2993 of this act, be required to pay the expense of the attachment and service thereof; which shall be the officer's fees, together with all necessary expense incurred by him in serving said attachment, to be audited and fixed, to be enforced in the same manner, and when collected to be paid to the officer or the party who has paid the same. Any person so attached and disobeying or resisting the service of said attachment is guilty of a misdemeanor.

§ 2997. [Am'd, 1892.] New venire, etc.

If the constable, to whom the venire is delivered, does not return it as required thereby; or it is for any reason set aside, the justice must proceed to draw another jury, in the manner prescribed in the foregoing sections, which shall be summoned in like manner as the first jury. If a full jury, drawn from those returned as prescribed in the foregoing sections cannot be obtained, the justice may direct the constable to require the attendance forthwith, or at such time as he may designate, not longer than twenty-four hours after the issuing thereof, of such a number of talesmen, from the bystanders or from the town, qualified to serve as jurors, as he deems sufficient for the purpose; or in his discretion he may draw from the jury box, double the number of jurors required to complete the jury in the manner required by the foregoing sections, which shall be summoned in like manner as the first jury, and he shall continue to do so till a jury is obtained. Nothing hereinbefore contained shall preclude the justice from adjourning the trial of the case, on his own motion, or on the application of either of the parties to the action, as provided by sections twenty-nine hundred and fifty-nine to twenty-nine hundred and sixty-eight of the Code of Civil Procedure.

L. 1892, ch. 567.

§ 2998. Juror's oath.

The justice must administer an oath or affirmation to each juror, well and truly to try the matter in difference between _____, plaintiff, and _____, defendant, and unless discharged by the justice, a true verdict to give, according to the evidence.

2 R. S. 242, § 103.

§ 2999. Jury to hear proofs.

After the jurors have been duly sworn, they must sit together, and hear the allegations and proofs of the parties, which must be made publicly, in their presence.

Id., § 104.

§ 3000. Witness's oath.

A person offered as a witness must, before any testimony is given by him, be duly sworn or affirmed, to the effect that the evidence which he shall give, relating to the matter in difference between _____, plaintiff, and _____, defendant, shall be the truth, the whole truth, and nothing but the truth.

Id., § 108.

§ 3001. Witness refusing to be sworn, etc. Warrant thereupon.

Where a witness, attending before a justice in an action, refuses to be sworn or affirmed in the form prescribed by law; or to answer a pertinent and proper question; or neglects or refuses to produce a book or paper which he has been duly subpoenaed to produce, as prescribed in section 2969 of this act, or duly required to produce by an order, made as prescribed in section 867 of this act; and the party, at whose instance he attended, makes oath that the testimony of the witness, or that the book or paper is so far material, that without it he cannot safely proceed with the trial of the action, the justice may, by warrant, commit the witness to the jail of the county.

Id., § 279. *am'd.*

§ 3002. Contents of warrant; imprisonment of recusant witness.

The warrant must specify the cause for which it is issued. If it is issued for refusing to answer a question, the question must be specified therein; if for neglecting or refusing to produce a book or paper, the same must be described with convenient certainty. The recusant witness must be closely confined, by virtue of the warrant, until he submits to be sworn or affirmed, or to answer, or to produce the book or paper required, as the case may be; or is otherwise discharged according to law.

2 R. S., § 289.

§ 3003. Adjournment thereupon.

The justice must thereupon, from time to time, at the request of the party in whose behalf the witness attended, adjourn the trial, until the witness testifies, or produces the book or paper required, or dies, or becomes a lunatic, or is discharged according to law.

Id., § 281.

§ 3004. Ex parte affidavit; when evidence.

An ex parte affidavit shall not be received in evidence upon a trial, without the consent of both parties, except in a case where it is specially allowed by law.

2 R. S. 242. § 195.

§ 3005. Competency of witness; how determined.

An objection to the competency of a witness must be tried and determined by the justice. Where the ground of the objection depends upon a matter of fact, evidence may be given thereupon, as upon any other question of fact; except that, if the witness is examined thereupon by the party objecting, no other testimony shall be received from either party as to his competency.

Id., § 107.

§ 3006. Constable to keep jury; his oath.

After hearing the allegations and proofs, the jury must be kept together in a private and convenient place, under the charge of a constable, until they all agree upon their verdict; and, for that purpose, the justice shall administer to the constable the following oath: "You swear in the presence of Almighty God, that you will, to the utmost of your ability, keep the persons sworn as jurors upon this trial together, in a private and convenient place, without any meat or drink except such as shall be ordered by me; that you will not suffer any communication to be made to them, orally or otherwise; that you will not communicate with them yourself, orally or otherwise, unless by my order, or to ask them whether they have agreed upon their verdict, until they are discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations, or the verdict they have agreed upon."

Id., § 109.

§ 3007. Rendition of verdict; plaintiff need not be called.

When the jurors have agreed upon their verdict, they must publicly deliver it to the justice, who must enter it in his docket book. It is not necessary to call the plaintiff before receiving the verdict; and the plaintiff cannot submit to a nonsuit or withdraw the action, after the cause has been committed to the jury.

Id., § 110.

§ 3008. Jury when to be discharged; new venire.

Where the justice is satisfied that the jurors cannot agree upon a verdict, after having been out a reasonable time, he may discharge them, and issue a new venire, returnable within forty-eight hours; unless the parties consent, and their consent is entered in the justice's docket-book, that the justice may render judgment upon the evidence already before him; which he may do, in that case.

2 R. S. 242, § 111.

§ 3009. Fine to be imposed on defaulting juror.

A person duly notified to attend as a juror, who fails to attend, or, attending, refuses to serve, without a reasonable excuse, proved by his oath, or the oath of another person, is liable to the same fine, to be imposed and collected, with costs, in like manner, and applied to the same use, as is prescribed in article second of title fourth of this chapter, with respect to a person subpoenaed as a witness, and not attending, or attending and refusing to testify.

Id., § 112, am'd; L. 1873, ch. 144 (9 Edm. 500).

TITLE VI.**Judgment; and docketing the same.****Sec. 8010. Judgment by confession.**

8011. Id.; mode of confessing judgment.

8012. Id.; when void.

8013. Judgment of nonsuit.

8014. Judgment upon verdict, etc.

8015. When judgment to be rendered.

8016. Remitting part of verdict, etc.

8017. Transcript of judgment; docketing the same.

8018. Id.; when execution may issue against person.

8019. Id.; in action for a chattel.

8020. Judgment against joint debtors.

8021. Docketing the same; action thereupon.

8022. Docketing judgment in another county.

8023. Justice may give transcript, after expiration of his term.

§ 8010. Judgment by confession.

A justice of the peace may enter a judgment upon the confession of the defendant, in any case, where the amount confessed does not exceed the sum of five hundred dollars, with such a stay of execution, if any, as is agreed upon by the parties to the judgment.

3 B. S. 242, § 113. See §§ 2864, 3224.

§ 8011. Id.; mode of confessing judgment.

A judgment upon confession shall not be rendered unless the following requisites are complied with:

1. The defendant must personally appear before the justice.

2. The confession must be in writing, signed by the defendant, and filed with the justice.

3. If the judgment is confessed for a sum exceeding fifty dollars, the confession must be accompanied with the affidavit of the defendant and of the plaintiff, stating that the defendant is honestly and justly indebted to the plaintiff in the sum specified therein, over and above all just demands which the defendant has against the plaintiff; and that the confession is not made or taken with intent to defraud any creditor.

Id., § 114.

§ 8012. Id.; when void.

A judgment confessed, otherwise than as prescribed in the last section, is void, as against every person, except a purchaser in good faith of property, real or personal, thereunder, and the defendant making the confession.

Id., § 115.

§ 8013. Judgment of nonsuit.

Judgment of nonsuit, with costs, must be rendered against a plaintiff prosecuting an action before a justice of the peace, in either of the following cases:

1. If he discontinues or withdraws the action.

2. If he fails to appear within one hour after the summons is returnable, or within one hour after the time to which the trial has been adjourned.

3. If he is nonsuited upon the trial.

Id., § 119.

*** 3014. Judgment upon verdict, etc.**

Where a verdict, or the decision of the justice upon a trial without a jury, is rendered in favor of either party, the justice must render judgment against the adverse party in conformity thereto, with costs, except as is otherwise specially prescribed by law.

Substituted for 2 R. S. 242, §§ 120 and 121.

§ 3015. When judgment to be rendered.

Where the plaintiff is nonsuited, or discontinues or withdraws the action; or where judgment is confessed, or a verdict is rendered; or where, at the close of the trial, the defendant is in custody; the justice must forthwith render judgment, and enter it in his docket-book. In every other case, he must render judgment, and enter it in his docket-book, within four days after the cause has been finally submitted to him.

Id., § 124.

§ 3016. Remitting part of verdict, etc.

Where a verdict, or the decision of the justice upon a trial without a jury, is rendered in favor of either party for a sum of money, the prevailing party may remit any portion thereof, and take judgment for the residue.

Id., § 125.

§ 3017. [Am'd, 1894.] Transcript of judgment; docketing the same.

A justice of the peace who renders a judgment, except in an action to recover a chattel, must, upon the application of the party in whose favor the judgment was rendered, and the payment of the fee therefor, deliver to him a transcript of the judgment. The county clerk of the county in which the judgment was rendered must, upon the presentation of the transcript and payment of the fee therefor, if within six years after the rendering thereof, indorse thereupon the date of its receipt, file it in his office and docket the judgment as of the time of the receipt of the transcript in the book kept by him for that purpose, as prescribed in article third, title first of chapter eleven of this act. Thenceforth the judgment is deemed a judgment of the county court of that county, and must be enforced accordingly; except that an execution can be issued thereupon only by the county clerk, as prescribed in section thirty hundred and forty-three of this act, and that the judgment is not a lien upon, and cannot be enforced against, real property, unless it is for twenty-five dollars or more, exclusive of costs.

Co. Proc., part of § 63; L. 1894, ch. 307. see § 276.

§ 3018. Id.; when execution may issue against person.

If the action, in which the judgment is rendered, is one of the actions specified in subdivision first or second of section 2895 of this act, or if an order of arrest was granted, and was executed, in a case specified in subdivision third of that section, and, in either case, if the defendant is a male person, the justice must insert, in each transcript given by him, as prescribed in the last section, the words, "defendant liable to execution against his person"; and a like note must also be made in the docket of the judgment, made by the county clerk.

§ 3019. Id.; in action for a chattel.

A justice of the peace, who renders judgment for a chattel, which has been delivered to the unsuccessful party, or for the value thereof, in case a return thereof cannot be had, must, where the value exceeds twenty-five dollars, upon the application of the party in whose favor the judgment was rendered, and payment of the fee therefor, deliver to him a transcript of the judgment, stating the particulars thereof. The county clerk of the county, in which the judgment was rendered, must, upon the presentation of the transcript, and payment of the fees therefor, indorse thereupon the date of its receipt, file it in his office, and docket the judgment, as of the time of the receipt of the transcript, in the book kept by him for that purpose, as prescribed in article third of title first of chapter eleventh of this act, and must also enter in the docket the particulars of the judgment, as stated in the transcript of the justice. Thenceforth the judgment is deemed a judgment of the county court of that county, and must be enforced accordingly; except that an execution can be issued thereupon only by the county clerk, as prescribed in section 3043 of this act.

§ 3020. Judgment against joint debtors.

Where an action is brought against two or more persons, jointly indebted upon contract, and the summons is served upon one or more, but not upon all of them, if the plaintiff recovers judgment, it must be entered against all, in the mode prescribed in section 1932 of this act. Sections 1933, 1934, and 1935 of this act apply to such a judgment, and to each execution issued thereupon; except that, where the justice or the county clerk issues the execution, he must make the indorsement prescribed in section 1934 of this act.

Substituted for 2 R. S. §§ 122 and 123.

§ 3021. Docketing the same; action thereupon.

The justice who gives a transcript of a judgment, taken as prescribed in the last section, must distinctly designate, in the transcript, each defendant who was not summoned. Thereupon the clerk, who docket the judgment, must make in the docket, under or opposite the name of each defendant not summoned, an entry, as prescribed in section 1936 of this act; and the provisions of that section apply to the judgment so docketed. An action, upon a judgment so docketed, can be maintained in a justice's court against the defendants summoned, only in a like case, and with like effect, as if they were the only defendants in the original action. An action may be maintained against the defendants not summoned, as prescribed in section 1937 of this act, in any court having jurisdiction thereof; and the plaintiff is entitled to costs, upon recovering final judgment therein, where the sum remaining unpaid is twenty-five dollars or more.

§ 3022. Docketing judgment in another county.

The clerk, with whom a transcript given by a justice is filed, as prescribed in either of the foregoing sections of this title, must furnish to any person applying therefor, and paying the fees allowed by law, one or more transcripts of the docket of the judgment, attested by his signature. A county clerk, to whom such a transcript is presented, must, upon payment of the fees therefor, immediately file it, and docket the judgment in the appropriate docket-book kept in his office, in like manner as the

judgment was docketed by the first county clerk. The judgment, when docketed as prescribed in this section, has the like effect, with respect to the enforcement thereof, or any proceedings thereunder, or by virtue thereof, in the county where it was so docketed, as if it was rendered by a justice of the peace of that county, and docketed upon filing his transcript; except that where an application for leave to issue an execution is necessary, it must be made to the county court of the county where the judgment was rendered.

Ce. Proc., § 68, and R."S., part of § 284.

§ 8023. Justice may give transcript, after expiration of his term.

A justice of the peace, whose term of office has expired, may make a transcript of a judgment rendered by him, as prescribed in either of the foregoing sections of this title.

TITLE VII.

Executions.

- Sec. 3024. When justice may issue execution.
3025. General requisites of execution.
3026. Execution upon judgment for money.
3027. Renewal of execution.
3028. Property exempt from execution.
3029. Indorsement of levy; notice of sale.
3030. Mode of levy and sale.
3031. Return of execution.
3032. Execution against the person; imprisonment of judgment debtor.
3033. When judgment debtor to be discharged.
3034. Affidavit; discharge.
3035. Penalty for not discharging.
3036. Affidavit a defence to action for escape.
3037. Discharge not to affect judgment.
3038. Execution upon judgment in action for a chattel.
3039. Action against constable for not returning execution.
3040. Constable not to act under execution after return day.
3041. Action against constable for money collected.
3042. Duty of constable whose term of office has expired.
3043. Execution upon judgment docketed with county clerk.

§ 3024. When justice may issue execution.

At any time within five years after entry of a judgment, the justice of the peace, who rendered it, being in office, may issue an execution thereupon, unless it has been docketed in the county clerk's office.

Co. Proc., § 64, subds. 12 and 13.

§ 3025. General requisites of execution.

An execution, issued by a justice, must be directed generally to any constable of the same county. It must intelligibly describe the judgment, stating the names of the parties in whose favor, and against whom, the time when, and the name of the justice by whom, the judgment was rendered; and it must be made returnable to the justice, within sixty days after its date.

R. S., part of § 181.

§ 3026. Execution upon judgment for money.

An execution, issued upon a judgment for a sum of money, must specify, in the body thereof, the sum recovered, and the sum actually due upon the judgment at the date of the execution; and, except in a case where special provision is otherwise made by law, it must, substantially, require the constable to satisfy the judgment, together with his fees, out of the personal property of the judgment debtor within the county, not exempt from levy and sale by virtue of an execution; and to bring the money before the justice, by the return day of the execution, to be rendered, by the justice to the party who recovered the judgment. If the judgment was recovered against a male person, in either of the actions specified in subdivision first or second of section 2805 of this act; or if an order of arrest was granted and was executed, in a case specified in subdivision third of that section, the execution must also command the constable, if sufficient personal property cannot be found to satisfy the judgment, to arrest the judgment debtor, and to convey him to the jail of the county, there to remain until he pays the judgment, or is discharged according to law. If the judgment was rendered in an action to recover a penalty or forfeiture given by a statute

of the State, the justice must indorse upon the execution a reference to the statute, as prescribed in section 1897 of this act, with respect to a copy of the summons.

R. S., § 131, am'd; L. 1831, ch. 300.

§ 3027. Renewal of execution.

After the return, wholly or partly unsatisfied, of an execution, issued by a justice of the peace, he may, from time to time, within five years after the judgment was rendered, issue a new execution or renew the former execution. An execution is renewed by a written indorsement thereupon to that effect, signed by the justice, and dated upon the day when it is made. If part of the execution has been satisfied, the indorsement must state the sum remaining due. Each indorsement renews the execution for sixty days from the date thereof. A justice whose term of office has expired may thus issue or renew an execution.

Id., §§ 145 and 147.

§ 3028. Property exempt from execution.

The same personal property is exempt from levy and sale, by virtue of an execution issued by a justice of the peace, which is exempt from levy and sale, by virtue of an execution issued out of the supreme court, and in the like cases, and under the same circumstances, as prescribed in sections 1389, 1390, 1391, 1392, 1393, and 1394 of this act, and the other special provisions of law, relating to such an exemption.

Id., § 169, am'd.

§ 3029. Indorsement of levy; notice of sale.

A constable, who takes personal property into his custody, by virtue of an execution, must indorse upon the execution the time of levying upon it. He must immediately post conspicuously, in at least three public places of the city or town, in which the property was taken, written or printed notices, signed by him, describing the property, and specifying the place, within the same city or town, where, and the time, not less than six days after the posting, when, it will be exposed for sale.

Id., § 148, am'd.

§ 3030. Mode of levy and sale.

The provisions of sections 1384, 1385, 1386, 1387, 1405, 1409, 1410, 1411, 1412, and 1428 of this act, substituting the constable for the sheriff, apply to and govern the levy upon and sale of personal property, by virtue of an execution issued by a justice of the peace; except where a different rule is prescribed in this act.

§ 3031. Return of execution.

The constable must return the execution to the justice, and pay to him the amount of the judgment, with interest, or so much thereof as he has collected; returning the surplus, if any, to the person from whose property it was collected.

R. S., part of § 149.

§ 3032. Execution against the person; imprisonment of judgment debtor.

For want of sufficient personal property, whereon to levy, the constable must, if the execution requires it, arrest the judgment

debtor, and convey him to the jail of the county. The keeper of the jail must thereupon keep the judgment debtor in custody, in all respects as if the execution was issued out of the supreme court, until the judgment and the fees of the constable are paid; or until the judgment debtor is thence discharged, in due course of law; except that if the execution has an indorsement, showing that the judgment was rendered in an action for a penalty or forfeiture, given by a statute of the State, the sheriff shall not admit the judgment debtor to the liberties of the jail.

R. S., part of §§ 151 and 143.

§ 3033. [Am'd, 1883.] When judgment debtor to be discharged.

If a person committed to jail by virtue of an execution issued by a justice of the peace, or out of the municipal court of Buffalo, or by virtue of an execution issued by a county clerk on a transcript of a judgment recovered before a justice of the peace, or in the said municipal court of Buffalo, has a family within the state for which he provides, he must be discharged, after remaining in custody, either with or without being admitted to the jail liberties, thirty days; otherwise he must be discharged after so remaining sixty days.

Id., § 152, am'd. Albany City Court, L. 1884, ch. 122; L. 1883, ch. 26.

§ 3034. Affidavit; discharge.

In order to procure a discharge, as prescribed in the last section, the prisoner must make, and deliver to the sheriff or jailer, an affidavit, stating the facts which entitle him thereto, according to the provisions of that section. Upon receiving such an affidavit the sheriff or jailer must forthwith discharge the prisoner from his custody. He must thereupon deliver the affidavit to the clerk of the county, who must file it in his office, without fee.

Id., §§ 153 and 154.

§ 3035. Penalty for not discharging.

A sheriff or jailer, who refuses to discharge the prisoner, upon receiving such an affidavit, forfeits twenty-five dollars for each day, during which he detains the prisoner; to be recovered by the latter, in addition to any damages, which he sustains by reason of the false imprisonment.

Id., § 155.

§ 3036. Affidavit a defence to action for escape.

The receipt of such an affidavit is a defence, to an action brought against the sheriff or jailer, by reason of the prisoner's discharge.

Id., § 156.

§ 3037. Discharge not to affect judgment.

Notwithstanding the discharge of a judgment debtor, as prescribed in the last four sections, the judgment remains valid as against his property; and a new execution may be issued accordingly, as if he had not been imprisoned.

Id., § 157.

§ 3038. Execution upon judgment in action for a chattel.

In an action for a chattel, the possession of which has not been delivered to the prevailing party, an execution, for the

delivery of the possession thereof to him, as well as for any damages recovered by him, may be issued by the justice; unless the judgment has been docketed in the county clerk's office, as prescribed in title sixth of this chapter. It must be to the same effect, and executed in the same manner, as a like execution issued upon a judgment rendered in the supreme court; except that it must be directed generally to any constable of the county; and that the direction to satisfy a sum of money, out of the property of the judgment debtor, must be in the form prescribed in this title for a like direction, where an execution is issued by a justice of the peace, upon a judgment for a sum of money.

Substitute for L. 1866, part of ch. 131.

§ 3039. Action against constable for not returning execution.

If a constable fails to return an execution within five days after the return day thereof, the party, in whose favor it was issued, may recover, in an action against the constable, the amount of the execution, if it was issued upon a judgment for a sum of money; or if it was for the delivery of the possession of a chattel, the value of the chattel, as specified in the judgment, together with the damages and costs awarded thereby; and, in either case, with interest from the time when the judgment was rendered.

R. S., § 159.

§ 3040. Constable not to act under execution after return day.

A constable shall not levy upon or sell property, or arrest a defendant, or take possession of a chattel, by virtue of an execution, after the time limited therein for its return, unless the execution has been renewed; nor shall he do any act under a renewed execution, after the expiration of the time for which it has been renewed.

Id., § 161.

§ 3041. Action against constable for money collected.

Where money, collected by a constable upon an execution, is not paid over by him according to law, any person entitled thereto may maintain an action in his own name, upon the instrument of security given by the constable and his sureties; and may recover therein the sum so collected, with interest from the time when it was collected.

Id., § 163.

§ 3042. Duty of constable whose term of office has expired.

A constable, to whom an execution is delivered, whose term of office expires on or before the return day thereof, must proceed thereupon in the same manner, as if his term of office had not expired; and he and his sureties are liable for any neglect of duty, with respect to the execution; or for money collected thereunder, or for damages sustained by reason of any act done by the constable, touching the execution, in the same manner, and to the same extent, as if his term of office had not expired.

Id., §§ 285 and 286. See L. 1872, ch. 788 (9 Edm. 481).

§ 3043. Execution upon judgment docketed with county clerk.

Where a judgment, rendered by a justice of the peace, has been docketed with a county clerk, upon the filing either of a transcript from the justice's docket, or of a transcript from the clerk's docket of another county, the execution, to be issued thereupon by the county clerk, must be in the same form, and executed in the same manner, as an execution issued upon a judgment of the county court; except as otherwise prescribed in section 1367 of this act; and except, also, that, where the judgment is for a sum less than twenty-five dollars, exclusive of costs, the direction to satisfy the judgment out of the real property of the judgment debtor must be omitted. In that case the provisions of this act, relating to the satisfaction of an execution out of the judgment debtor's real property, are not applicable thereto.

Co. Proc., § 64, subd. 13. See §§ 3017 and 1367, ante.

TITLE VIII.

Appeals.

Article 1. Appeals generally.

2. Appeal where a new trial is not had in the appellate court.
3. Appeal for a new trial in the appellate court.

ARTICLE FIRST.

Appeals generally.

Sec. 3044. Justice's judgment reviewed by appeal.

3045. Who may appeal; to what court appeal to be taken.
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3058. Restitution upon reversal.
3059. Setting off costs and recovery.
3060. Certain sums may be included in disbursements.
3061. Judgment-roll.

§ 3044. Justice's judgment reviewed by appeal.

The only mode of reviewing a judgment, rendered by a justice of the peace in a civil action, is by an appeal, as prescribed in this title.

Co. Proc., part of § 351.

§ 3045. [Am'd, 1895.] Who may appeal; to what court appeal to be taken.

An appeal may be taken by any party aggrieved by the judgment. Except where the judgment is rendered by a justice of the peace of the city of Buffalo, the appeal must be to the county court of the county where the judgment was rendered.

Id., part of §§ 325 and 352; L. 1895, ch. 946.

§ 3046. [Am'd, 1882.] Appeal; when and how taken.

An appeal must be taken within twenty days after the entry of the judgment in the justice's docket; except that, where a defendant appeals from a judgment rendered in an action, wherein he did not appear, and the summons was not personally served upon him, the appeal may be taken within twenty days after personal service upon him, on the part of the plaintiff, of written notice of the entry of the judgment; but not after the expiration of five years from the entry of the judgment. An appeal is taken by serving upon the justice by whom the judgment was rendered, and upon the respondent, a written notice of appeal, subscribed either by the appellant, or by his attorney in the appellate court.

Id., part of §§ 353 and 354.

§ 3047. [Am'd, 1913.] Service of notice upon justice; payment of costs and fee.

Service of the notice of appeal upon the justice, must be made by delivering it to him personally, or to his clerk, appointed pursuant to law, or by mailing such notice to the justice at his office in the manner prescribed by service of notice by mail in section seven hundred and ninety-seven of this act; but if the justice is dead, or if neither he nor his clerk can, after reasonable diligence, be found within the county, service of the notice upon the justice may be made by delivering it to the clerk of the appellate court. Unless the justice is dead, the appellant must, at the time of serving the notice, pay to the person to whom it is delivered the costs of the action, included in the judgment, and the sum of two dollars, as the fee of the justice for making the return.

Co. Proc., part of §§ 354 and 359. Am'd, L. 1913, ch. 445. In effect Sept. 1, 1913.

§ 3048. [Am'd, 1913.] Service of notice upon respondent.

Service of the notice of appeal upon the respondent may be made, by delivering it, in any part of the state, to the respondent personally, or in one of the following methods:

1. By leaving it at his residence, with a person of suitable age and discretion or by serving the notice upon the respondent by mail, or in case an attorney appeared for respondent at the trial, the notice may be served upon the attorney, either personally, or in the manner prescribed for service of notice by mail in section seven hundred and ninety-seven of this act.

2. If service cannot be made, with due diligence, upon the respondent, in the manner prescribed in the foregoing subdivision, the notice of appeal may be served upon him by delivering it to the clerk of the appellate court.

Id., part of § 354. Am'd, L. 1913, ch. 445. In effect Sept. 1, 1913.

§ 3049. Amendment; when allowed.

Where the appellant, seasonably and in good faith, serves the notice of appeal, upon either the justice or the respondent, but omits, through mistake, inadvertence, or excusable neglect, to serve it upon the other, or to do any other act necessary to perfect the appeal, the appellate court, upon proof by affidavit of the facts, may, in its discretion, permit the omission to be supplied, or an amendment to be made, upon such terms as justice requires.

Id., § 327.

§ 3050. Undertaking to stay execution upon judgment.

If the appellant desires a stay of execution, he must give a written undertaking, executed by one or more sureties, approved by the justice who rendered the judgment, or by a judge of the appellate court, to the effect that, if the appeal is dismissed; or if judgment is rendered against the appellant in the appellate court, and an execution issued thereupon is returned wholly or partly unsatisfied; the sureties will pay the amount of the judgment, or the portion thereof remaining unsatisfied, not exceeding a sum, specified in the undertaking, which must be at least one hundred dollars, and not less than twice the amount of the judgment; or, if the judgment in the justice's court is for the recovery of a chattel, that the sureties will pay the sum fixed by that judgment as the value of the chattel, together with the damages, if any, awarded for the taking, withholding, or detention thereof. A copy of the undertaking, with a notice of the

delivery thereof, must be served with the notice of appeal, and in like manner. Section 1335 of this act applies to such an undertaking.

Co. Proc., §§ 355 and 356.

§ 3051. Proceedings; how stayed.

The delivery of the undertaking to the justice or to his clerk, pursuant to law, and service of a copy thereof, and of notice of the delivery thereof, stay the issuing of an execution upon the judgment. If an execution has been issued, the service of a copy of the undertaking, certified by the justice or the clerk, or accompanied with an affidavit, showing that it is a copy, and that the original has been duly filed, upon the officer holding the execution, stays further proceedings thereunder.

Id., § 357.

§ 3052. Id.; when justice is dead, etc.

Where the justice is dead, or cannot, with due diligence, be found within the county, and he has no clerk, appointed pursuant to law, or the clerk cannot, with due diligence, be found within the county, the undertaking may be filed with the clerk of the appellate court. In that case, notice of the filing must be given to the respondent, as prescribed in section 3048 of this act, for service of a notice of appeal upon him. The filing of the undertaking has the same effect, as the delivery thereof to the justice; and a copy thereof certified by the county clerk, served upon the officer holding an execution, has the same effect, as if it was certified, as prescribed in the last section.

Id., § 358.

§ 3053. Return.

The justice must, after ten and within thirty days from the service of the notice of appeal, and the payment of the costs and fee, as prescribed in section 3047 of this act, make a return to the appellate court, annex thereto the notice of appeal and the undertaking, if any has been delivered to him or to his clerk, and file the same with the clerk of the appellate court. The return must contain all the proceedings, including the evidence and the judgment; unless the appellant has, in his notice of appeal, demanded a new trial, in a case where he is entitled thereto, as prescribed in article third of this title. In the latter case, the justice must return the summons, together with each warrant of attachment, order of arrest, or requisition to replevy, or execution granted by him in the action, with the proof of the service thereof; the pleadings, or copies thereof; the proceedings upon the trial; and the judgment; with a brief statement of the amount and nature of the claims litigated by the parties. But he need not return the evidence, or any part thereof, unless he is required so to do by the special order of the appellate court.

Id., § 360, am'd.

§ 3054. Id.; when justice has gone out of office.

Where the justice has gone out of office, he must, nevertheless, make a return in the same manner, and his return has the same effect, as if he remained in office.

Id., § 361.

§ 3055. Further return; how compelled.

If the return is defective, the appellate court may direct the justice to make a further or amended return, as often as is necessary. The appellate court may compel the justice, by attachment, to make and file a return, or a further or amended return. The court is always open for those purposes. Where the justice has removed to another county of the State, the appellate court may compel him to make the return, as if he was still within the county where the judgment was rendered.

Co. Proc., §§ 362 and 363.

§ 3056. Id.; when justice is dead, etc.

If the justice dies, becomes a lunatic, absconds, removes from the State, or otherwise becomes unable to make the return, the appellate court may receive affidavits, or examine witnesses, as to the evidence and other proceedings taken, and the judgment rendered, before the justice; and may determine the appeal, as if a return had been duly made by the justice.

Id., § 363.

§ 3057. Proceedings when error in fact is alleged.

Where an appeal is founded upon an error in fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the justice, the court may determine the matter upon affidavits; or, in its discretion, upon the examination of witnesses; or in both methods.

Id., part of § 66.

§ 3058. Restitution upon reversal.

Where the judgment of the justice is reversed or modified, the appellate court may make or compel restitution of property or of a right lost by means of the erroneous judgment; but not so as to affect the title of a purchaser, in good faith and for value, of property sold by virtue of a warrant of attachment in the action, or an execution issued upon the judgment. In that case, the appellate court may compel the value, or the purchase-price to be restored, or deposited to abide the event of the action, as justice requires. Six days' notice of an application for an order for restitution must be given; and, if the application is granted before judgment, the proper direction may be included therein.

Id., § 369.

§ 3059. Setting off costs and recovery.

If, upon the appeal, a sum of money is awarded to one party, and costs are awarded to the adverse party, the appellate court must set off the one against the other, and render judgment for the balance.

Id., § 370.

§ 3060. Certain sums may be included in disbursements.

Where costs are awarded to the appellant, he may include, in the disbursements upon the appeal, the costs and fee paid to the justice upon taking the appeal; and, where the judgment rendered by the justice was against the appellant, he may also include, in those disbursements, the costs of the action, before the justice, which he would have been entitled to recover, if the judgment of the justice had been in his favor.

Id., part of § 311.

§ 8061. Judgment-roll.

The clerk, immediately after entering final judgment upon the determination of an appeal, must attach together and file such of the following papers, as were used upon the appeal; which constitute the judgment-roll:

1. The return of the justice, or a certified copy thereof; the notice of appeal; and the undertaking, if any has been given.

2. The verdict, report, or decision, and each offer, if any, made as prescribed in article third of this title.

3. A certified copy of the judgment, together with each notice of exceptions, or case, which is then on file.

4. Every other paper, then on file, and a certified copy of every order, which in any way involves the merits, or necessarily affects the judgment.

ARTICLE SECOND.***Appeal where a new trial is not had in the appellate court.***

Sec. 3062. Hearing of appeal; dismissal thereof.

3063. Judgment.

3064. When new trial in justice's court may be directed.

3065. Id.; proceedings before justice.

3066. Costs; when awarded.

3067. Amount of costs.

§ 3062. [Am'd, 1895.] Hearing of appeal; dismissal thereof.

If the case is one where the appellant is not entitled to, or has not demanded, a new trial in the appellate court, as prescribed in section 3068 of this act, the respondent may, within twenty days of the service on him of the notice of appeal, serve upon the appellant or his attorney a written stipulation that the judgment appealed from may be reversed with five dollars costs and disbursements of the appeal, and thereafter no further steps shall be taken in such appeal, except to enter judgment in pursuance of such stipulation for the enforcement thereof; in case such stipulation shall not be so served, the appeal may be brought to a hearing in the appellate court at any term thereof at which such an appeal can be heard, held after the return is filed, upon a notice by either party of not less than eight days. It must be placed upon the calendar, and must continue thereupon without further notice until it is finally disposed of. If, after being regularly placed upon the calendar, neither party brings it to a hearing before the end of the second term thereafter at which it might be noticed for hearing and heard, the court must dismiss the appeal unless it directs the same to be continued for cause shown.

Co. Proc., § 364; L. 1805, ch. 946.

§ 3063. [Am'd, 1893, 1900, 1911.] Judgment.

In a case specified in the last section, the appeal must be heard upon the original papers or a certified copy thereof, and a copy or copies thereof need not be furnished for the use of the court. The appellate court must render judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits. It may affirm, modify, or reverse the judgment of the justice, in whole or in part, and as to any or all of the parties, and for errors of law or of fact, and where the judgment is contrary to or against the weight of the evidence the appellate court may, upon its reversal of a judgment, order a new trial before the same justice or before another justice of the same county to be designated in the order, and at a time and place to be specified in the order, and in such a case the costs of the appeal shall be in the discretion of the appellate court.

Am'd by L. 1893, ch. 380; L. 1900, ch. 553; L. 1911, ch. 364, in effect Sept. 1, 1911.

§ 3064. When new trial in justice's court may be directed.

If the appeal is taken by the defendant, who failed to appear before the justice, either upon the return of the summons, or at the time to which the trial of the action was adjourned; and he shows, by affidavit or otherwise, that manifest injustice has been done, and renders a satisfactory excuse for his

default; the appellate court may, in its discretion, set aside the judgment appealed from, or stay proceedings thereunder, and by order direct a new trial, before the same justice, or before another justice of the same county, designated in the order, at such a time and place, specified in the order, and upon such terms, as it deems proper.

Co. Proc., part of § 366.

§ 3065. [Am'd, 1893.] Id.; proceedings before justice.

Where a new trial is directed before a justice, as prescribed in the last two sections, the parties must appear before him, at the time and place specified in the order of the appellate court, without service of any notice, or of a copy of the order. Thereupon the like proceedings must be had in the action, as upon the return of a summons personally served.

L. 1898 ch. 380.

§ 3066. Costs; when awarded.

Upon an appeal provided for in this article, the award of costs is regulated as follows:

1. If the appeal is dismissed, because neither party brings it to a hearing, as prescribed in this article, costs shall not be awarded to either party.

2. If the judgment is reversed for an error in fact, not affecting the merits; or if a new trial is directed, before the same or another justice, as prescribed in this article; the costs of the appeal are in the discretion of the appellate court.

3. If the judgment is affirmed, costs must be awarded to the respondent.

4. If the judgment is reversed, costs must be awarded to the appellant.

5. If the judgment is affirmed only in part, the costs, or such a part thereof, as to the appellate court seems just, not exceeding ten dollars, besides disbursements, may be awarded to either party.

Co. Proc., part of §§ 368 and 371.

§ 3067. Amount of costs.

Upon an appeal, provided for in this article, costs, when awarded, must be as follows, besides disbursements:

To the appellant, upon reversal, thirty dollars.

To the respondent, upon affirmance, twenty-five dollars.

Id., part of § 71, am'd.

ARTICLE THIRD.

Appeal for a new trial in the appellate court.

Sec. 3068. When appellant may demand new trial in appellate court.

3069. Undertaking to be given.

3070. Offer to compromise before return.

3071. Proceedings in appellate court.

3072. Offer to compromise after return.

3073. Amount of costs.

§ 3068. [Am'd, 1893.] When appellant may demand new trial in appellate court.

Where an issue of fact or an issue of law was joined before the justice, and the sum, for which judgment was demanded by either party in his pleading, exceeds fifty dollars; or where, in an action to recover a chattel, the value of the property, as fixed, together with the damages recovered, if any, exceeds fifty dollars; the appellant may, in his notice of appeal, except when the appeal is to the county court of Kings county, demand a new trial in the appellate court; and thereupon is entitled thereto, whether the defendant was or was not present at the trial. An appeal from a judgment of a justice's court or by a justice of the peace in the city of Brooklyn, or any of the towns in the county of Kings must be taken and disposed of in the manner prescribed in articles first and second of this chapter and title, and not otherwise.

L. 1893, ch. 380.

§ 3069. Undertaking to be given.

To render such an appeal effectual, the appellant must at the time of the service of the notice of appeal upon the justice, give the undertaking required, by this title, to stay the execution of the judgment.

Co. Proc., part of § 355.

§ 3070. [Am'd, 1895.] Offer to compromise before return.

Upon an appeal, provided for in this article, from a judgment for a sum of money only, either party may, within fifteen days after service of the notice of appeal, serve upon the adverse party, or upon his attorney, a written offer to allow judgment to be rendered in the appellate court, in favor of either party, for a specified sum. If the offer is not accepted, it cannot be proved upon the trial. If the party, within ten days after service of the offer upon him, serves upon the party making the same, or upon his attorney, written notice that he accepts the offer, he must file it, with an affidavit of service of the notice of acceptance, with the clerk of the appellate court, who thereupon must enter judgment accordingly. Where an offer is made as above provided, the party refusing to accept the same shall be liable for costs of the appeal, unless the recovery shall be more favorable to him than the sum offered. If neither party makes an offer, as provided herein, the party in whose favor the verdict, report or decision in the appellate court is given, shall be entitled to recover his costs upon the appeal. Costs when awarded according to the provisions of this section shall be in amounts provided in section three thousand and seventy-three of this article.

L. 1., § 371; L. 1895, ch. 356.

§ 8071. Proceedings in appellate court.

Upon an appeal, provided for in this article, after the expiration of ten days from the time of filing the justice's return, the action is deemed an action at issue in the appellate court; and all the proceedings therein, including the entry, enforcement, and review of the judgment, are the same, as if the action had been commenced in the appellate court, except as otherwise specially prescribed in this chapter.

Co. Proc., §§ 364 and 366.

§ 8072. Offer to compromise after return.

Either party may, at any time after the action is deemed at issue in the appellate court, and before the trial, serve upon the adverse party, a written offer to allow judgment to be taken against him, for a sum, or property, or to the effect, therein specified, with or without costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken; and, if it is accepted, the action becomes severed, and may proceed against the other defendants, as if it had been originally commenced against them only. If the party receiving the offer, within ten days thereafter, serves upon the adverse party, notice that he accepts it, he may file it, with proof of acceptance; and thereupon the clerk must enter judgment accordingly. If the offer is not thus accepted, it cannot be proved upon the trial; and if the party, to whom it is made, fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time.

Id., § 366.

§ 8073. Amount of costs.

Upon an appeal, provided for in this article, costs, when awarded, must be as follows, besides disbursements:

For all proceedings before notice of trial, fifteen dollars.

For all subsequent proceedings before trial, ten dollars.

For the trial of an issue of law, fifteen dollars.

For the trial of an issue of fact, twenty dollars.

For the argument of a motion for a new trial on a case, fifteen dollars.

For each term, not more than five, at which the appeal is regularly on the calendar, excluding the term, at which it is tried, or otherwise finally disposed of, ten dollars.

Id., part of § 371, am'd.

TITLE IX.**Costs.**

Sec. 3074. When prevailing party to recover costs. What costs allowed.

3075. When neither party to recover costs.

3076. Amount of costs limited.

3077. Costs upon demurrer.

3078. Taxation of costs.

3079. Increased costs.

3080. Costs on judgment for one or more defendants.

3081. Costs wrongfully collected may be recovered back.

§ 3074. [Am'd, 1903.] When prevailing party to recover costs. What costs allowed.

Except as otherwise specially prescribed by law, a party who recovers judgment in an action in a justice's court, is entitled to costs; which must be included in the judgment. Costs consist of the fees, allowed by law, for services necessarily rendered in the action, at the request of the party entitled to costs, or paid by him, as prescribed by law; and of such other expenses, as a party is entitled to include in his costs, by express provision of law. The defendant in an action brought in a justice's court may require security for costs to be given, where the plaintiff is a foreign corporation. So far as practicable, the provisions of title three of chapter twenty-one of this act, shall apply to the proceedings for requiring such security, the requisites of the undertaking and the justification of sureties therein.

2 R. S. 247, § 126 (2 Edm. 264); L. 1857, ch. 775, § 2 (4 Edm. 700); L. 1866, ch. 692, § 2 (6 Edm. 803); L. 1903, ch. 276. In effect Sept. 1, 1903.

§ 3075. [Am'd, 1909.] When neither party to recover costs.

In either of the following cases, costs shall not be awarded to either party, but each party must pay his own costs:

1. Where the action is discontinued by the absence of the justice for more than one hour, after the summons is returnable, or after the time to which the trial has been adjourned.

2. Where the justice is disqualified, for a reason specified in section fifteen of the judiciary law.

3. Where the action is discontinued, upon the ground that the defendant is an infant, for whom a guardian ad litem has not been appointed.

4. In an action to recover one or more chattels, where the plaintiff recovers a chattel, or part of a chattel, or the value thereof, and the defendant also recovers a chattel, or part of a chattel, which has been replevied and delivered to the plaintiff, or the value thereof. The plaintiff is entitled to costs, where both parties recover, as specified in this subdivision, unless the chattel, for which the defendant recovers, has been replevied and delivered to the plaintiff.

Am'd by L. 1909, ch. 65, § 3. See note 84 of notes of Board of Statutory Consolidation at end of code.

§ 3076. [Am'd, 1895.] Amount of costs limited.

The sum to be awarded, as costs, to the prevailing party, except where it is otherwise specially prescribed by law, is limited as follows:

1. It cannot exceed fifteen dollars, besides the fees of witnesses, where, upon the trial of an issue of fact or of law, either party recovers damages to the amount of fifty dollars or more, or one or more chattels, the value of which, as fixed, together with the

damages, if any, amounts to fifty dollars or more; or, where, if the defendant recovers judgment, the sum for which the plaintiff demanded judgment, was fifty dollars or more, or the value of all the chattels, to recover which the action was brought, was stated in the complaint at fifty dollars or more.

2. In every other case, it cannot exceed ten dollars, besides the fees of witnesses, attending from another county.

But the prevailing party is entitled, in addition to the sum specified in this section, to the fees and expenses allowed by law for a commission issued to examine a witness not residing in the county or in an adjoining county; and for each adjournment exceeding one, which was granted upon the application of the party against whom the judgment is rendered.

Substituted for L. 1866, ch. 692, § 2 (6 Edm. 804); L. 1841, ch. 138, § 2 (4 Edm. 548); L. 1866, ch. 507.

§ 3077. Costs upon demurrer.

Where judgment is rendered upon the trial of a demurrer, the costs of the trial must be included therein; otherwise costs are not allowed upon the trial of a demurrer.

See Co. Proc., § 64, subd. 11.

§ 3078. Taxation of costs.

Where a justice renders a judgment, he must specify, in his docket-book, the items of costs, which were allowed by him. Before any item of costs is thus allowed, other than a fee to the justice, or to a juror or witness who attended, or to a constable who has certified the amount of his fee, upon a paper filed with the justice, the party must show, by his oath, or that of his attorney, to the satisfaction of the justice, that the item was actually and legally paid or incurred.

§ 3079. Increased costs.

Increased costs must be awarded in favor of the defendant, in an action in a justice's court, in a case, and increased at the rate, specified in section 3258 of this act.

§ 3080. Costs on judgment for one or more defendants.

In an action against two or more defendants, not united in interest, who make separate defences by separate answers, if the plaintiff fails to recover judgment against all, the justice must award costs to those who have judgment in their favor.

2 R. S. 616, § 18 (2 Edm. 690).

§ 3081. Costs wrongfully collected may be recovered back.

Where a justice includes in a judgment a greater amount of costs than is allowed by law, or an improper item of costs or fees, and the same is collected; the person from whom it was collected may, notwithstanding the judgment, recover from the justice who has received it, the amount thereof, with interest.

2 R. S. 268, § 230 (2 Edm. 274).

TITLE X.

Action on special proceeding, relating to an animal straying upon the highway.

- § 8062. Action against person suffering animals to stray.
 § 8063. Penalties to be recovered.
 § 8064. Certain officers to seize animals straying.
 § 8065. When private person may seize such animals.
 § 8066. Officer or person seizing to present petition.
 § 8067. Precept thereupon.
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 § 8070. Answer; trial.
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 § 8072. Application of proceeds of sale.
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 § 8075. Order upon claim for surplus; appeal therefrom.
 § 8076. Proceedings upon decision in favor of person answering.
 § 8077. Demand of possession before trial. Proceedings thereupon.
 § 8078. Id.; when animal wilfully set at large by third person.
 § 8079. Action by owner in such a case.
 § 8100. Action by petitioner and by officer.
 § 8101. Demand of possession after final order and before sale.
 § 8102. Order upon demand of possession; appeal therefrom.
 § 8103. Id.; stay of proceedings.
 § 8104. Appeal from final order.
 § 8105. Id.; by claimant; stay of proceedings and delivery of possession.
 § 8106. Proceedings upon affirmance.
 § 8107. Limitation of action for seizing animals.
 § 8108. Certain actions cannot be maintained.
 § 8109. Where several animals are trespassing, damages are entire. Proceedings in such cases.
 § 8110. Proceedings in other cases, where there are different owners.
 § 8111. Surplus, where there are different owners.
 § 8112. When one action, etc., supercedes any other.
 § 8113. Rights of officer when private person fails to prosecute.
 § 8114. Person having a special property deemed owner.
 § 8115. Agent may act for his principal.

§ 8062. Action against person suffering animals to stray.

Any person, who suffers or permits one or more cattle, horses, colts, asses, mules, swine, sheep, or goats, to run at large, or to be herded or pastured, in a public street, highway, park or place, elsewhere than in a city, incurs thereby the penalty or penalties specified in the next section; and any resident of the town, or the officer to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section 2875 of this act, or the overseer or superintendent of the poor of the town or district, in which one or more of those animals are found so running at large, herded, or pastured, may maintain an action against him, in a justice's court, held in that town or district, to recover the penalty or penalties so incurred. Where the action is brought by a private person, the justice must pay the proceeds of an execution, issued upon a judgment therein in favor of the plaintiff, after deducting the costs, to the officer, who might have brought the action, as prescribed in this section, to be applied by him to the support of the poor within his town or district.

L. 1862, ch. 459, § 1 (3 Edm. 547); L. 1872, ch. 776, § 1 (9 Edm. 476); L. 1897, ch. 814 (7 Edm. 185).

§ 8063. Penalties to be recovered.

If the plaintiff recovers judgment, in an action brought as prescribed in the last section, the justice must award to him the

following sums, by way of penalties, besides the costs of the action:

1. For each horse, colt, ass, mule, swine, bull, ox, cow, or calf, five dollars.

2. For each sheep or goat, one dollar.

The entire amount of the penalties may be recovered, in one action, although it exceeds the sum, for which a justice can render a judgment in an ordinary action.

§ 3084. Certain officers to seize animals straying.

Where one or more cattle, horses, colts, asses, mules, swine, sheep, or goats are found running at large, or being herded or pastured, in a public street, highway, park, or place, elsewhere than in a city, the overseer of highways of the road district, or, if they are so found within an incorporated village, the street commissioner thereof, having personal knowledge or being notified of the fact, must immediately seize the animal or animals, and keep it or them in his possession, until disposed of as prescribed in the following sections of this title.

See note to § 3082, ante.

§ 3085. When private person may seize such animals.

Any person may seize one or more animals specified in the last section, then running at large, or being herded or pastured, in a public street, highway, park, or place, elsewhere than in a city, bordering upon real property owned or occupied by him; or then trespassing upon real property so owned or occupied, having entered thereupon from such a public street, highway, park, or place. The person making the seizure, must keep the animal or animals seized, in his possession, until disposed of as prescribed in the following sections of this title.

See L. 1862, ch. 459, § 2, and L. 1867, ch. 814, § 2 (7 Edm. 185).

§ 3086. Officer or person seizing to present petition.

An officer or other person, who seizes an animal or animals, as prescribed in either of the last two sections, must immediately file, with a justice of the peace of the town in which the seizure was made, a written petition, verified by his oath: setting forth the facts which bring the case within either of those sections; briefly describing the animal or animals seized; stating either the name of the owner, or that his name is not known to the petitioner, and cannot be ascertained by him with reasonable diligence; and praying for a final order, directing the sale of the animal or animals seized, and the application of the proceeds thereof, as prescribed in this title. Where the petition alleges, that any animal or animals seized, were then trespassing upon real property owned or occupied by the petitioner, it must state the amount of the damages, if any, which the petitioner has sustained thereby. In that case, the decision of the justice, or, where the issues are tried by a jury, the verdict must fix the amount of the damages.

See Id., § 3, and L. 1867, ch. 814, § 2 (7 Edm. 185).

§ 3087. Precept thereupon.

Upon the presentation of the petition, the justice must issue a precept under his hand: directed to the owner, if his name is stated in the petition, or, if it is not so stated, directed generally to all persons having an interest in the animal or animals seized;

briefly reciting the substance of the petition; describing the animal or animals seized, and requiring the person or persons, to whom the precept is directed, to show cause before the justice, at a time and place specified therein, not less than ten nor more than twenty days, after the issuing of the precept, why the prayer of the petition should not be granted.

3088. Id.; how served.

The precept must be served upon the person, to whom it is directed by his name, within the same time, and in like manner as a summons is required to be served, as prescribed in section 2910 of this act. Where it is directed generally to all persons, having an interest in the animal or animals seized, it may be served by a constable of the town, or by an elector thereof, specially authorized so to do by a written indorsement upon the precept, under the hand of the justice, by posting a copy thereof in at least six public and conspicuous places in the town where the seizure was made; one of which places must be the nearest district school house, or, if the seizure was made within an incorporated village, having schools in charge of a board of education, a building in which such a school is kept. Each copy must be so posted, within two days after the precept is issued. Where the precept is directed to a person by his name, and proof is made by affidavit, to the satisfaction of the justice, that it cannot, with reasonable diligence, be personally served upon that person, within the county, at least six days before the return day thereof, the justice may, by a written order, direct that service thereof be made, by posting copies thereof, at least five days before the return day, as prescribed in this section; in which case, service thereof may be made accordingly.

§ 3089. Proof of service of precept.

At the place where the precept is returnable, and at the expiration of the time specified in section 2893 of this act, the petitioner must, unless the precept is directed to a person by his name, and he appears, furnish proof of the service of the precept, as prescribed in the last section. If it was served by a constable, either personally or by posting, his written return upon the precept is sufficient proof of the facts relating to the service, as stated therein. If it was served by a private person, proof of service must be made by affidavit.

§ 3090. Answer; trial.

The owner, or a person having an interest in any animal seized, may appear upon the return of the precept, and thereby make himself a party to the special proceeding. The person so appearing may, upon the return of the precept, file a written answer, subscribed by him or his attorney, and verified by the oath of the person subscribing it, denying, absolutely or upon information and belief, one or more material allegations contained in the petition. His answer must also set forth his interest in the animal or animals seized. The subsequent proceedings must be the same as in an action in a justice's court, wherein an issue of fact has been joined, except as otherwise specially prescribed in this title.

§ 3091. Decision in favor of petitioner; warrant to sell; execution thereof.

If no person appears and answers, or if the decision of the justice, or the verdict of the jury, where the issues were tried by a

jury, is in favor of the petitioner, the justice must make a final order, directing the sale of the animal or animals seized, and the application of the proceeds thereof, as prescribed in this title. Thereupon the justice must issue a warrant, under his hand, directed generally to any constable of the county, commanding him to sell the animal or animals seized, at public auction, for the best price which he can obtain therefor; and to make return thereof to the justice, at a time and place therein specified, not less than ten nor more than twenty days thereafter. The sale must be made upon the like notice, and in like manner, as a sale of property, by virtue of an execution issued by a justice of the peace; and the constable must make return, as required by the warrant, and must pay the proceeds of the sale to the justice, deducting therefrom his fees, at the rate allowed by law for the collection of such an execution.

§ 3092. Application of proceeds of sale.

The justice must apply the proceeds of the sale as follows:

1. He must pay the costs of the petitioner, as taxed by the justice, at the same rates as the costs of an action brought before him, including the justice's fees in such an action; and also the fees for the service of the precept, either personally or by posting, at the rate allowed by law for personal service of a summons by a constable.

2. Out of the remainder of the proceeds, he may retain to his own use, a fee of one dollar, for each animal sold.

3. Out of the remainder of the proceeds, he must pay to the officer, or other person making the seizure, the following fees, for the seizure of each animal seized and sold, to wit: one dollar for each horse, colt, ass, or mule; fifty cents for each bull, ox, cow, or calf; and twenty-five cents for each goat, sheep, or swine; together with a reasonable compensation, fixed by him, for the care and keeping of each animal, from the time of the seizure to the time of the sale; and, also, where any animal sold was seized, while trespassing upon real property owned or occupied by the petitioner, the damages sustained by the petitioner in consequence thereof, as ascertained by the decision of the justice, or the verdict of the jury upon which the final order was made.

4. Out of the remainder of the proceeds, he must pay to the officer, to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section 2875 of this act, the following penalties, to wit: five dollars for each horse, colt, ass, mule, bull, ox, cow, calf, or swine, seized and sold; and one dollar for each sheep or goat, seized and sold; which penalties must be received by the officer, for the benefit of the poor of his town or district.

5. If any surplus remains, he must pay the same to the person or persons entitled thereto, as prescribed in the following sections of this title.

§ 3093. Disposition of surplus.

Any person may, within ten days after the return of the warrant, file, with the justice, a written claim to the surplus of the proceeds of the sale, or to any part thereof. On the eleventh day after the return, or, if it is a Sunday or a public holiday, on the first day thereafter, which is neither Sunday nor a public holiday, the justice must proceed to inquire into the claims so filed; and, for the purpose of determining them, he must hear the allegations and proofs of each claimant; and he may issue subpoenas, as upon the trial of an action. He may, upon the

application of any claimant, and for good cause shown, adjourn the hearing, from time to time, but not more than thirty days in all. After hearing the allegations and proofs of all the claimants, he must decide the claims, and enter an order accordingly. If no claim is filed; or if the right to the surplus money, or any part thereof, is not established, to the satisfaction of the justice, as prescribed in this section; any person, whose claim was not determined upon the hearing, may file a claim thereto, at any time before the expiration of a year from the return of the warrant; and, thereupon, the justice must proceed, as prescribed in this section with respect to a claim filed within the ten days.

§ 3004. Id.; when no claim made within a year.

If, at the expiration of one year after the return of the warrant, any portion of the surplus remains, a claim to which has not been established to the satisfaction of the justice, pursuant to the provisions of the last section, the justice must pay it, for the benefit of the poor, to the officer to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section 2875 of this act; and, thereupon, all persons are forever barred from any claim thereto. But if a claim, filed as prescribed in the last section, remains undetermined at the expiration of the year, the justice must determine it within ten days thereafter; and, for that purpose, he must retain the surplus in his hands until the determination.

§ 3005. Order upon claim for surplus; appeal therefrom.

An appeal from an order determining a claim, as prescribed in the last two sections, may be taken to the county court, by a claimant, within ten days after the making of the order, as from a judgment of a justice in an action to recover a sum equal to the claim; and the proceedings thereupon are the same, except that an undertaking is not necessary for any purpose. Upon such an appeal, each other claimant, whose interest is affected by the order appealed from, must be made a respondent. If there is no such claimant, the officer entitled to the surplus must be made respondent; but costs cannot be awarded against him, unless he appears upon the appeal; in which case, the costs are in the discretion of the appellate court. Where an appeal, taken as prescribed in this section, is perfected, the county judge may, in his discretion, make an order extending the time, within which payment of the surplus must be made, as prescribed in the last section, and staying payment accordingly. Unless such an order is made, and a copy thereof is served upon the justice, payment must be made as prescribed in the last section, notwithstanding the appeal; and upon proof of the payment, the appeal must be dismissed. Where an appeal is taken to the supreme court, from the determination of the county court, the county judge, or a justice of the supreme court may make a like order, and with like effect.

§ 3006. Proceedings upon decision in favor of person answering.

If the decision of the justice, or the verdict of the jury, where the issues are tried by a jury, is in favor of the person answering, it must fix the value of each animal seized. If the justice or the jury find that the seizure was malicious, and without probable cause, the decision or verdict must assess the damages

sustained by the person answering, by means of the seizure and detention. The justice must thereupon make a final order, awarding to the person so answering, the return of the animal or animals so seized, or the value thereof if a return cannot be had; together with his costs, at the rates allowed by law in an action brought before him to recover a chattel; and, also, twice the sum assessed as his damages, if any. Thereupon a warrant must be issued by the justice to a constable, to the same effect, as an execution issued, in an action to recover a chattel, upon a judgment in favor of the defendant, where the chattel has not been delivered to him; and each provision of this chapter, relating to a judgment and an execution in such a case, applies to a final order made, and a warrant issued thereupon, as prescribed in this section.

See L. 1867, ch. 814, § 7 (7 Edm. 189).

§ 3097. Demand of possession before trial. Proceedings thereupon.

At any time after the precept is issued, and before the commencement of the trial, the owner of any animal seized may file with the justice a written demand of the possession thereof. Thereupon he is entitled to the possession, upon complying with the following terms:

1. He must pay to the justice, for the use of the petitioner, the costs of the proceedings, to the time of filing the demand, as prescribed in subdivision first of section 3092 of this act, and, also, the sums payable on account of each animal, whereof possession is so demanded, as prescribed in subdivision third of the same section; which sums must be fixed by the justice, after hearing the allegations and proofs of the parties.

2. He must also pay to the justice, a fee of one dollar for each animal, whereof possession is so demanded.

3. If the petitioner is an officer, to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section 2875 of this act, the claimant must also pay to the justice, for the petitioner's use, the sum specified therein on account of each animal, whereof possession is so demanded.

4. The claimant must also prove, to the satisfaction of the justice, by affidavit or other competent evidence, that he is the owner of each animal, whereof possession is so demanded. Each person who has appeared must have notice of, and may oppose, the claim.

Id., § 4.

§ 3098. Id.; when animal wilfully set at large by third person.

But where, in a case specified in the last section, the person filing a demand, presents therewith to the justice sufficient proof, by affidavit or otherwise, that the running at large, herding, pasturing, or trespassing, by reason whereof the animal or animals, of which he demands possession, were seized, was caused by the wilful act, intended to effect that object, of a person other than the owner; and also makes the proof specified in subdivision fourth of that section; he is entitled to possession, pursuant to his demand, upon paying to the petitioner, or to the justice for his use, a reasonable sum, to be fixed by the justice, after hearing the allegations and proofs of the parties, as compensation for the care and keeping of the animal or animals,

whereof possession is so demanded, and without paying any other sum, specified in the last section.

See L. 1869, ch. 424 (7 Edm. 448), part of § 5.

§ 3099. Action by owner in such a case.

The owner of an animal, seized in consequence of a wilful act specified in the last section, may recover, in an action against the person who committed it, all damages sustained by him, in consequence thereof, including the sum paid in order to recover possession of the animal, as prescribed in the last section; and, in addition thereto, the sum of twenty dollars for each animal seized.

Id., remainder of § 5.

§ 3100. Action by petitioner and by officer.

Where the possession of an animal has been delivered, as prescribed in the last section but one, an action may also be maintained, by the petitioner in the special proceeding before the justice, against the person who committed the wilful act, to recover, in addition to all other damages sustained by the plaintiff in consequence of the wilful act, all sums, to which the plaintiff would have been entitled out of the proceeds of the sale, as prescribed in section 3092 of this act, other than the compensation paid for the care and keeping of the animal. In the like case, if the petitioner is a private person, the officer, to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section 2875 of this act, may maintain an action against the person, who committed the wilful act, to recover the penalties to which the plaintiff would have been entitled, out of the proceeds of the sale, as prescribed in that subdivision. Neither of the actions specified in this or the last section is affected by the pendency of, or the recovery of judgment in, either of the others.

§ 3101. Demand of possession after final order and before sale.

A person, entitled to demand the possession of an animal, as prescribed in section 3097 of this act, who did not appear upon the return of the precept, or upon the trial, may file, with the justice, a written demand of the possession, at any time after the final order, and not less than three days before the time appointed for the sale; and, thereupon, he is entitled to the possession, upon complying with the following terms:

1. He must furnish, by affidavit or other competent evidence, a sufficient excuse, to the satisfaction of the justice, for his failure to appear.

2. He must, in all respects, comply with the provisions of section 3097 of this act; except that it is necessary for him to pay only one-half of the justice's fee, as prescribed in subdivision second of that section; and one-half of the fees payable to the petitioner, for the seizure of each animal, as prescribed in subdivision third of section 3092 of this act.

See L. 1867, ch. 814, part of § 4.

§ 3102. Order upon demand of possession; appeal therefrom.

Where a demand for the return of the possession of an animal is filed, as prescribed in either of the last five sections, the justice

must, at the request of either party thereto, make, and enter in his minutes, an order determining the same. An appeal from such an order may be taken to the county court, by the person making the demand, or by either party to the special proceeding, at any time before the final order in the special proceeding is made; and each person or party so entitled to appeal, must be made a respondent upon an appeal taken by one of the others. The appeal must be taken in like manner, as an appeal from a judgment of the justice in an action to recover a chattel; and the proceedings thereupon are the same, except as otherwise prescribed in the next section.

§ 8103. Id.; stay of proceedings.

An appeal from an order, specified in the last section, is not effectual for any purpose, unless the appellant procures from the county judge, an order directing a stay of the proceedings upon the petition, and a stay of the execution of the order appealed from, and files it with the justice, within the time allowed for the appeal. The order may be granted or refused, in the discretion of the county judge, or granted upon such terms, as to security or otherwise, as he thinks proper; and it may be vacated or modified, either absolutely, or unless further security is given, in his discretion.

§ 8104. Appeal from final order.

Within ten days after a final order upon a petition is made, as prescribed in this title, an appeal therefrom may be taken by the petitioner, or by the person answering, in like manner as an appeal from a judgment of the justice in an action to recover a sum of money, equal to the value of the animal or animals, and the proceedings thereupon are the same, except as otherwise prescribed in the next section.

See L. 1867, ch. 814, part of § 6.

§ 8105. Id.; by claimant; stay of proceedings and delivery of possession.

An appeal from a final order, taken as prescribed in the last section, by the person answering, is not effectual for any purpose, unless the appellant files, with the notice of appeal, an order of the county judge, or, if he is absent from the county, of a justice of the supreme court, reciting that the appeal has been perfected, and that security has been given thereupon, as prescribed in this section, and directing a stay of proceedings upon the final order appealed from, and that the possession of the animal or animals seized be delivered to the appellant. The order can be made only where an undertaking is given by the appellant, as required for the purpose of perfecting an appeal from a judgment, and staying the execution thereof; and also an undertaking, in the same or another instrument, to the effect that, if the final order appealed from is affirmed, or if the appeal is dismissed, the appellant will pay all sums which the justice awards against him, upon the hearing after the determination of the appeal, as prescribed in the next section, not exceeding a sum specified therein; which must be, at least, twice the amount of all the sums, which might be deducted from the proceeds of the sale, as prescribed in section 3092 of this act. The sum must be fixed, and the undertaking must be approved, by the judge who grants the order. Upon filing the order with the

justice, the appellant is forthwith entitled to the possession of the animal or animals seized.

§ 8106. Proceedings upon affirmance.

If the final order appealed from is affirmed, upon an appeal taken by the person answering, the county court must appoint a time and place, at which the justice must fix the sums payable by the appellant, pursuant to his undertaking. The justice may adjourn the hearing to another place, and to another time, not exceeding three days after the time so appointed. The justice must fix the sums so payable, as if a warrant for the sale of the animals seized had been returned, and the proceeds thereof paid to him by the constable, as prescribed in section 5092 of his act. The undertaking upon the appeal inures to the benefit of each officer, to whom any sum is payable, as prescribed in that section; and with respect to any of those sums, the respondent is a trustee for the officer entitled thereto.

§ 8107. Limitation of action for seizing animals.

Where an animal is seized, upon the ground that it was running at large, or was being herded or pastured, or was trespassing, contrary to the provisions of this title; and the officer or other person making the seizure, immediately files his petition, and diligently prosecutes the same, as prescribed in this title; an action to recover the animal so seized, or to recover damages for the seizure, or for any act subsequent thereto, must be commenced within one year after the cause of action accrues.

L. 1897, ch. 814, § 7.

§ 8108. Certain actions cannot be maintained.

A person, to whom the precept was directed by his name, and who was personally served therewith, or a person who has appeared and answered in the special proceeding, or demanded the return of any animal seized, cannot maintain an action against the officer or other person seizing an animal, or a person acting by his command, or in his aid, in a case specified in the last section. But, except as specified in this section, the owner of an animal seized or detained, under color of any provision of this title, may maintain an action to recover the animal, or its value, or damages, for the seizure or detention, or for any unlawful act subsequent thereto, if, in fact, the animal was not, at the time of the seizure, running at large, or being herded or pastured, or trespassing, as the case may be, as specified in the foregoing provisions of this title.

§ 8109. Where several animals are trespassing, damages are entire. Proceedings in such cases.

For the purpose of determining the damages sustained by the petitioner, where two or more animals are found simultaneously trespassing upon real property, owned or occupied by him, all the damage done by all the animals seized, is to be regarded as done by them jointly; and the petitioner's remedy therefor is entire, and must be enforced against all the animals, and the proceeds of the sale thereof. Where different persons, who are known, own different animals seized, the precept must be directed to all of them by their names. If one or more of the owners are known, and the others are unknown, and cannot be

ascertained with reasonable diligence, the precept must be directed to each known owner, by his name, and, also generally to all persons having an interest in those animals, the owners of which are unknown. In a case specified in this section, a demand of the possession of an animal seized cannot be made, as prescribed in section 3007 or 3101 of this act, unless it is made with respect to all the animals seized, and by persons entitled to the possession of all of them. But a separate demand may be made, as prescribed in section 3008 of this act, by each owner of one or more animals seized; in which case, if possession is delivered to him, as prescribed in that section, the petitioner's remedy for his damages is the same, with respect to the animal or animals, of which possession is not so delivered, and against the proceeds of the sale thereof, as if those, whereof possession is so delivered, had not been trespassing upon the property.

§ 3110. Proceedings in other cases, where there are different owners.

Where the petitioner does not allege, that the animals seized, were trespassing upon real property owned or occupied by him, and different persons own different animals seized, a separate special proceeding may be instituted, as prescribed in this title, against each owner, or against any two or more owners, with respect to the animals owned by him or them. Or the proceedings may be taken against all the owners jointly; in which case, each person to whom the precept is directed by his name, and each person having an interest in an animal seized, has the same right to demand the possession of the animal owned by him, and the same right to answer separately, as if the special proceeding was against him separately; and the final order may be in favor of one or more of the persons so answering, with respect to the animal or animals owned by him or them, and for his or their costs; and against the remainder of the persons answering, or to whom the precept was directed, or for the sale of the remainder of the animals, in like manner, as if the former persons had not answered, or had not been named in the precept. But the person, first making a demand of the possession of any animal seized, must pay all the costs to the time of the demand; and a person, subsequently making a demand, is excused from the payment of any costs, except those which have accrued since the former demand.

§ 3111. Surplus where there are different owners.

Where proceedings are taken jointly against different persons, who own different animals seized, as prescribed in either of the last two sections, the surplus, remaining in the justice's hands, must be distributed between them, in proportion to the value of the animals owned by each, to be determined by the justice. Any owner may claim separately his proportion of the surplus; and sections 3003 and 3004 of this act apply to a claim made, and to the disposition of the surplus arising, as prescribed in this section.

§ 3112. When one action, etc., supersedes any other.

Where two or more persons, or an officer and a private person, are authorized, by this title, to bring an action, or to seize an animal, and take the proceedings prescribed in this title for the disposition thereof, the commencement of an action, or the seizure of the animal, by either of them, supersedes the right of any of the

others to bring such an action, or to make such a seizure, with respect to the animal seized, or in question in the action. But the justice may, in his discretion, allow an officer or other person, who is interested in the recovery, or in the application of the proceeds of the sale, to appear in the action or special proceeding, for the purpose of protecting his interest, and to take such part in the proceedings therein as the justice thinks proper.

§ 3113. Rights of officer when private person fails to prosecute.

Where a seizure is made by a private person, as prescribed in this title, and the possession of an animal seized is abandoned by him, without filing a petition; or where an action, brought by a private person, as prescribed in this title, is settled or discontinued by the plaintiff; the officer, to whom a penalty is payable, as prescribed in section 3083 of this act, or in subdivision fourth of section 3092 of this act, may, unless he has assented to the abandonment, settlement, or discontinuance, maintain an action against the owner of the animal in question, to recover the penalty so payable to him; and, upon proof of the facts, which would have entitled the plaintiff in the former action, or the petitioner in the special proceeding, to recover, he is entitled to judgment accordingly.

§ 3114. Person having a special property deemed owner.

When a person is, at the time of the seizure, entitled to the possession of an animal, as against the general owner thereof, by virtue of a special property therein, he is deemed, for all the purposes of this title, the owner thereof.

§ 3115. Agent may act for his principal.

The duly authorized agent of the owner or person entitled to the possession of an animal, as specified in the last section, may, in his own name, answer, make any demand, or take any other proceeding, which the owner or person so entitled may take, as prescribed in this title.

TITLE XI.

Provisions specially relating to courts of justices of the peace in the city of Brooklyn.

- Sec. 3116. Repealed, 1902. See the Municipal Court Act of New York city.
 3117. Repealed, 1902. See the Municipal Court Act of New York city.
 3118. Repealed, 1902. See the Municipal Court Act of New York city.
 3119. Repealed, 1902. See the Municipal Court Act of New York city.
 3120. Repealed, 1902. See the Municipal Court Act of New York city.
 3121. Interpreter for police court, and for first, second and third districts.
 3122. Id.; for fourth and fifth districts.
 3123. Id.; for sixth district.
 3124. Common council may appoint additional interpreters.
 3125. Common council to designate attendants, etc.
 3126. Repealed, 1902. See the Municipal Court Act of New York city.
 3127. Repealed, 1902. See the Municipal Court Act of New York city.
 3128. Repealed, 1902. See the Municipal Court Act of New York city.
 3129. Repealed, 1902. See the Municipal Court Act of New York city.
 3130. Repealed, 1902. See the Municipal Court Act of New York city.
 3131. Repealed, 1902. See the Municipal Court Act of New York city.
 3132. Repealed, 1902. See the Municipal Court Act of New York city.
 3133. Application of other provisions. Holding court open.

§ 3116. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3117. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3118. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3119. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3120. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3121. Interpreter for police court, and for first, second and third districts.

There is an interpreter for the police court of the city of Brooklyn, and the justices' courts of the first, second, and third districts of that city, who is appointed, and may be removed at pleasure, by the justices of those courts, or a majority of them. He is entitled to an annual salary, fixed and to be paid as prescribed by law.

L. 1870, ch. 607.

§ 3122. Id.; for fourth and fifth districts.

There is an interpreter for the justices' courts of the fourth and fifth districts of the city of Brooklyn, who is appointed, and may be removed at pleasure, by the justices of the peace of those districts. He is entitled to an annual salary, fixed and to be paid as prescribed by law.

L. 1871, ch. 331.

§ 3123. Id.; for sixth district.

There is an interpreter for the justice's court of the sixth district of the city of Brooklyn, who is appointed by the justice of

the peace of that district, subject to confirmation by the common council, and may be removed by that justice at his pleasure. He is entitled to an annual salary, fixed and to be paid as prescribed by law.

L. 1873, ch. 780, § 2.

§ 3124. Common council may appoint additional interpreters.

The common council of the city of Brooklyn may, where it deems it necessary, upon the request of a justice, appoint one or more interpreters for justices' courts in that city, in addition to those provided for in the last three sections; fix their salaries; and prescribe the court or courts which they must attend. An officer, so appointed, may be removed by the common council, for cause.

L. 1875, ch. 623.

§ 3125. Common council to designate attendants, etc.

The common council of the city of Brooklyn may designate one or more policemen, or constables, to attend each of the justices' courts in that city. The common council may, by ordinance or otherwise, fix and define their duties in and about those courts, and may allow them such compensation, in lieu of all fees and perquisites, as it deems proper.

L. 1850, ch. 102, § 17; and L. 1855, ch. 514, § 3.

§ 3126. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3127. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3128. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3129. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3130. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3131. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3132. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3133. Application of other provisions. Holding court open.

Each justice of the peace of the city of Brooklyn is a justice of the peace of Kings county; and each provision of this act, relating to the proceedings before a justice of the peace of a town, applies to the proceedings before a justice of the peace of that city, except as otherwise specially prescribed in this title. Each of those justices must hold his court open, from nine o'clock in the morning, until three o'clock in the afternoon.

See L. 1849, ch. 125, §§ 35 and 36; L. 1850, ch. 102, § 18; L. 1871, ch. 492, § 8; L. 1873, ch. 863, part of § 16.

TITLE XII

Miscellaneous provisions.

- Sec. 8134. Mode of application of certain provisions of this act.
 8135. General requisites of mandates.
 8136. Reward to constable forbidden.
 8137. Justice or constable not to *u. y.* claim, etc.
 8138. Penalty.
 8139. Violation of preceding sections a defence of action.
 8140, 8141. Docket-book to be kept by justice, entries therein.
 8142. Index to docket-book.
 8143. Papers to be filed.
 8144. Deposit of books and papers with town or city clerk.
 8145. Certificate in docket-book deposited.
 8146. Town or city clerk to demand books, etc., upon death, etc., of justice.
 8147. Delivery; how compelled.
 8148. Entries to be evidence.
 8149. Justice to furnish copies of papers.
 8150. Transfer of action when justice's term expires, etc.
 8151. *Id.*; when justice is a witness.
 8152. Proceedings upon transfer.
 8153. Penalty for not paying over money.
 8154. Action on judgment of justice.
 8155. *Id.*; proof of judgment, etc.
 8156. Execution of mandate by private person.
 8157. Constable to execute mandates in person.
 8158. Sheriff to act where execution of mandate is resisted.

§ 3134. Mode of application of certain provisions of this act.

Where a provision of this act, not contained in this chapter, is made applicable to proceedings before a justice of the peace, the application is subject to the qualification, that it does not include any thing, which is repugnant to any special provision of law, regulating the jurisdiction or powers of a justice of the peace, or the proceedings before him. Where a provision, thus made applicable, relates to the filing of a paper in a court, or with a clerk, the paper must, in an action or special proceeding before a justice of the peace, be filed with the justice, unless he has a clerk appointed pursuant to law; and where it confers a power upon a court or a judge, the provision, making it applicable to proceedings taken under this chapter, is to be construed, as conferring a like power upon the justice, before whom the action or special proceeding is brought.

§ 3135. General requisites of mandates.

A mandate, issued by a justice of the peace, must be signed by him, and may be without seal. It must be entirely filled up, at the time when it is delivered to an officer to be executed, so as to have no blank, either in the date thereof or otherwise; except that there may be a blank in a subpoena for the name of any or all of the witnesses. A mandate, issued and delivered to an officer to be executed, contrary to this section, is void.

2 R. S. 267, §§ 232 and 233 (2 Edm. 275).

§ 3136. Reward to constable forbidden.

A constable shall not ask or receive any money or other valuable thing from any person, as a consideration, reward, or inducement for omitting or delaying to arrest a person, or to take him to jail, or to sell property, by virtue of an execution, or to

execute any other duty, pertaining to his office; or any money or valuable thing, other than the fees expressly allowed to him by law, for executing any duty pertaining to his office.

2 R. S. 267, § 234.

§ 3137. Justice or constable not to buy claim, etc.

A justice of the peace or constable shall not, directly or indirectly, buy, or be interested in buying, a bond, note, or other demand or cause of action, for the purpose of bringing an action or instituting a special proceeding before a justice founded thereupon; nor shall a justice or a constable, either before or after an action or a special proceeding is commenced, lend or advance, or agree to lend or advance, or procure to be lent or advanced, any money or other valuable thing to any person, in consideration of, or as a reward for, or an inducement to, the placing or having placed in his hands, a debt or other demand or cause of action, for prosecution or collection.

Id., § 235.

§ 3138. Penalty.

A justice of the peace or constable who violates a provision of the last three sections, is guilty of a misdemeanor; and shall be punished accordingly. A conviction also operates as a forfeiture of his office.

Id., § 236.

§ 3139. Violation of preceding sections a defence to action.

It is a defence to an action, brought before a justice of the peace, that the demand, upon which it is founded, was bought and sold, or received for prosecution, contrary to the foregoing provisions of this title. In an action wherein such a defence is interposed, if the plaintiff, after being duly subpoenaed as a witness, fails to attend, pursuant to the subpoena; or if, upon the trial, or upon his examination as a witness by virtue of a commission, he refuses to answer any question pertinent to show a violation of either of those provisions; the justice, besides punishing him, in a proper case, for his failure or refusal, must dismiss his complaint. The testimony, in such an action, of the plaintiff, or any other witness, is not evidence, in a criminal prosecution against him, for violating either of those provisions.

Id., §§ 237-242.

§ 3140. [Am'd, 1899.] Docket-book to be kept by justice; entries therein.

A justice of the peace must keep a docket-book, in which he must enter:

1. The title of every action or special proceeding commenced before him.
2. The time when the summons, or the mandate for the commencement of the special proceeding, was issued; with a statement of the nature of the mandate, and a memorandum of each order of arrest, warrant of attachment, or requisition to replevy, granted by him.
3. The time when the parties appeared before him, either without process, or upon the return of the summons, or of the mandate for the commencement of the special proceeding.
4. A concise statement of the substance of each oral pleading, or a memorandum of the filing of each written pleading.

5. Each adjournment; stating upon whose application, and to what time and place, it was made.

6. The issuing of a venire; stating upon whose application it was issued, and the time and place of the return thereof.

7. The time when a trial was had; and, if it was by a jury, the names of all the persons returned as having been notified to attend as jurors; stating who did not attend; who attended; and who were sworn.

8. The name of each witness sworn upon the trial; stating at whose request he was sworn; each objection made to the competency of a witness; and the decision thereupon.

9. The verdict of the jury, and the time of receiving it; or, if the jury disagreed and were discharged, a statement of that fact.

10. A concise statement of the substance of each order, made by him in the course of the action or special proceeding.

11. The judgment or final order; and the time of entering it.

12. The execution; the time of issuing it; the kind of execution; the name of the officer to whom it was delivered; and each renewal, with the date thereof.

13. The return of each execution; the time of the return; and a statement of any money paid to the justice thereupon, and when and by whom it was paid.

14. Each transcript of the judgment, given by him to be filed in the county clerk's office, and the time when it was given.

15. The appeal, if any; and the time of service of the notice of appeal.

16. [Added, 1899.] Such entries shall be made in a book which must be furnished to him by the clerk of the town in which he resides and to be designated as "justices' civil docket" and to be the property of, and a charge against, such town.

§ R. S. 267, § 24; L. 1899, ch. 221. In effect Sept. 1, 1899.

§ 3141. The same.

Each of the entries, specified in the last section, must be made under the title of the action or special proceeding to which it relates; and, in addition thereto, the justice may enter in like manner any other proceeding, had before him in the action or special proceeding, which he thinks proper to enter. A docket-book, kept by a justice, must be kept open, during the hours, when a sheriff's office is required by law to be kept open, for search and examination by any person, upon his reasonable request and to a reasonable extent.

Id., § 244.

§ 3142. Index to docket-book.

A justice of the peace must keep an alphabetical index to all the judgments, entered by him in his docket-book; and he must insert therein the names of all the parties to each judgment, and the page of the book, where the judgment is entered.

Id., § 251.

§ 3143. Papers to be filed.

A justice of the peace must carefully file and preserve each affidavit or other paper, delivered to him to be filed in an action or special proceeding.

Id., § 250.

§ 3144. Deposit of books and papers with town or city clerk.

If a justice of the peace, either before or after the expiration of his term of office, removes from the town or city wherein he was elected, he must forthwith deposit, with the clerk of that town or city, his docket-book, and all other books and papers, in his custody, relating to an action or a special proceeding, which has been heard by him, or commenced before him. A justice who is removed from office, must make a like deposit, within ten days after receiving notice of his removal, or afterwards, upon the demand of the clerk of the town or city. But the omission of the justice to make the deposit, does not affect the validity of any book or paper, so required to be deposited, or of any proceeding to which it relates.

2 R. S. 267, §§ 252 and 253.

§ 3145. Certificate in docket-book deposited.

A justice of the peace must make, in each docket-book deposited by him, as prescribed in the last section, a certificate under his hand, to the effect that each judgment or order, entered therein, was duly rendered or made, as therein stated; and that the sum, appearing by the book to be due thereupon, has not been paid, to his knowledge.

Id., § 254.

§ 3146. [Am'd, 1905.] Town or city clerk to demand books, et cetera, upon death, et cetera, of justice.

Am'd L. 1911, ch. 448

If a justice of the peace dies, or his office becomes otherwise vacant, the town or city clerk must demand and receive all books and papers, which belonged to the justice in his official capacity, from any person having them in his possession, and such clerk may make and issue a transcript of a judgment so rendered by such a justice of the peace and appearing upon the docket of such justice of the peace so on file in his office, upon receiving his fees for the same, which shall be the same now allowed a justice of the peace for issuing a transcript, and such transcript so issued by such clerk shall have the same force and effect as though the same had been issued by such justice of the peace during his term of office.

Id., § 255; L. 1905, ch. 436. In effect Sept. 1, 1905.

§ 3147. Delivery; how compelled.

If any book or paper, required to be deposited with the town or city clerk, as prescribed in this title, is withheld, the like proceedings may be had, at the instance of the town or city clerk, to compel the deposit thereof, as are prescribed by law, where an officer refuses or neglects to deliver a book or paper in his custody as such officer, to his successor in office.

Id., § 256.

§ 3148. Entries to be evidence.

An entry made, as prescribed by law, in the docket-book, kept by a justice of the peace, and deposited with the town or city clerk, as prescribed in this title, is presumptive evidence of the matters of fact stated therein; but the presumption may be repelled by proof.

Id., § 257.

§ 3149. Justice to furnish copies of papers.

A justice of the peace must furnish, upon request and payment of his fees, to any person interested in a judgment or order entered by him, a transcript of the judgment or order, together with a copy of all the entries in his docket-book, relating to the cause; a copy of his minutes of the evidence in the cause, or the substance of the testimony, if he has not taken minutes; and a copy of any paper on file in the cause: or such portions thereof as are required.

L. 1841, ch. 141, § 11 (1 Edm. 546).

§ 3150. Transfer of action when justice's term expires, etc.

If the term of office of a justice of the peace is about to expire, or he is about to remove from the town or city, before judgment is rendered in an action, or a final order is made in a special proceeding, pending before him, he must previously make a written order, reciting the fact, and directing the action or special proceeding to be continued before another justice of the same town or city, named in the order.

§ 3151. Id.; when justice is a witness.

If, before an issue of fact is joined in an action or special proceeding, the defendant, or, where he has not been arrested, his attorney, presents to the justice satisfactory proof, by affidavit, that the justice, before whom the action or special proceeding is pending, is a material witness for the defendant, without whose testimony he cannot safely proceed to trial, setting forth therein the particular facts and circumstances, which he expects to prove by him: the justice must forthwith make a written order, directing the action or special proceeding to be continued before another justice of the same town or city, named in the order.

See 2 R. S. 229, § 21 (2 Edm. 215); also, *id.*, § 118, am'd, L. 1838, ch. 243; L. 1875, ch. 334.

§ 3152. Proceedings upon transfer.

Where an order is made, as prescribed in either of the last two sections, the constable must forthwith take it and all other papers in the action, with the body of the defendant, if he is under arrest, before the justice named in the order. The plaintiff or petitioner must forthwith appear before that justice, who must take cognizance of the action or special proceeding, and must proceed therein as if it had been commenced before him. Costs, recovered in the action or special proceeding, include the fees allowed by law, for services performed by the constable and the justice, before the transfer, together with the fees allowed by law, for the proceedings before the justice to whom the cause is transferred.

§ 3153. Penalty for not paying over money.

A justice of the peace, who neglects or refuses, within a reasonable time after demand, to pay any money, collected by him in his official capacity, to the person entitled thereto, is guilty of a misdemeanor, and shall be punished accordingly. A conviction also operates as a forfeiture of his office.

Section 259 of R. S.

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§ 3154. Action on judgment of justice.

In an action upon a judgment of a justice of the peace, brought in the county wherein it was rendered, within five years after the rendition thereof, against a defendant upon whom the summons was personally served, no costs can be recovered, except where the justice, who rendered the judgment, is dead, or out of office, or otherwise incapable of acting: or has removed from the county: or where one of the parties has died: or where the docket of the judgment has been lost or destroyed.

Co. Proc., § 71, last clause.

§ 3155. Id.; proof of judgment, etc.

In an action brought upon a judgment of a justice of the peace, who is dead, or out of office, or otherwise incapable of acting; or has removed from the county; or cannot be found therein; the original docket-book of the justice is presumptive evidence of any matter entered therein, as prescribed by law; but the presumption may be repelled by proof. If the docket-book is lost or destroyed, or if it cannot be produced, after reasonable effort to obtain it, the like proof may be given, respecting the recovery of the judgment, as upon any other question of fact.

Sections 285 and 287, R. S.

§ 3156. Execution of mandate by private person.

A justice of the peace, who issues any mandate, authorized by this chapter, except a venire, may, at the request of the party, whenever he deems it expedient so to do, empower, by a written authority indorsed upon the mandate, any proper person of full age, not a party to the action, to serve or otherwise execute it. For that purpose the person so empowered has all the power and authority, and is subject to all the obligations and liabilities, of a constable; and his return is evidence in like manner as a constable's. But a person so empowered is not entitled to any fee or reward for his services.

Sections 271 and 272, R. S. See § 2885, ante.

§ 3157. Constable to execute mandates in person.

A constable, to whom a mandate is directed and delivered as prescribed in this chapter, must execute it in person, pursuant to the tenor thereof. He cannot act by deputy in such a case.

Section 273, R. S. See § 2885, ante.

§ 3158. [Am'd, 1909.] Sheriff to act where execution of mandate is resisted.

If a constable, to whom a mandate, issued by a justice of the peace, is directed and delivered, finds, or has reason to apprehend, that resistance will be made to the execution thereof, he may deliver it to the sheriff of the county, with a written certificate, stating the facts, and requiring the sheriff to execute it. Thereupon the sheriff must execute the mandate; and he is subject to all the liabilities attaching to a constable in executing it. Sections four hundred and four hundred and one of the judiciary law apply to a mandate delivered to a sheriff, as prescribed in this section.

Am'd by L. 1909, ch. 65, § 3. See note 85 of notes of Board of Statutory Consolidation at end of code.

CHAPTER XX.

Provisions Relating to Certain Courts in Cities, and the Proceedings Therein.

TITLE I.—The City Court of the City of New York.

TITLE II.—The Mayor's Court of the City of Hudson, and the Recorders' Courts of the Cities of Utica and Oswego.

TITLE III.—The City Court of Yonkers.

TITLE IV.—The District Courts of the City of New York, and the Justices' Courts of the Cities of Albany and Troy.

TITLE V.—The Municipal Court of the City of Rochester.

TITLE I.

The city court of the city of New York.

Article 1. Provisions generally applicable to proceedings in the court.

2. Provisions exclusively applicable to the proceedings, other than appeals, in an ordinary action.
3. Provisions exclusively applicable to the proceedings, other than appeals, in certain marine causes.
4. Appeals.

ARTICLE FIRST.

Provisions generally applicable to proceedings in the court.

Sec. 8159. Provisions, applying generally to courts of record, subject to certain qualifications.

3160. Certain sections not to apply to New York city court; who a non-resident.

3161. Time for service of notices.

3162. Service of notice of trial; filing of note of issue.

3163. When court may relieve from imprisonment.

3164. Money; how paid into the court.

3164a. Fees of clerk of New York city court.

§ 3159. [Am'd, 1907.] Provisions, applying generally to courts of record, subject to certain qualifications.

Each of the foregoing provisions of this act which is made, by chapter twenty-second of this act, applicable to the city court of the city of New-York, or generally to courts of record, is subject to the qualifications and exceptions expressed or plainly implied in this title.

L. 1872, ch. 639, § 2; am'd L. 1907, ch. 707. In effect Aug. 12, 1907.

§ 3160. [Am'd, 1896, 1902.] Certain sections not to apply to New York city court; who a non-resident.

Sections four hundred and thirty-eight and six hundred and three, sections six hundred and eleven to six hundred and nineteen, both inclusive, and sections six hundred and thirty-six, eight hundred and twenty-seven and ten hundred and fifteen of this act do not apply to an action or a special proceeding brought in the city court of the city of New York, or before a justice thereof, or to any proceeding therein. Sections thirty-two hundred and sixty-eight and thirty-two hundred and sixty-nine of this act do not apply to an action in the court, prosecuted as prescribed in article third of this title; or where an undertaking has been given as prescribed in section thirty-one hundred and

sixty-five of this act. A plaintiff, in an action brought in the court, who has an office for the regular transaction of business in person, within the city of New York, is deemed a resident of that city, within the meaning of sections thirty-two hundred and sixty-eight and thirty-two hundred and sixty-nine of this act.

2. The provisions of section ten hundred and thirteen of the code of civil procedure are hereby made applicable to and binding upon the city court of the city of New York.

L. 1896, ch. 954. See § 1013. L. 1902, ch. 515. In effect Sept. 1, 1902.

§ 3161. [Am'd, 1902.] Time for service of notices in New York city court.

The time for personal service of certain notices, in an action brought in the court, is as follows:

1. Notice of justification of the sureties, in an undertaking given by the plaintiff, as security for the defendant's costs, not more than two days.

2. Notice of an application for judgment in a case specified in section five hundred and thirty-seven of this act; notice of a motion to strike out a pleading, in a case specified in section five hundred and thirty-eight of this act; notice of an application for judgment upon the defendant's default, or of the execution of a reference, or writ of inquiry, or of an assessment thereupon, as prescribed in section twelve hundred and nineteen of this act; not less than two days.

3. Notice of the justification of bail, not less than two, nor more than ten days.

4. Notice of a motion, other than a motion specified in subdivision second of this section, not less than four days; but the court or a justice thereof may, upon an affidavit showing grounds therefor, prescribe a shorter time, by an order to show cause.

5. Notice of trial of an issue of fact, or of an issue of law; notice of any hearing, the time for serving which is not expressly prescribed in either of the foregoing subdivisions of this section, or elsewhere in this title; not less than five days.

6. Notice of taxation of costs, not less than two days; except where all the attorneys, serving and served with the notice, reside or have their offices in the city of New York, in which case, one day's notice is sufficient.

L. 1872, ch. 629, §§ 5 and 14; L. 1874, ch. 545, § 2; L. 1875, ch. 479, §§ 17 and 50; also, § 51, subd. 10; L. 1902, ch. 515. In effect Sept. 1, 1902.

§ 3162. [Am'd, 1902.] Service of notice of trial; filing of note of issue.

Notice of trial of an issue triable at a term of the court may be given for any day of the term. A note of issue must be filed at least two days before the day, or the commencement of the term, for which the notice of the trial is given; and it must, in addition to the matters specified in section nine hundred and seventy-seven of this act, state the day or the term, for which the notice has been given. But this and the last section do not apply to a case where special provision is otherwise made in article third of this title.

See L. 1874, ch. 545, § 2; L. 1902, ch. 515. In effect Sept. 1, 1902.

§ 3163. When court may relieve from imprisonment.

Where it satisfactorily appears that a party, who is actually confined in jail, by virtue of an order of arrest, or an execution against the person, issued in an action brought in the court, is physically unable to endure the confinement, and that he cannot procure bail, or the necessary sureties in a bond for the jail liberties, as the case requires, the court, or justice thereof, may, in its or his discretion, by order, direct the sheriff to release him from custody. The sheriff must obey such an order. After such a release from an execution against the person, another execution, against the person of the judgment debtor, cannot be issued upon the judgment; but the judgment creditor may enforce the judgment against property, as if the execution, from which the judgment debtor was released, had been returned without his being taken.

See L. 1875, ch. 479, part of § 10.

§ 3164. Money; how paid into the court.

Money paid into the court, pursuant to any provision of this act, must, unless the court otherwise directs, be paid directly to the chamberlain of the city of New-York, to the credit of the cause in which it is paid.

§ 3164a. [Added, 1906.] Fees of clerk of New York city court.

The clerk of the city court of the city of New York is entitled to receive for the use of the city of New York, for the services performed by him the following fees and none other: For filing a note of issue for the general or equity calendar, three dollars; for entering final judgment in an action, including the filing of the judgment roll, fifty cents; and ten cents in addition for each folio exceeding ten, contained in said judgment. For filing and entering an order directing the change of name, one dollar for each name so changed. For entering any other order or an interlocutory judgment, ten cents for each folio exceeding five. For a certified or other copy of an order, record, or other paper, entered or filed in his office, five cents for each folio. For filing and entering a certificate of satisfaction, of a judgment twenty-five cents and for certifying a copy thereof twelve cents. For filing and entering an assignment of a judgment twenty-five cents, and for certifying a copy thereof twelve cents. For filing and entering a release of a judgment twenty-five cents, and for certifying a copy thereof twelve cents. For certifying a transcript of the docket of a judgment twelve cents. For an extract of the minutes of a trial ten cents. For attesting the correctness of the copy of any paper or record on file in his office, ten cents for each folio. For a certificate other than herein described, twenty-five cents. For making and certifying a search for any paper or record, one dollar. For comparing and certifying the printed papers on appeal from an order or judgment taken as prescribed in article fourth of title first of chapter twenty of this act, one cent per folio thereof. But where the attorneys for all the parties interested, other than parties in default or against whom a judgment or a final order has been taken, and is not appealed from, stipulate in writing that a paper is a copy of any paper whereof a certified copy is required by any provisions of this act, the stipulation takes the place of a certificate, as to the parties so stipulating, and the clerk is not required to certify the same, or entitled to any fees therefor. And the paper so proved by stipulation shall be received by the clerks of all the courts and by the courts and shall be used or filed with the same force and effect as if certified by a clerk of the court.

Added L. 1906, ch. 273. In effect Apr. 19, 1906.

ARTICLE SECOND.

Provisions exclusively applicable to the proceedings, other than appeals, in an ordinary action.

Sec. 8165. Summons.

- 8166. Time for service of pleadings, etc.
- 8167. Enforcement of certain judgments in favor of working women.
- 8168. Time for non-acceptance and justification of bail, etc.
- 8169. Proof necessary to obtain warrant of attachment.
- 8170. Service of summons without the city, or by publication.
- 8171. Commission to take testimony.
- 8172. Court may refer question arising upon a motion.
- 8173. Time for filing decision upon a trial by the court. *Id.*; when sufficient.
- 8174. Counterclaims.
- 8175. Perishable property may be sold.
- 8176. Portion of verdict, etc., may be remitted.

§ 8165. Summons.

The summons, in an action brought in the court, must state that the time, within which the defendant must serve a copy of his answer, is six days after the service thereof, exclusive of the day of service; except in one of the following cases:

1. A justice of the court may, upon satisfactory proof, by affidavit, that either the plaintiff or the defendant resides without the city of New-York; or, where there are two or more plaintiffs, or two or more defendants, that all the plaintiffs or all the defendants reside without that city, direct, by an order, that the defendant be summoned to answer within a shorter time, specified therein, not less than two days after the service of the summons, exclusive of the day of service; whereupon the summons must correspond to the order. The order must be indorsed upon or annexed to the summons; and a copy thereof must be delivered with a copy of the summons. The justice may, in his discretion, as a condition of granting the order, require the plaintiff to give an undertaking, with one or more sureties, to the effect that the plaintiff will pay any judgment which may be rendered against him in the action, not exceeding a sum specified in the undertaking, which must be at least two hundred dollars.

2. Where an order, directing service of the summons without the city of New-York, or by publication, is granted, the summons must state that the time, within which the defendant must serve a copy of his answer, is ten days after service thereof, exclusive of the day of service. If a summons, requiring the defendant to answer within a shorter time, has been issued, as prescribed in this section, before an order specified in this subdivision is granted, the justice granting such an order may direct that the summons be amended accordingly, and thereupon the summons published, or served without the city, pursuant to the order, must correctly state the time.

L. 1872, ch. 29, § 5; L. 1874, ch. 545, § 1.

§ 8166. Time for service of pleadings, etc.

The time, within which a defendant in a case specified in section 479 of this act must demand a copy of the complaint, and the time within which the plaintiff must serve the same, after a demand thereof, as prescribed in that section, and the time, within which a copy of a pleading, subsequent to the complaint, must be served, after the service of a copy of the preceding pleading, is the

same number of days, as stated in the summons, within which the defendant is required to serve a copy of his answer, after service of the summons. But, except as otherwise prescribed in section 3185 of this act, a defendant, arrested before answer, has ten days after the arrest, within which to demand a copy of the complaint or to serve a copy of his answer, as the case requires; and judgment must be stayed accordingly.

§ 3167. [Repealed by L. 1907, ch. 707.]

§ 3168. Time for non-acceptance and justification of bail, etc.

The time for taking certain proceedings, in an action brought in the court, is as follows:

1. Service of notice of non-acceptance of bail, within five days after the delivery, to the plaintiff's attorney, of certified copies of the order of arrest, return, and undertaking, as prescribed in section 577 of this act.

2. Service of notice of justification of the bail, within five days after service of the notice specified in subdivision first of this section.

3. Service of notice of exception to the sureties, in an undertaking given by the plaintiff, as security for the defendant's costs within two days after service, upon the defendant's attorney, of a written notice of the filing thereof; and service of notice of the justification of the same, or new sureties, within two days after service of the notice of exception.

R. 1875, ch. 479, §§ 16 and 17; also, § 51, subd. 9.

§ 3169. [Am'd, 1899.] Proof necessary to obtain warrant of attachment.

In order to entitle the plaintiff to a warrant of attachment against property, he must show by affidavit, to the satisfaction of the justice granting it, that a sufficient cause of action exists against the defendant, to recover damages for one or more causes specified in section six hundred and thirty-five of this act, to an amount stated in the affidavit, which, if the action is to recover damages for breach of contract, must be stated over and above all counterclaims known to the plaintiff; and also that the case is within one of the following subdivisions:

1. That the defendant is a foreign corporation, or being a natural person is not a resident of the State.

2. That the defendant, being an adult and a resident of the borough of Manhattan in the city of New York, has departed from the State, with intent to defraud his creditors, or to avoid service of the summons, or keeps himself concealed therein, with like intent; or that, after proper and diligent effort to ascertain the place of the sojourn of such a resident adult defendant, the same cannot be ascertained.

3. That the defendant, being an adult, has removed, or is about to remove, property from the State, with intent to defraud his

creditors, or that he has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete property, with the like intent.

4. That the defendant, being an adult and a resident of that borough has been continuously without the United States more than six months next before the granting of the warrant, and has not made a designation of a person upon whom to serve a summons in his behalf, as prescribed in section four hundred and thirty of this act; or a designation so made no longer remains in force.

See L. 1881, ch. 303, §§ 33, 34 and 47; L. 1872, ch. 399; see, also, L. 1876, ch. 126; L. 1898, ch. 226. In effect Sept. 1, 1899.

§ 3170. Service of summons without the city, or by publication.

An order, directing the service of a summons, either without the city of New-York, or by publication, may be granted by the court, or by a justice thereof; but only in a case, where a warrant of attachment has been issued, as prescribed in the last section, and personal service of the summons cannot be made, with due diligence, within that city. The plaintiff, when he applies for such an order, must show by affidavit, to the satisfaction of the court or justice, that the case is within this section. Where an order is granted, as prescribed in this section, service of the summons without that city may be made, as directed in the order, either within or without the State. Sections 440 to 445, both inclusive, and sections 638, 707, and 708 of this act apply to the service or publication, pursuant to such an order, and to the proceedings relating to the same, and subsequent thereto; substituting the words, "the city of New-York", in place of the words, "the State" wherever the latter words occur. If the defendant is a resident of the city of New-York, the order must also direct that a copy of the summons, complaint, and order be left at his residence, specifying it, with a person of suitable age and discretion, if, upon reasonable application, admittance can be obtained, and such a person found who will receive it; or, if admittance cannot be so obtained, nor such a person found, by affixing the same to the outer door of the residence so specified.

L. 1874, ch. 545, § 3. See, also, § 438, subd. 3, ante.

§ 3171. Commission to take testimony.

The application, to the court, of article second of title third of chapter ninth of this act, is subject to the following qualifications:

1. The words, "the city and county of New-York, or either of the counties of Richmond, Kings, Queens, or Westchester", must be regarded as substituted, in place of the words, "the State", wherever those words are used in that article, with respect to the locality of a witness.

2. Interrogatories, framed pursuant to that article, can be settled only by a justice of the court.

3. A commission, or order to take depositions, issued or granted, pursuant to that article, may be executed either within or without the State.

L. 1862, ch. 389, § 3. See ante, § 887.

§ 3172. Court may refer question arising upon a motion.

The court may, of its own motion, or upon the application of either party, without the consent of the other, by order, direct a reference, to determine and report upon a question of fact, arising upon a motion, in any stage of an action.

L. 1875, ch. 479, § 55. See ante, § 887.

§ 3173. Time for filing decision upon a trial by the court. Id.; when sufficient.

The time within which the decision of the court must be filed, in a case specified in section 1010 of this act, is ten days after the cause is finally submitted. The decision of the court, in a case specified in section 1022 of this act, is sufficient if it directs the judgment to be entered thereupon; but, if so required by a party appealing, the justice by whom the decision was made, must, within ten days after the appeal is perfected, and notice thereof and of the requirement is given to him, make, and file with the clerk, a special decision, stating separately the facts found, and the conclusions of law.

L. 1872, ch. 629, § 4.

§ 3174. Counterclaims.

A counterclaim, specified in subdivision second of section 501 of this act, cannot be interposed, in an action brought in the court, unless it is of such a nature, that the court has jurisdiction of an action founded thereupon; except that, in an action brought by an executor or administrator, any counterclaim may be interposed, which could be interposed, in a like action, brought in the supreme court. A counterclaim may be interposed, in an action brought in the court, without respect to the amount thereof; and judgment thereupon, in favor of the defendant, may be rendered for any sum.

§ 3175. Perishable property may be sold.

Where perishable property has been levied upon, by virtue of an execution or warrant of attachment, the court may, upon the application of the officer making the levy, by order, direct the sale thereof, at such a time, and upon such a notice, as it deems proper; and thereupon the property must be sold accordingly.

L. 1874, ch. 545, § 6.

§ 3176. Portion of verdict, etc., may be remitted.

A party to whom a sum is awarded, upon a trial, an assessment of damages, or the execution of a reference or writ of inquiry, may remit any portion thereof, and take judgment for the residue.

See L. 1857, ch. 344, § 49.

ARTICLE THIRD.***Provisions exclusively applicable to the proceedings, other than appeals, in certain marine causes.***

Sec. 8177. Arrest in certain marine causes. Court may regulate by general rules.

8178. Id.; contents of order of arrest.

8179. Id.; proceedings on arrest.

8180, 8181. Id.; bail or deposit before return.

8182. Id.; bail or deposit after return.

8183. Id.; when and how defendant to remain in custody.

8184. Id.; return of summons, etc.

8185. Id.; proceedings after return.

8186. Id.; trial.

8187. Ordinary action may be brought for like cause.

§ 8177. Arrest in certain marine causes. Court may regulate by general rules.

In an action specified in subdivision second of section 317 of this act, the plaintiff may apply for an order of arrest, to accompany the summons, in the form and to the effect specified in the next section. If such an order is granted, the proceedings in the action must be conducted as prescribed in this article. The justices of the court, or a majority of them, may, from time to time, by one or more general rules, attested by the hands of the justices making the same, and filed with the clerk, regulate the manner in which an application for such an order may be made, and the cases in which an undertaking may be dispensed with. Until regulations are so established, the justice to whom the application is made, may, in his discretion, require or dispense with an undertaking thereupon.

See L. 1872, ch. 629, part of § 6.

§ 8178. Id.; contents of order of arrest.

The order of arrest, granted as prescribed in the last section, must require the sheriff to arrest the defendant, and to bring him forthwith before the court, at the chambers thereof; or if, when he is arrested, the court is not in session at chambers, to hold him to bail, in a sum specified in the order, for his personal attendance at the opening of the court, on the next day thereafter, when it is in session at the chambers thereof. The order must also direct that the defendant be summoned to answer the complaint in the action forthwith. Thereupon the summons must conform to the order.

See R. L. 1813, §§ 389, §§ 110, 111, 118, 119, 120, 121, 123, 124, 127-130; also, L. 1872, ch. 629, § 5.

§ 8179. Id.; proceedings on arrest.

The sheriff, upon arresting the defendant, by virtue of such an order must, at the same time, serve upon him the summons; and also a copy of the order of arrest, and of the papers, upon which it was granted. He must forthwith bring the defendant before the court, at the chambers thereof; if the court is then in session at chambers; otherwise, unless bail is given, as prescribed in the next section, he must take the defendant to the jail of the city and county of New-York, for the confinement of prisoners in civil causes. The keeper thereof must confine the defendant therein. On the next day thereafter, when the court is in session at chambers, the sheriff must take the defendant from the jail, and bring him before the court.

§ 3180. Id.; bail or deposit before return.

The defendant may give bail, by delivering to the sheriff a written undertaking to the plaintiff, in the sum specified in the order of arrest, executed by one or more sureties, to the effect that the defendant will attend in person at the opening of the court, at the chambers thereof, on the next day thereafter when it is there in session; or he may deposit with the sheriff the sum specified in the order of arrest. In either case, the sheriff must forthwith release him from custody.

§ 3181. The same.

Where bail is given, as prescribed in the last section, the officer taking the acknowledgment of the undertaking must, if the sheriff so requires, examine under oath, to a reasonable extent, the persons offering to become bail, concerning their property and their circumstances. The defendant may give bail, or make the deposit, immediately upon his arrest, at any hour of the day or night; and he must have reasonable opportunity to seek for and to procure bail, before being committed to jail. Where a deposit is made, the money deposited must, before the expiration of the next day thereafter, not being Sunday or a public holiday, be paid, by the sheriff, into court, to the credit of the action, as prescribed in section 3164 of this act.

§ 3182. Id.; bail or deposit after return.

At any time after the return of the sheriff, and before final judgment, a justice of the court may admit a defendant in custody to bail, or allow him to make a deposit; and may direct his release, upon his giving bail, or making the deposit accordingly. The sum to be deposited, or the sum specified in the undertaking of the bail, must be fixed, and the sureties in the undertaking must be approved, by the justice; who must be satisfied, by their examination, or by other proof, respecting their sufficiency. The undertaking must be to the effect that the defendant will, at all times, render himself amenable to any mandate which may be issued, to enforce a final judgment against him in the action. Article fourth of title first of chapter seventh of this act, applies, where bail is given as prescribed in this or the last section.

§ 3183. Id.; when and how defendant to remain in custody.

Unless bail is given, or a deposit is made, as prescribed in the last three sections, the defendant must remain in the jail by virtue of the order of arrest, until final judgment in the action; and, if the judgment is against the defendant, until the return of an execution against property, issued thereupon. But the court must direct him to be brought into court, at the time of the trial; and it may, in its discretion, direct him to be brought into court at any other time. In either case, he must be taken from the jail, and brought into court accordingly.

§ 3184. Id.; return of summons, etc.

The sheriff, after serving the summons and executing the order of arrest, must make a full return of his proceedings thereupon, to the court at chambers. The return must be made forthwith, unless the court is not then in session at chambers; in which case, it must be made immediately after the opening of the court, on the first day thereafter, when it is there in session.

If the defendant has given bail, the undertaking of the bail must be returned, to be delivered to the plaintiff when the court so directs.

§ 3185. Id.; proceedings after return.

Unless both parties sooner appear, the court must wait one hour after the return; or, if the defendant has given bail, one hour after the opening of the court. As soon after the parties appear, or after the expiration of the hour, as the business upon which the court is then engaged will permit, the court must take up the cause. If the plaintiff does not then appear, a judgment dismissing the complaint, with costs, must be rendered. If the defendant does not then attend in person, the plaintiff must then make his complaint, and the defendant's default must be entered. If the plaintiff appears and the defendant attends in person, the pleadings must then be made, and issue must be joined. The pleadings may be oral or written; if they are oral, the clerk must enter the substance thereof in the minutes. If either party desires a trial by a jury, he must demand the same, at the time of the joinder of issue; otherwise the issue must be tried by the court, without a jury.

§ 3186. Id.; trial.

Where a trial by jury is duly demanded, the court at chambers must direct the issue to be tried, at a trial term, upon such notice as it deems proper, or without notice; it may also direct that the action have a preference upon the day calendar, either generally or for a particular day; and it may give such direction as it deems proper, with respect to filing a note of issue. Where a trial by jury is not duly demanded, or where the defendant is in default, the evidence must then, or at such subsequent time, either at chambers or at a trial term or special term, as the court at chambers appoints, be given; and thereupon final judgment must be rendered. But the issue must be appointed to be tried, within six days after the joinder thereof, unless both parties assent to a longer time; or a trial by jury is demanded, and there is no term of the court, at which it can be had, within that time. The trial cannot be adjourned, without the consent of both parties, beyond three calendar months from the joinder of issue.

§ 3187. Ordinary action may be brought for like cause.

This article does not prevent the plaintiff from commencing, and conducting in the ordinary manner an action, for a cause specified in subdivision second of section 317 of this act.

ARTICLE FOURTH.

Appeals.

(Amended, 1902.)

Sec. 3188. Appeal from a judgment.

3189. Idem; from an order.

3190. Time to appeal and proceedings thereupon.

3191. Appeal to appellate division of the supreme court and in what cases.

3192. Idem; proceedings regulated.

3193. Idem; within what time.

3194. Idem; determination upon appeal, how enforced. Idem; where new trial was properly granted.

§ 3188. [Am'd, 1895, 1902.] **Appeal from a judgment.**

An appeal, to the supreme court may be taken from a final or interlocutory judgment rendered in the city court of the city of New York in a case where an appeal may be taken to the appellate division of the supreme court from a final or interlocutory judgment rendered in the supreme court as prescribed in section thirteen hundred and forty-six and section thirteen hundred and forty-nine of this act.

L. 1853, ch. 617, § 5; L. 1872, ch. 629, §§ 9 and 11; L. 1895, ch. 946; L. 1902, ch. 515. In effect Sept. 1, 1902.

§ 3189. [Am'd, 1895, 1902.] **Idem; from an order.**

An appeal to the supreme court may also be taken from an interlocutory judgment rendered, or an order made at chambers, or at a special term or a trial term of said city court, or from an order made by a judge thereof out of court, in a case where an appeal may be taken to the appellate division of the supreme court from an interlocutory judgment rendered, or an order made, in like manner, as prescribed in sections thirteen hundred and forty-seven, thirteen hundred and forty-eight and thirteen hundred and forty-nine of this act. Upon such an appeal the supreme court shall have full power to review any exercise of discretion by the court or judge below.

L. 1872, ch. 629, §§ 9 and 10; L. 1895, ch. 946; L. 1902, ch. 515. In effect Sept. 1, 1902.

§ 3190. [Am'd, 1902.] **Time to appeal and proceedings thereupon.**

An appeal, authorized by either of the last two sections, must be taken within ten days after service of a copy of the judgment or order appealed from, and a written notice of the date of the entry thereof. In every other respect, titles first, third and fourth of chapter twelfth of this act, so far as the same are applicable thereto, apply to and govern an appeal, taken as prescribed in either of the last two sections.

L. 1902, ch. 515. In effect Sept. 1, 1902.

§ 3191. [Am'd, 1895, 1902.] **Appeal to the appellate division of the supreme court; in what cases.**

An appeal to the appellate division of the supreme court in the first judicial department may be taken from the judgment or order entered upon the determination of an appeal taken as prescribed in section thirty-one hundred and eighty-eight and thirty-one hundred and eighty-nine of this act, provided such appeal

be allowed by order made at the term at which such appeal was determined or at the term next after judgment is entered upon such determination and provided further that, where such appeal is from an order granting a new trial upon a case or exceptions, the appellant must, with his application for leave to appeal, file an assent on his part that, if the order is affirmed, judgment absolute may be rendered against him.

Co. Proc., § 352; L. 1874, ch. 545, § 9; L. 1895, ch. 946; L. 1902, ch. 515. In effect Sept. 1, 1902.

§ 3192. [Am'd, 1902.] Practice and proceedings on appeal to appellate division of supreme court.

Titles first, third and fourth of chapter twelve of this act, so far as the same are applicable thereto, apply to and govern an appeal, taken as prescribed in the last section, except as otherwise expressly prescribed in the next two sections.

See L. 1874, ch. 545, § 9; L. 1902, ch. 515. In effect Sept. 1, 1902.

§ 3193. [Am'd, 1895, 1902.] Idem; within what time taken.

An appeal, authorized by section thirty-one hundred and ninety-one of this act, must be taken within twenty days after the service of a copy of the order allowing such appeal and a written notice of the date of the entry thereof.

L. 1895, ch. 946; L. 1902, ch. 515. In effect Sept. 1, 1902.

§ 3194. [Am'd, 1902.] Idem; determination upon appeal, how enforced. Idem; where new trial was properly granted.

The judgment or order of the appellate court must be remitted to the court below, to be enforced according to law. Upon an appeal from an order granting a new trial, on a case or exceptions, if the appellate court determines that no error was committed in granting the new trial, it must render judgment absolute upon the right of the appellant; and thereupon an assessment of damages, or any other proceedings, requisite to render the judgment effectual, may be had in the city court of the city of New York.

L. 1902, ch. 515. In effect, Sept. 1, 1902.

§ 3194-a. [Added, 1904.] Appeals from the city court of the city of New York.

Where, on an appeal from a judgment or order taken as prescribed in article fourth of title first of chapter twenty of this act, a party shall present to the clerk a printed copy of the judgment roll or order appealed from, it shall be the duty of the clerk, as required, to compare and certify the same, for which service the clerk must receive, for the use of the city of New York a fee at the rate of one cent per folio. Where the attorneys for all the parties interested, other than parties in default, or against whom a judgment or a final order has been taken, and is not appealed from, stipulate in writing that a paper is a copy of any paper whereof a certified copy is required by any provisions of this act, the stipulation takes the place of a certificate, as to the parties so stipulating, and the clerk is not required to certify the same, or entitled to any fees therefor. And the paper so proved by stipulation shall be received by the clerks of all the courts and by the courts and shall be used or filed with the same force and effect as if certified by a clerk of the court.

L. 1904, ch. 430. In effect Sept. 1, 1904.

§ 3195. [Repealed Jan. 1, 1896; L. 1895, ch. 946.]

TITLE II.

The mayor's court of the city of Hudson, and the recorder's courts of the cities of Utica and Oswego.

[Mayor's Court of City of Hudson superseded by City Court of the City of Hudson by L. 1895, ch. 751, §§ 127-142.]

Sec. 3196. Civil jurisdiction prescribed.

- 3197. Certain pending actions, etc., transferred to supreme court.
- 3198. Id.: certain papers, etc., to be transmitted to county clerk.
- 3199. Power of supreme court, in actions, etc., so transferred.
- 3200. Proceedings in case of judge's disability.
- 3201. Service of subpoenas.
- 3202. Effect of this title limited.

§ 3196. Civil jurisdiction prescribed.

The civil jurisdiction of the mayor's court of the city of Hudson, the recorder's court of the city of Utica, and the recorder's court of the city of Oswego, extends only to an action whereof jurisdiction is expressly conferred upon the court, by a provision of a statute incorporating, or otherwise specially relating to the government of, the city wherein the court is located.

Co. Proc., § 33.

§ 3197. Certain pending actions, etc., transferred to supreme court.

Every civil action, now pending in either of those courts, other than an action specified in the last section, is hereby transferred to the supreme court; and the subsequent proceedings therein, before and after the judgment, must be the same, as if the action had been commenced in the supreme court.

§ 3198. Id.: certain papers, etc., to be transmitted to county clerk.

All judgment-rolls, and other records, and all books and papers, relating exclusively to civil actions, other than an action specified in the last section but one, now remaining, in either of those courts, must be delivered by the clerk thereof, or, if there is no clerk, by the judge or other officer, having the custody thereof, to the clerk of the county in which the court is located, to be preserved among the records of his office. The expense of so doing is a county charge.

§ 3199. Power of supreme court, in actions, etc., so transferred.

The supreme court may review, enforce, vacate, or amend a final judgment heretofore rendered by either of those courts, in a civil action, other than an action specified in section 3196 of this act, with like power and effect, as the court in which it was commenced might have so done, if this act had not been passed.

§ 3200. Proceedings in case of judge's disability.

The county court of the county in which either of those courts is located, may, by an order, remove to itself an action of which either of those courts has jurisdiction, as prescribed in section 3196 of this act, upon proof, by affidavit, that the judge thereof is, for any cause, incapable of acting, either generally or in the particular action. Sections 344, 345, and 346 of this act apply to such an order of removal, and to the proceedings subsequent thereto. The proceedings subsequent to the order are the same, as in an action brought in the county court, except that costs

must be awarded, as if the action had remained in the court from which it was removed.

Co. Proc., part of § 83.

§ 3201. Service of subpoenas.

A subpoena, issued out of either of those courts, may be served upon a witness, at any place within the State. A warrant to apprehend a witness, for a failure to obey such a subpoena, may be directed to the sheriff of the county where the court is located, and executed by him within any county of the State. The sheriff is subject to the same liability, for a failure to serve or return it, as if it was issued out of the supreme court.

2 R. L. 505, ch. 85, § 18.

§ 3202. Effect of this title limited.

This title does not affect any provision of law conferring upon a judge, or upon the judges, of either of those courts, jurisdiction, power or authority, in an action brought in another court, or in a special proceeding.

TITLE III.*

The city court of Yonkers.

Sec. 3203. Jurisdiction in civil actions.

3204. Last section qualified.

3205. Summons, where served.

3206. This title does not affect jurisdiction of the court, etc., in special proceedings.

§ 3203. Jurisdiction in civil actions.

The jurisdiction of the city court of Yonkers extends to the following civil actions only:

1. An action against a natural person, or against a foreign or domestic corporation, wherein the complaint demands judgment for a sum of money only, or to recover one or more chattels, with or without damages for the taking, withholding, or detention thereof.

2. An action to foreclose or enforce a lien, upon real property in the city of Yonkers, created, as prescribed by statute, in favor of a person who has performed labor, or furnished materials to be used, in erecting, altering, or repairing a building, building lot, or appurtenance thereto, including fences, sidewalks, paving, wells, fountains, fish-ponds, ornamental and fruit trees, and every other improvement to a building or building lot.

3. An action to foreclose or enforce a lien, for a sum not exceeding one thousand dollars, exclusive of interest, upon one or more chattels.

See L. 1873, ch. 61, §§ 1 and 3; L. 1874, ch. 171, § 1; L. 1875, ch. 233, § 1; L. 1878, ch. 186, §§ 1 and 2.

§ 3204. [Am'd, 1888.] Last section qualified.

The jurisdiction conferred by the last section is subject to the following limitations and regulations:

1. In an action wherein the complaint demands judgment for a sum of money only, the sum, for which judgment is rendered in favor of the plaintiff, cannot exceed one thousand dollars, exclusive of interest, and costs as taxed; except where it is brought upon a bond or undertaking, given in an action or a special proceeding in the same court, or before the city judge. Where the action is brought upon a bond or other contract, the judgment must be for the sum actually due, without regard to a penalty therein contained; and where the money is payable in instalments, successive actions may be brought, for the instalments, as they become due.

2. In an action to recover one or more chattels, a judgment cannot be rendered, in favor of the plaintiff, for a chattel or chattels, the aggregate value of which exceeds one thousand dollars.

3. The court has not jurisdiction of an action against an executor or administrator, in his representative capacity.

4. The court has not jurisdiction of any action, unless one of the parties thereto resides in the city of Yonkers, or in a town of Westchester county, adjoining that city; or a warrant of attachment is granted to accompany the summons, and levied upon property of the defendant, within that city; or the action is brought to recover one or more statutory penalties, by the city of Yonkers, or one of its officers or boards of commissioners. Such warrant of attachment must be granted and subsequent

* The practice in the city court of Yonkers is materially changed by L. 1893, ch. 418.

proceedings taken in accordance with the provisions and requirements herein relating to attachments in courts of justices of the peace.

L. 1888, ch. 494.

§ 3205. Summons, where served.

The summons, in an action brought in the court, may be served at any place within the county of Westchester, but not elsewhere.

§ 3206. This title does not affect jurisdiction of the court, etc., in special proceedings.

This title does not affect any provision of law, conferring upon the court, or upon the city judge of Yonkers, jurisdiction, power, or authority, in a special proceeding; or conferring upon the city judge of Yonkers power or authority, in an action brought in another court.

TITLE IV.

The district courts of the city of New-York, and the justices' courts of the cities of Albany* and Troy.

- Article 1. Provisions generally applicable to all the courts specified in this title.
 2. Provisions exclusively applicable to the district courts of the city of New-York.
 3. Provisions exclusively applicable to the justices' courts of Albany and Troy.

ARTICLE FIRST.

Provisions generally applicable to all the courts specified in this title.

- Sec. 8207. Service of complaint with summons; proceedings thereupon.
 8208. Id.; and proof of service.
 8209. Action to be commenced by service of summons.
 8210. Order of arrest; warrant of attachment; requisition to replevy.
 8211. The last section qualified.
 8212. Proceedings where title to real property is in question.
 8213. Appeals.
 8214. Effect of this act, upon jurisdiction and proceedings.

§ 3207. Service of complaint with summons; proceedings thereupon.

Section 3126 of this act applies to an action to recover upon or for breach of a contract, express or implied, brought in a district court of the city of New-York, in the justice's court of the city of Albany, or in the justice's court of the city of Troy.

L. 1867, ch. 344, § 15; L. 1873, ch. 182, §§ 1 and 2.

§ 3208. Id.; and proof of service.

In an action brought in either of those courts, the summons, and, in a proper case, a copy of the complaint, may be served by any person not a party to the action: except that, where the action is brought in a district court of the city of New-York, a person, other than a constable or a marshal, serving the same, must be first empowered to do so, either by the justice, or by the attorney to the corporation, as now prescribed by law. Proof of service thereof, by such a person, must be made by his affidavit; which must state the particular place, time, and manner of service, and that the affiant knew the person so served, to be the person mentioned and described in the summons, as defendant therein.

See L. 1873, ch. 182, §§ 1 and 3; L. 1867, ch. 344, § 15; L. 1862, ch. 484, § 14; L. 1864, ch. 569, § 2, and L. 1866, ch. 758; also § 2878, ante.

§ 3209. Action to be commenced by service of summons.

An action, brought in either of those courts, at any time after this chapter takes effect, must be commenced by the voluntary appearance of, and joinder of issue by, the parties, or by the service of a summons.

§ 3210. [Am'd, 1884.] Order of arrest; warrant of attachment; requisition to replevy.

Articles third, fourth, and fifth of title second of chapter nineteenth of this act apply to an action brought in either of those

* The title is now "City Court of Albany," Laws 1884, ch. 123.

courts, except as otherwise prescribed in the next section. And except, also, that where the warrant of attachment, or requisition to replevy, is issued out of a district court of the city of New-York, against a non-resident defendant, the said warrant, or requisition, must require the marshal to attach or replevy the property, on or before a day therein specified, which must be not less than two nor more than four days before the return day of the summons.

L. 1884, ch. 400.

§ 3211. The last section qualified.

The provisions of the last section are subject to the following qualifications:

1. Nothing contained in either of the articles, so made applicable, applies to an order of arrest, in an action brought in a district court of the city of New-York, or affects any provision of this title, relating to the jurisdiction of either of the courts specified in this title.

2. An order of arrest in an action brought in the justice's court of Albany, or the justice's court of Troy, or a warrant of attachment, or a requisition to replevy, in either of those courts, or in a district court of the city of New-York, must be granted by, and directed to, and executed by, the officer empowered, by the statutes remaining in force after this chapter takes effect, to grant or execute, as the case requires, in the same court, a warrant to arrest, a warrant of attachment, or a requisition in an action to recover a chattel.

3. The manner of applying for, granting, and executing an order of arrest, a warrant of attachment, or a requisition to replevy, and the proceedings thereupon, and with respect thereto, as prescribed in the articles so made applicable, are subject to the statutes, remaining unrepealed after this chapter takes effect, specially applicable to those courts, or to either or any of them, prescribing the duties of the justices, or of the clerks thereof, or regulating the mode of transacting business in an action brought therein.

§ 3212. Proceedings where title to real property is in question.

Sections 2951 to 2958 of this act, both inclusive, apply to an action, brought in either of those courts; except that, where the action is brought in a district court of the city of New-York, the surety upon the defendant's undertaking is liable, in the case specified in section 2952, to any amount, for which judgment might have been rendered by the district court, if the answer and undertaking had not been delivered.

See Co. Proc., § 68.

§ 3213. [Am'd, 1895.] Appeals.

An appeal from a judgment, rendered in a district court of the city of New York, may be taken to the supreme court, in the cases, and in the manner prescribed in articles first and second of title eight of chapter nineteenth of this act. Such appeal shall be heard in such manner and by such justice or justices as the appellate division of the supreme court in the first department shall direct. The appellate court may reverse, affirm or modify the judgment appealed from, and where a judgment is reversed, may order a new trial in the district court. Where a judgment is modified, or where a new trial is ordered, costs

shall be in the discretion of the appellate court. An appeal from the judgment rendered in the justice's court of the city of Albany, or the justice's court of the city of Troy, may be taken in a case where an appeal may be taken to a county court from a judgment rendered by a justice of the peace as prescribed by title eight of that chapter, and in no other case. Such an appeal must be taken to the county court of the county wherein the court is located.

L. 1857, ch. 344, § 76; L. 1895, ch. 946.

§ 3214. Effect of this act, upon jurisdiction and proceedings.

Except as otherwise specially prescribed in this title, this act does not affect any statutory provision remaining unrepealed after this chapter takes effect, relating to the jurisdiction and powers of either of those courts; the appointment, qualification, tenure of office, powers, or duties of the justices, or of the clerk, or any other officer thereof; or the proceedings therein; except that a provision of this or any other statute, whereby a proceeding in an action, brought in either of those courts, or a special proceeding, brought therein, or before a justice thereof, is assimilated, either expressly, or by reference to another provision of law, to a proceeding, in an action or a special proceeding before a justice of the peace, is deemed to refer to the corresponding proceeding, as prescribed in chapter nineteenth of this act.

ARTICLE SECOND.***Provisions exclusively applicable to the district courts of the city of New-York.***

- Sec. 3215. Repealed, 1902. See the Municipal Court Act of New York city.
3216. Repealed, 1902. See the Municipal Court Act of New York city.
3217. Repealed, 1902. See the Municipal Court Act of New York city.
3218. Proceedings thereupon.
3219. Repealed, 1902. See the Municipal Court Act of New York city.
3220. Repealed, 1902. See the Municipal Court Act of New York city.
3221. Repealed, 1902. See the Municipal Court Act of New York city.
3222. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3215. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3216. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3217. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3218. Proceedings thereupon.

An order of arrest must direct that the summons accompanying it be made returnable, immediately upon the arrest of the defendant; and it must specify a sum, in which the defendant may be let to bail. Sections 3179 to 3181, both inclusive, section 3182, except the last sentence thereof, and section 3183 of this act, apply to an order of arrest, granted in an action in either of those courts; and to the proceedings upon, and relating to, the execution thereof. In all other respects, the statutory provisions remaining unrepealed after this chapter takes effect, which apply to and regulate the application for a warrant to arrest a defendant, the granting and execution thereof, and the proceedings subsequent thereto, apply to and regulate the application for an order of arrest, the granting and execution thereof, and the proceedings subsequent thereto.

Id., §§ 17-19.

§ 3219. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3220. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3221. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3222. Repealed, 1902. See the Municipal Court Act of New York city.

ARTICLE THIRD.

Provisions exclusively applicable to the justices' courts of Albany and Troy.

- Sec. 3223. Jurisdiction in civil actions.
 3224. Id.; upon judgment by confession.
 3225. Docketing judgments; execution thereupon.
 3225a. Application of certain sections.

§ 3223. Jurisdiction in civil actions.

The justice's court of the city of Albany, and the justice's court of the city of Troy, have jurisdiction, each within the city where the court is located, of an action, of which a justice of the peace has jurisdiction, as prescribed in sections 1737, 2861, 2862, and 2863 of this act; and also of an action to recover a penalty, given by the charter, or a by-law or an ordinance of the common council of that city, where the plaintiff demands judgment for a sum, not exceeding two hundred dollars. Neither of those courts has jurisdiction of any other civil action; but this section does not affect the jurisdiction conferred, by the statutory provisions remaining in force after this chapter takes effect, upon either of those courts, in a special proceeding.

See Co. Proc., § 67; L. 1866, ch. 189; L. 1834, ch. 271, § 3; L. 1870, ch. 506, § 11; L. 1872, ch. 129, § 11; L. 1876, ch. 18, § 14. See L. 1898, ch. 312; L. 1899, ch. 590.

§ 3224. Id.; upon judgment by confession.

The jurisdiction of each of those courts extends also to the taking and entry of a judgment, upon the confession of a defendant, as prescribed in title sixth of chapter nineteenth of this act, where the sum confessed does not exceed five hundred dollars.

§ 3225. Docketing judgments; execution thereupon.

The provisions of sections 3017 to 3022 of this act, both inclusive, apply to a judgment rendered in either of those courts, and to the proceedings subsequent thereto, and in the action wherein the judgment was rendered; except that the transcript, filed in the clerk's office of the county wherein the court is located, must be furnished by the clerk of the court, in which the judgment was rendered.

§ 3225a. [Added, 1897.] Application of certain sections.

The provisions of sections twenty-nine hundred and ninety to thirty hundred and nine of this act, both inclusive, apply to the justices' court of the city of Troy, except that the city clerk of the city of Troy shall fulfil all the duties therein required of the town clerk.

L. 1897, ch. 604. In effect Sept. 1, 1897.

TITLE V.

The municipal court of the city of Rochester.

Sec. 3226. Provisions of chapter 19 generally applicable to the court and judges.

3227. Appeals.

§ 3226. [Am'd, 1907.] Provisions of chapter 19 generally applicable to the court and judges.

The provisions of chapter nineteenth of this act, excluding section three thousand sixty-three, excluding article three of title eight, and excluding titles tenth and eleventh thereof, apply to the municipal court of the city of Rochester, and to the judges thereof; except so far as they are inconsistent with the next section, or with the charter of the city of Rochester or with any other statute applying to said court or the judges thereof as now existing or hereafter amended. For the purpose of applying the same, the court is deemed a justice's court; each judge thereof is deemed a justice of the peace; and the city of Rochester is deemed a town of Monroe county.

L. 1878, ch. 196, part of § 4; L. 1907, ch. 754. In effect Jan. 1, 1908.

§ 3227. [Added, 1907; am'd, 1908.] Appeals.

Appeals may be taken to the county court of Monroe county from judgments and orders of the municipal court of the city of Rochester and from orders of the judges thereof as provided in articles one and two of title eight of chapter nineteen of this act, and the provisions thereof, except section three thousand sixty-three, apply to such appeals, except as herein expressly modified. The appeal must be heard on the return or a certified or stipulated copy thereof, and may be brought on for hearing in the county court in the same manner and on the same notice as motions are or may be brought on for hearing in said court, or may be put on the calendar of said court as provided in section three thousand sixty-two of this act. An appellant may apply to the county court to open a default as provided in section three thousand sixty-four of this act, which application may be heard without the return unless otherwise ordered by the court; and an appellant may apply upon affidavits and the return to said court for a new trial or hearing upon the ground of newly discovered evidence; the court in either case may stay any or all proceedings under the judgment or order appealed from upon such terms as it deems proper, and may grant a new trial or hearing as hereinafter provided upon such terms as it deems proper. The county court and other appellate courts on such appeals must render judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits, and may affirm or reverse, wholly or partly, or modify, the judgment or order appealed from for errors of law or of fact or because the judgment is excessive or insufficient or contrary to the evidence or contrary to law, and may, if necessary or proper, grant a new trial or hearing in the municipal court of the city of Rochester, or before a judge thereof, as may be proper, at a time designated by it, and thereupon the municipal court or judge must proceed, and adjournments may be granted, a jury trial demanded, and all other proceedings taken as if the action or proceeding had been commenced anew. A copy of the judgment or order granting a new trial or hearing must be served by the party entering it on the opposite party or his attorney at least two days before the time set for the new trial or hearing. When a new trial or hearing is granted the appellate court may in its discretion award costs of the appeal to either party absolutely or to abide the event.

L. 1907, ch. 754; L. 1908, ch. 308. In effect Sept. 1, 1908.

CHAPTER XXI.

Costs and Fees.

TITLE I.—Awarding and Enforcing Payment of Costs.

TITLE II.—Fixing the Amount of Costs.

TITLE III.—Security for Costs.

TITLE IV.—General Provisions Relating to Fees.

TITLE V.—Sums Allowed as Fees.

TITLE I.

Awarding and enforcing payment of costs.

- Article 1. General regulations respecting the awarding of costs.
 2. Regulations respecting the awarding of costs in particular cases.
 3. Miscellaneous provisions.

ARTICLE FIRST.

General regulations respecting the awarding of costs.

Sec. 3228. When plaintiff entitled to costs of course.

3229. When defendant entitled to costs of course. Rule as to two or more defendants.

3230. When costs are discretionary.

3231. Costs, where several actions are brought on same instrument, &c.

3232. Interlocutory costs upon issue of law.

3233. Id.; how collected.

3234. Costs, where there are several issues of fact.

3235. Id.; after discontinuance upon answer of title.

3236. Costs of a motion.

3237. The foregoing sections limited.

3238. Costs upon appeal from final judgment.

3239. Id.; upon appeal from interlocutory judgment or order.

3240. Id.; in a special proceeding.

§ 3228. [Am'd, 1898, 1904, 1910.] When plaintiff entitled to costs of course.

The plaintiff is entitled to costs of course, upon the rendering of a final judgment in his favor, in either of the following actions.

1. An action, triable by a jury, to recover real property, or an interest in real property; or in which a claim of title to real property arises upon the pleadings, or is certified to have come in question upon the trial.

2. An action to recover a chattel. But if the value of the chattel, or of all the chattels, recovered by the plaintiff, as fixed, together with the damages, if any, awarded to him, is less than fifty dollars, the amount of his costs cannot exceed the amount of the value and the damages.

3. [Am'd, 1898.] An action specified in subdivision first, third, fourth or fifth of section twenty-eight hundred and sixty-three of this act. But if, in an action to recover damages for an assault, battery, false imprisonment, libel, slander, criminal conversation, seduction, or malicious prosecution; or a fine or penalty in which the people of the state are a party, the plaintiff recovers less than fifty dollars damages, the amount of his costs can not exceed the damages.

L. 1898, ch. 110. In effect Sept. 1, 1898. See § 3234.

4. An action, other than one of those specified in the foregoing subdivisions of this section, in which the complaint demands

judgment for a sum of money only. But the plaintiff is not entitled to costs, under this subdivision, unless he recovers the sum of fifty dollars or more.

Co. Proc., part of § 304.

am'd
1-80 5. [Added, 1904, *am'd*, 1910.] In all actions hereafter brought *am'd* 1916 d. 3-0
in the supreme court, triable in the county of New York which could have been brought, except for the amount claimed therein, in the city court of the city of New York, and in which the defendant shall have been served with process within the county of New York, the plaintiff shall recover no costs or disbursements unless he shall recover one thousand dollars or more. In all actions hereafter brought in the supreme court, triable in the county of Kings, which could have been brought, except for the amount claimed therein, in the county court of Kings county, and in which the defendant shall have been served with process within the county of Kings, the plaintiff shall recover no costs or disbursements unless he shall recover five hundred dollars or more. In all actions hereafter originally brought in the supreme court, triable in the county of Albany, and in which the defendant is a resident of the county of Albany, which could have been brought, except for the amount claimed therein, in the county court of the county of Albany, the plaintiff shall recover no costs or disbursements unless he shall recover five hundred dollars or more. In all actions hereafter brought in the supreme court, triable in the county of New York or the county of Kings, or in the city court of the city of New York or the county court of Kings county, which could have been brought, except for the amount claimed therein, in the municipal court of the city of New York, and in which the defendant shall have been served with process within the city of New York, the plaintiff shall recover no costs or disbursements unless he shall recover two hundred and fifty dollars or more. The fact that in any action a plaintiff is not entitled to costs under the provisions of this subdivision shall not entitle the defendant to costs under the next following section.

L. 1904, ch. 557; L. 1910, ch. 574. In effect Sept. 1, 1910.

§ 3229. When defendant entitled to costs of course. Rule as to two or more defendants.

The defendant is entitled to costs, of course, upon the rendering of final judgment, in an action specified in the last section, unless the plaintiff is entitled to costs, as therein prescribed. But where, in such an action against two or more defendants, the plaintiff is entitled to costs against one or more, but not against all of them, none of the defendants are entitled to costs, of course. In that case, costs may be awarded, in the discretion of the court, to any defendant, against whom the plaintiff is not entitled to costs, where he did not unite in an answer, and was not united in interest, with a defendant, against whom the plaintiff is entitled to costs.

Id., part of §§ 305, 306.

§ 3230. [Am'd, 1900.] When costs are discretionary.

Except as prescribed in the last two sections, the court may, upon the rendering of a final judgment, in its discretion award costs to any party in such sum not exceeding the total amount authorized by statute as to the court shall seem just.

Id., part of § 306; L. 1900 ch. 181. In effect Oct. 1, 1900.

§ 3231 [Am'd, 1895.] Costs, where several actions are brought on same instrument, etc.

Where two or more actions are brought, in a case specified in section 454 of this act, or otherwise for the same cause of action, against persons who might have been joined as defendants in one action, costs, other than disbursements, cannot be recovered, upon the final judgment, by the plaintiff, in more than one action, which shall be at his election. But this prohibition does not apply to a case where the plaintiff joins as defendants, in each action brought, all the persons liable, not previously sued, who can, with reasonable diligence, be found within the State; or, if the action is brought in the city court of the city of New-York, or a county court, within the city or county, as the case may be, where the court is located.

Id., part of § 304. See, also, 2 R. S. 615, § 15 (2 Edm. 638); L. 1895, ch. 946.

§ 3232. Interlocutory costs upon issue of law.

Where an issue of law and an issue of fact are joined, between the same parties to the same action, and the issue of fact remains undisposed of, when an interlocutory judgment is rendered upon the issue of law; the interlocutory judgment may, in the discretion of the court, deny costs to either party, or award costs to the prevailing party, either absolutely, or to abide the event of the trial of the issue of fact.

See 2 R. S., § 28.

§ 3233. Id.; how collected.

Section 779 of this act applies to interlocutory costs, awarded as prescribed in the last section, as if they were costs of a motion.

§ 3234. Costs, where there are several issues of fact.

In an action specified in section 3228 of this act, wherein the complaint sets forth separately two or more causes of action, upon which issues of fact are joined, if the plaintiff recovers upon one or more of the issues, and the defendant upon the other or others, each party is entitled to costs against the adverse party, unless it is certified that the substantial cause of action was the same upon each issue; in which case, the plaintiff only is entitled to costs. Costs, to which a party is so entitled, must be included in the final judgment, by adding them to, or offsetting them against, the sum awarded to the prevailing party; or otherwise, as the case requires. But this section does not entitle a plaintiff to costs, in a case specified in subdivision fourth of section 3228 of this act, where he is not entitled to costs, as prescribed in that subdivision.

See 2 R. S. 617, § 26 (2 Edm. 641).

§ 3235. Id.; after discontinuance upon answer of title.

Where an action, brought before a justice of the peace, or in a district court of the city of New-York, or a justice's court of a city, has been discontinued, as prescribed by law, upon the delivery of an answer, showing that title to real property will come in question; and a new action, for the same cause, has been commenced in the proper court; the party in whose favor final judgment is rendered in the new action, is entitled to costs; except that, where final judgment is rendered therein, in favor

of the defendant, upon the trial of an issue of fact, the plaintiff is entitled to costs, unless it is certified, that the title to real property came in question on the trial.

Co. Proc., §§ 60 and 61.

§ 3236. Costs of a motion.

Costs upon a motion in an action, where the costs thereof are not specially regulated in this act, or upon a reference made pursuant to sections 623, 624, 827, or 1015 of this act, may be awarded, either absolutely or to abide the event of the action, or of the reference, to any party, in the discretion of the court or judge.

Id., part of § 815. See, also, L. 1840, ch. 386, § 15 (4 Edm. 690).

§ 3237. The foregoing sections limited.

The foregoing sections of this article do not affect the recovery of costs upon an appeal.

§ 3238. Costs upon appeal from final judgment.

Upon an appeal from the final judgment in an action, the recovery of costs is regulated as follows:

1. In an action specified in section 3228 of this act, the respondent is entitled to costs upon the affirmance, and the appellant upon the reversal, of the judgment appealed from; except that, where a new trial is directed, costs may be awarded to either party, absolutely or to abide the event, in the discretion of the court.

2. In every other action, and also where the final judgment appealed from is affirmed in part, and reversed in part, costs may be awarded in like manner, in the discretion of the court.

Co. Proc., part of § 306.

§ 3239. Id.; upon appeal from interlocutory judgment or order.

Upon an appeal from an interlocutory judgment or an order, in an action, costs are in the discretion of the court, and may be awarded absolutely, or to abide the event, except as follows:

1. Where the appeal is taken from an order granting or refusing a new trial, and the decision upon the appeal refuses a new trial, the respondent is entitled, of course, to the costs of the appeal.

2. Where an appeal is taken from an order, refusing a new trial, and an appeal is also taken from the judgment rendered upon the trial, neither party is entitled to the costs of the appeal from the order.

Co. Proc., §§ 306 and 315.

§ 3240. [Am'd, 1881.] Id.; in a special proceeding.

Costs in a special proceeding, instituted in a court of record, or upon an appeal in a special proceeding, taken to a court of record, where the costs thereof are not specially regulated in this act, may be awarded to any party, in the discretion of the court, at the rates allowed for similar services. In an action brought in the same court, or an appeal from a judgment taken to the same court, and in like manner.

See L. 1840, ch. 270, § 3 (4 Edm. 682; 5 Id. 133); also, §§ 2088, 2100, 2143, 2241, 2316, 2401, 2445, 2456, ante.

TITLE IV.

The district courts of the city of New-York, and the justices' courts of the cities of Albany* and Troy.

- Article 1. Provisions generally applicable to all the courts specified in this title.
 2. Provisions exclusively applicable to the district courts of the city of New-York.
 3. Provisions exclusively applicable to the justices' courts of Albany and Troy.

ARTICLE FIRST.

Provisions generally applicable to all the courts specified in this title.

Sec. 3207. Service of complaint with summons; proceedings thereupon.

3208. Id.; and proof of service.

3209. Action to be commenced by service of summons.

3210. Order of arrest; warrant of attachment; requisition to replevy.

3211. The last section qualified.

3212. Proceedings where title to real property is in question.

3213. Appeals.

3214. Effect of this act, upon jurisdiction and proceedings.

§ 3207. Service of complaint with summons; proceedings thereupon.

Section 3126 of this act applies to an action to recover upon or for breach of a contract, express or implied, brought in a district court of the city of New-York, in the justice's court of the city of Albany, or in the justice's court of the city of Troy.

L. 1857, ch. 344, § 15; L. 1873, ch. 182, §§ 1 and 2.

§ 3208. Id.; and proof of service.

In an action brought in either of those courts, the summons, and, in a proper case, a copy of the complaint, may be served by any person not a party to the action; except that, where the action is brought in a district court of the city of New-York, a person, other than a constable or a marshal, serving the same, must be first empowered to do so, either by the justice, or by the attorney to the corporation, as now prescribed by law. Proof of service thereof, by such a person, must be made by his affidavit; which must state the particular place, time, and manner of service, and that the affiant knew the person so served, to be the person mentioned and described in the summons, as defendant therein.

See L. 1873, ch. 182, §§ 1 and 3; L. 1857, ch. 344, § 15; L. 1862, ch. 484, § 14; L. 1864, ch. 569, § 2, and L. 1866, ch. 758; also § 2878, ante.

§ 3209. Action to be commenced by service of summons.

An action, brought in either of those courts, at any time after this chapter takes effect, must be commenced by the voluntary appearance of, and joinder of issue by, the parties, or by the service of a summons.

§ 3210. [Am'd, 1884.] Order of arrest; warrant of attachment; requisition to replevy.

Articles third, fourth, and fifth of title second of chapter nineteenth of this act apply to an action brought in either of those

* The title is now "City Court of Albany," Laws 1884, ch. 123.

courts, except as otherwise prescribed in the next section. And except, also, that where the warrant of attachment, or requisition to replevy, is issued out of a district court of the city of New-York, against a non-resident defendant, the said warrant, or requisition, must require the marshal to attach or replevy the property, on or before a day therein specified, which must be not less than two nor more than four days before the return day of the summons.

L. 1884, ch. 400.

§ 3211. The last section qualified.

The provisions of the last section are subject to the following qualifications:

1. Nothing contained in either of the articles, so made applicable, applies to an order of arrest, in an action brought in a district court of the city of New-York, or affects any provision of this title, relating to the jurisdiction of either of the courts specified in this title.

2. An order of arrest in an action brought in the justice's court of Albany, or the justice's court of Troy, or a warrant of attachment, or a requisition to replevy, in either of those courts, or in a district court of the city of New-York, must be granted by, and directed to, and executed by, the officer empowered, by the statutes remaining in force after this chapter takes effect, to grant or execute, as the case requires, in the same court, a warrant to arrest, a warrant of attachment, or a requisition in an action to recover a chattel.

3. The manner of applying for, granting, and executing an order of arrest, a warrant of attachment, or a requisition to replevy, and the proceedings thereupon, and with respect thereto, as prescribed in the articles so made applicable, are subject to the statutes, remaining unrepealed after this chapter takes effect, specially applicable to those courts, or to either or any of them, prescribing the duties of the justices, or of the clerks thereof, or regulating the mode of transacting business in an action brought therein.

§ 3212. Proceedings where title to real property is in question.

Sections 2951 to 2958 of this act, both inclusive, apply to an action, brought in either of those courts; except that, where the action is brought in a district court of the city of New-York, the surety upon the defendant's undertaking is liable, in the case specified in section 2952, to any amount, for which judgment might have been rendered by the district court, if the answer and undertaking had not been delivered.

See Co. Proc., § 68.

§ 3213. [Am'd, 1895.] Appeals.

An appeal from a judgment, rendered in a district court of the city of New York, may be taken to the supreme court, in the cases, and in the manner prescribed in articles first and second of title eight of chapter nineteenth of this act. Such appeal shall be heard in such manner and by such justice or justices as the appellate division of the supreme court in the first department shall direct. The appellate court may reverse, affirm or modify the judgment appealed from, and where a judgment is reversed, may order a new trial in the district court. Where a judgment is modified, or where a new trial is ordered, costs

shall be in the discretion of the appellate court. An appeal from the judgment rendered in the justice's court of the city of Albany, or the justice's court of the city of Troy, may be taken in a case where an appeal may be taken to a county court from a judgment rendered by a justice of the peace as prescribed by title eight of that chapter, and in no other case. Such an appeal must be taken to the county court of the county wherein the court is located.

L. 1857, ch. 244, § 76; L. 1895, ch. 946.

§ 3214. Effect of this act, upon jurisdiction and proceedings.

Except as otherwise specially prescribed in this title, this act does not affect any statutory provision remaining unrepealed after this chapter takes effect, relating to the jurisdiction and powers of either of those courts; the appointment, qualification, tenure of office, powers, or duties of the justices, or of the clerk, or any other officer thereof; or the proceedings therein; except that a provision of this or any other statute, whereby a proceeding in an action, brought in either of those courts, or a special proceeding, brought therein, or before a justice thereof, is assimilated, either expressly, or by reference to another provision of law, to a proceeding, in an action or a special proceeding before a justice of the peace, is deemed to refer to the corresponding proceeding, as prescribed in chapter nineteenth of this act.

ARTICLE SECOND.

Provisions exclusively applicable to the district courts of the city of New-York.

- Sec. 3215. Repealed, 1902. See the Municipal Court Act of New York city.
3216. Repealed, 1902. See the Municipal Court Act of New York city.
3217. Repealed, 1902. See the Municipal Court Act of New York city.
3218. Proceedings thereupon.
3219. Repealed, 1902. See the Municipal Court Act of New York city.
3220. Repealed, 1902. See the Municipal Court Act of New York city.
3221. Repealed, 1902. See the Municipal Court Act of New York city.
3222. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3215. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3216. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3217. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3218. **Proceedings thereupon.**

An order of arrest must direct that the summons accompanying it be made returnable, immediately upon the arrest of the defendant; and it must specify a sum, in which the defendant may be let to bail. Sections 3179 to 3181, both inclusive, section 3182, except the last sentence thereof, and section 3183 of this act, apply to an order of arrest, granted in an action in either of those courts; and to the proceedings upon, and relating to, the execution thereof. In all other respects, the statutory provisions remaining unrepealed after this chapter takes effect, which apply to and regulate the application for a warrant to arrest a defendant, the granting and execution thereof, and the proceedings subsequent thereto, apply to and regulate the application for an order of arrest, the granting and execution thereof, and the proceedings subsequent thereto.

Id., §§ 17-19.

§ 3219. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3220. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3221. Repealed, 1902. See the Municipal Court Act of New York city.

§ 3222. Repealed, 1902. See the Municipal Court Act of New York city.

ARTICLE THIRD.

Provisions exclusively applicable to the justices' courts of Albany and Troy.

Sec. 3223. Jurisdiction in civil actions.

3224. Id.; upon judgment by confession.

3225. Docketing judgments; execution thereupon.

3225a. Application of certain sections.

§ 3223. Jurisdiction in civil actions.

The justice's court of the city of Albany, and the justice's court of the city of Troy, have jurisdiction, each within the city where the court is located, of an action, of which a justice of the peace has jurisdiction, as prescribed in sections 1737, 2861, 2862, and 2863 of this act; and also of an action to recover a penalty, given by the charter, or a by-law or an ordinance of the common council of that city, where the plaintiff demands judgment for a sum, not exceeding two hundred dollars. Neither of those courts has jurisdiction of any other civil action; but this section does not affect the jurisdiction conferred, by the statutory provisions remaining in force after this chapter takes effect, upon either of those courts, in a special proceeding.

See Co. Proc., § 67; L. 1866, ch. 189; L. 1834, ch. 371, § 3; L. 1870, ch. 593, § 11; L. 1872, ch. 129, § 11; L. 1876, ch. 18, § 14. See L. 1896, ch. 312; L. 1899, ch. 590.

§ 3224. Id.; upon judgment by confession.

The jurisdiction of each of those courts extends also to the taking and entry of a judgment, upon the confession of a defendant, as prescribed in title sixth of chapter nineteenth of this act, where the sum confessed does not exceed five hundred dollars.

§ 3225. Docketing judgments; execution thereupon.

The provisions of sections 3017 to 3022 of this act, both inclusive, apply to a judgment rendered in either of those courts, and to the proceedings subsequent thereto, and in the action wherein the judgment was rendered; except that the transcript, filed in the clerk's office of the county wherein the court is located, must be furnished by the clerk of the court, in which the judgment was rendered.

§ 3225a. [Added, 1897.] Application of certain sections.

The provisions of sections twenty-nine hundred and ninety to thirty hundred and nine of this act, both inclusive, apply to the justices' court of the city of Troy, except that the city clerk of the city of Troy shall fulfil all the duties therein required of the town clerk.

L. 1897, ch. 604. In effect Sept. 1, 1897.

TITLE V.

The municipal court of the city of Rochester.

Sec. 3226. Provisions of chapter 19 generally applicable to the court and judges.

3227. Appeals.

§ 3226. [Am'd, 1907.] Provisions of chapter 19 generally applicable to the court and judges.

The provisions of chapter nineteenth of this act, excluding section three thousand sixty-three, excluding article three of title eight, and excluding titles tenth and eleventh thereof, apply to the municipal court of the city of Rochester, and to the judges thereof; except so far as they are inconsistent with the next section, or with the charter of the city of Rochester or with any other statute applying to said court or the judges thereof as now existing or hereafter amended. For the purpose of applying the same, the court is deemed a justice's court; each judge thereof is deemed a justice of the peace; and the city of Rochester is deemed a town of Monroe county.

L. 1876, ch. 196, part of § 4; L. 1907, ch. 754. In effect Jan. 1, 1908.

§ 3227. [Added, 1907; am'd, 1908.] Appeals.

Appeals may be taken to the county court of Monroe county from judgments and orders of the municipal court of the city of Rochester and from orders of the judges thereof as provided in articles one and two of title eight of chapter nineteen of this act, and the provisions thereof, except section three thousand sixty-three, apply to such appeals, except as herein expressly modified. The appeal must be heard on the return or a certified or stipulated copy thereof, and may be brought on for hearing in the county court in the same manner and on the same notice as motions are or may be brought on for hearing in said court, or may be put on the calendar of said court as provided in section three thousand sixty-two of this act. An appellant may apply to the county court to open a default as provided in section three thousand sixty-four of this act, which application may be heard without the return unless otherwise ordered by the court; and an appellant may apply upon affidavits and the return to said court for a new trial or hearing upon the ground of newly discovered evidence; the court in either case may stay any or all proceedings under the judgment or order appealed from upon such terms as it deems proper, and may grant a new trial or hearing as hereinafter provided upon such terms as it deems proper. The county court and other appellate courts on such appeals must render judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits, and may affirm or reverse, wholly or partly, or modify, the judgment or order appealed from for errors of law or of fact or because the judgment is excessive or insufficient or contrary to the evidence or contrary to law, and may, if necessary or proper, grant a new trial or hearing in the municipal court of the city of Rochester, or before a judge thereof, as may be proper, at a time designated by it, and thereupon the municipal court or judge must proceed, and adjournments may be granted, a jury trial demanded, and all other proceedings taken as if the action or proceeding had been commenced anew. A copy of the judgment or order granting a new trial or hearing must be served by the party entering it on the opposite party or his attorney at least two days before the time set for the new trial or hearing. When a new trial or hearing is granted the appellate court may in its discretion award costs of the appeal to either party absolutely or to abide the event.

L. 1907, ch. 754; L. 1908, ch. 308. In effect Sept. 1, 1908.

CHAPTER XXI.

Costs and Fees.

TITLE I.—Awarding and Enforcing Payment of Costs.

TITLE II.—Fixing the Amount of Costs.

TITLE III.—Security for Costs.

TITLE IV.—General Provisions Relating to Fees.

TITLE V.—Sums Allowed as Fees.

TITLE I.

Awarding and enforcing payment of costs.

- Article 1. General regulations respecting the awarding of costs.
 2. Regulations respecting the awarding of costs in particular cases.
 3. Miscellaneous provisions.

ARTICLE FIRST.

General regulations respecting the awarding of costs.

Sec. 3228. When plaintiff entitled to costs of course.

3229. When defendant entitled to costs of course. Rule as to two or more defendants.

3230. When costs are discretionary.

3231. Costs, where several actions are brought on same instrument, (c. c.)

3232. Interlocutory costs upon issue of law.

3233. Id.; how collected.

3234. Costs, where there are several issues of fact.

3235. Id.; after discontinuance upon answer of title.

3236. Costs of a motion.

3237. The foregoing sections limited.

3238. Costs upon appeal from final judgment.

3239. Id.; upon appeal from interlocutory judgment or order.

3240. Id.; in a special proceeding.

§ 3228. [Am'd, 1898, 1904, 1910.] When plaintiff entitled to costs of course.

The plaintiff is entitled to costs of course, upon the rendering of a final judgment in his favor, in either of the following actions.

1. An action, triable by a jury, to recover real property, or an interest in real property; or in which a claim of title to real property arises upon the pleadings, or is certified to have come in question upon the trial.

2. An action to recover a chattel. But if the value of the chattel, or of all the chattels, recovered by the plaintiff, as fixed, together with the damages, if any, awarded to him, is less than fifty dollars, the amount of his costs cannot exceed the amount of the value and the damages.

3. [Am'd, 1898.] An action specified in subdivision first, third, fourth or fifth of section twenty-eight hundred and sixty-three of this act. But if, in an action to recover damages for an assault, battery, false imprisonment, libel, slander, criminal conversation, seduction, or malicious prosecution; or a fine or penalty in which the people of the state are a party, the plaintiff recovers less than fifty dollars damages, the amount of his costs can not exceed the damages.

L. 1898, ch. 110. In effect Sept. 1, 1898. See § 3234.

4. An action, other than one of those specified in the foregoing subdivisions of this section, in which the complaint demands

judgment for a sum of money only. But the plaintiff is not entitled to costs, under this subdivision, unless he recovers the sum of fifty dollars or more.

Co. Proc., part of § 304.

Am'd
C-1914
h-80 5. [Added, 1904, am'd, 1910.] In all actions hereafter brought *am'd*
1916
5-0 in the supreme court, triable in the county of New York which could have been brought, except for the amount claimed therein, in the city court of the city of New York, and in which the defendant shall have been served with process within the county of New York, the plaintiff shall recover no costs or disbursements unless he shall recover one thousand dollars or more. In all actions hereafter brought in the supreme court, triable in the county of Kings, which could have been brought, except for the amount claimed therein, in the county court of Kings county, and in which the defendant shall have been served with process within the county of Kings, the plaintiff shall recover no costs or disbursements unless he shall recover five hundred dollars or more. In all actions hereafter originally brought in the supreme court, triable in the county of Albany, and in which the defendant is a resident of the county of Albany, which could have been brought, except for the amount claimed therein, in the county court of the county of Albany, the plaintiff shall recover no costs or disbursements unless he shall recover five hundred dollars or more. In all actions hereafter brought in the supreme court, triable in the county of New York or the county of Kings, or in the city court of the city of New York or the county court of Kings county, which could have been brought, except for the amount claimed therein, in the municipal court of the city of New York, and in which the defendant shall have been served with process within the city of New York, the plaintiff shall recover no costs or disbursements unless he shall recover two hundred and fifty dollars or more. The fact that in any action a plaintiff is not entitled to costs under the provisions of this subdivision shall not entitle the defendant to costs under the next following section.

L. 1904, ch. 557; L. 1910, ch. 574. In effect Sept. 1, 1910.

§ 3229. When defendant entitled to costs of course. Rule as to two or more defendants.

The defendant is entitled to costs, of course, upon the rendering of final judgment, in an action specified in the last section, unless the plaintiff is entitled to costs, as therein prescribed. But where, in such an action against two or more defendants, the plaintiff is entitled to costs against one or more, but not against all of them, none of the defendants are entitled to costs, of course. In that case, costs may be awarded, in the discretion of the court, to any defendant, against whom the plaintiff is not entitled to costs, where he did not unite in an answer, and was not united in interest, with a defendant, against whom the plaintiff is entitled to costs.

Id., part of §§ 305, 306.

§ 3230. [Am'd, 1900.] When costs are discretionary.

Except as prescribed in the last two sections, the court may, upon the rendering of a final judgment, in its discretion award costs to any party in such sum not exceeding the total amount authorized by statute as to the court shall seem just.

Id., part of § 306; L. 1900 ch. 181. In effect Oct. 1, 1900.

§ 3231 [Am'd, 1895.] Costs, where several actions are brought on same instrument, etc.

Where two or more actions are brought, in a case specified in section 454 of this act, or otherwise for the same cause of action, against persons who might have been joined as defendants in one action, costs, other than disbursements, cannot be recovered, upon the final judgment, by the plaintiff, in more than one action, which shall be at his election. But this prohibition does not apply to a case where the plaintiff joins as defendants, in each action brought, all the persons liable, not previously sued, who can, with reasonable diligence, be found within the State; or, if the action is brought in the city court of the city of New-York, or a county court, within the city or county, as the case may be, where the court is located.

Id., part of § 304. See, also, 2 R. S. 615, § 15 (2 Edm. 638); L. 1805, ch. 946.

§ 3232. Interlocutory costs upon issue of law.

Where an issue of law and an issue of fact are joined, between the same parties to the same action, and the issue of fact remains undisposed of, when an interlocutory judgment is rendered upon the issue of law; the interlocutory judgment may, in the discretion of the court, deny costs to either party, or award costs to the prevailing party, either absolutely, or to abide the event of the trial of the issue of fact.

See 2 R. S., § 28.

§ 3233. Id.; how collected.

Section 779 of this act applies to interlocutory costs, awarded as prescribed in the last section, as if they were costs of a motion.

§ 3234. Costs, where there are several issues of fact.

In an action specified in section 3228 of this act, wherein the complaint sets forth separately two or more causes of action, upon which issues of fact are joined, if the plaintiff recovers upon one or more of the issues, and the defendant upon the other or others, each party is entitled to costs against the adverse party, unless it is certified that the substantial cause of action was the same upon each issue; in which case, the plaintiff only is entitled to costs. Costs, to which a party is so entitled, must be included in the final judgment, by adding them to, or offsetting them against, the sum awarded to the prevailing party; or otherwise, as the case requires. But this section does not entitle a plaintiff to costs, in a case specified in subdivision fourth of section 3228 of this act, where he is not entitled to costs, as prescribed in that subdivision.

See 2 R. S. 617, § 26 (2 Edm. 641).

§ 3235. Id.; after discontinuance upon answer of title.

Where an action, brought before a justice of the peace, or in a district court of the city of New-York, or a justice's court of a city, has been discontinued, as prescribed by law, upon the delivery of an answer, showing that title to real property will come in question; and a new action, for the same cause, has been commenced in the proper court; the party in whose favor final judgment is rendered in the new action, is entitled to costs; except that, where final judgment is rendered therein, in favor

of the defendant, upon the trial of an issue of fact, the plaintiff is entitled to costs, unless it is certified, that the title to real property came in question on the trial.

Co. Proc., §§ 60 and 61.

§ 3236. Costs of a motion.

Costs upon a motion in an action, where the costs thereof are not specially regulated in this act, or upon a reference made pursuant to sections 623, 624, 827, or 1015 of this act, may be awarded, either absolutely or to abide the event of the action, or of the reference, to any party, in the discretion of the court or judge.

Id., part of § 315. See, also, L. 1840, ch. 386, § 15 (4 Edm. 690).

§ 3237. The foregoing sections limited.

The foregoing sections of this article do not affect the recovery of costs upon an appeal.

§ 3238. Costs upon appeal from final judgment.

Upon an appeal from the final judgment in an action, the recovery of costs is regulated as follows:

1. In an action specified in section 3228 of this act, the respondent is entitled to costs upon the affirmance, and the appellant upon the reversal, of the judgment appealed from; except that, where a new trial is directed, costs may be awarded to either party, absolutely or to abide the event, in the discretion of the court.

2. In every other action, and also where the final judgment appealed from is affirmed in part, and reversed in part, costs may be awarded in like manner, in the discretion of the court.

Co. Proc., part of § 306.

§ 3239. Id.; upon appeal from interlocutory judgment or order.

Upon an appeal from an interlocutory judgment or an order, in an action, costs are in the discretion of the court, and may be awarded absolutely, or to abide the event, except as follows:

1. Where the appeal is taken from an order granting or refusing a new trial, and the decision upon the appeal refuses a new trial, the respondent is entitled, of course, to the costs of the appeal.

2. Where an appeal is taken from an order, refusing a new trial, and an appeal is also taken from the judgment rendered upon the trial, neither party is entitled to the costs of the appeal from the order.

Co. Proc., §§ 306 and 315.

§ 3240. [Am'd, 1881.] Id.; in a special proceeding.

Costs in a special proceeding, instituted in a court of record, or upon an appeal in a special proceeding, taken to a court of record, where the costs thereof are not specially regulated in this act, may be awarded to any party, in the discretion of the court, at the rates allowed for similar services, in an action brought in the same court, or an appeal from a judgment taken to the same court, and in like manner.

See L. 1840, ch. 270, § 3 (4 Edm. 682; 5 id. 123); also, §§ 2086, 2109, 2143, 2210, 2316, 2401, 2445, 2456, ante.

ARTICLE SECOND.

Regulations respecting the awarding of costs in particular cases.

Sec. 3241. Costs against the State; how paid.

3242. Costs where action brought by people on relation of private person.

3243. Id.; for the benefit of a county, etc.

3244. Costs, against a school officer.

3245. Id.; against a municipal corporation.

3246. Id.; by or against an executor, etc.

3247. Costs in case of transfer, etc., of cause of action.

§ 3241. Costs against the State; how paid.

Where costs are awarded against the people of the State in an action or a special proceeding brought, by a public officer, pursuant to any provision of law, and the proceedings have not been stayed, by appeal or otherwise; the comptroller must draw his warrant upon the treasurer, for the payment of the costs, out of any money in the treasury, appropriated for that purpose, upon the production to him of an exemplified copy of the judgment, or order awarding the costs, and, where the amount is not fixed thereby, of a taxed bill of costs; accompanied, in either case, with a certificate of the attorney-general, to the effect that the action or special proceeding was brought pursuant to law. The fees of the clerk, for the exemplified copy, must be certified thereupon by him, and included in the warrant.

2 R. S. 553, § 14 (2 Edm. 573).

§ 3242. Costs where action brought by people on relation of private person.

Where an action is brought, in the name of the people of the State, upon the relation of a private corporation or individual, as prescribed in section 1986 of this act, a judgment, awarding costs to the defendant, must award them, against the relator, in the first instance; and against the people, only in case an execution, issued thereupon against the property of the relator, is returned unsatisfied.

Co. Proc., part of § 319.

§ 3243. Id.; for the benefit of a county, etc.

In an action or a special proceeding, brought in the name of the people of the State, to recover money or property, or to establish a right or claim, for the benefit of a county, city, town, or village, costs shall not be awarded against the people; but, where they are awarded to the defendant, they must be awarded against the body for whose benefit the action or special proceeding was brought.

Id., § 320.

§ 3244. Costs, against a school officer.

Costs cannot be awarded to the plaintiff, in an action against a school officer, or a supervisor, on account of an act performed by him, by virtue of, or under color of his office; or on account of a refusal or an omission to perform a duty enjoined upon him by law: where his act, refusal or omission might have been the subject of an appeal to the State superintendent of public instruction, and where it is certified that it appeared, upon the trial, that the defendant acted in good faith. But this section

does not apply to an action for a penalty; or to an action or a special proceeding, to enforce a decision of the superintendent.

L. 1864, ch. 535, § 6 (5 Edm. 361).

§ 3245. [Am'd, 1899.] Id.; against a municipal corporation.

Costs cannot be awarded to the plaintiff, in an action against a municipal corporation, in which the complaint demands a judgment for a sum of money only, unless the claim, on which the action is founded, was, before the commencement of the action, presented to the board of such corporation having the power to audit the same, or to its chief fiscal officer, at least ten days before the commencement of said action.

L. 1859, ch. 262, § 2 (4 Edm. 662); L. 1886, ch. 573; L. 1899, ch. 609. In effect Sept. 1, 1899.

§ 3246. Id.; by or against an executor, etc.

In an action, brought by or against an executor or administrator, in his representative capacity, or the trustee of an express trust, or a person expressly authorized by statute to sue or to be sued, costs must be awarded, as in an action by or against a person, prosecuting or defending in his own right, except as otherwise prescribed in sections 1835 and 1836 of this act; but they are exclusively chargeable upon, and collectible from the estate, fund, or person represented, unless the court directs them to be paid, by the party personally, for mismanagement or bad faith in the prosecution or defence of the action.

Co. Proc., part of § 317.

§ 3247. Costs in case of transfer, etc., of cause of action.

Where an action is brought, in the name of another, by a transferee of the cause of action, or by the other person, who is beneficially interested therein; or where, after the commencement of an action, the cause of action becomes, by transfer or otherwise, the property of a person, not a party to the action; the transferee, or other person so interested, is liable for costs, in the like cases, and to the same extent, as if he was the plaintiff; and, where costs are awarded against the plaintiff, the court may, by order, direct the person so liable to pay them. Except in a case, where he could not have been lawfully directed to pay costs, personally, if he had been a party, as prescribed in the last section, his disobedience to the order is a contempt of court. But this section does not apply to a case, where the person so beneficially interested, is the attorney or counsel for the plaintiff, if his only beneficial interest consists of a right to a portion of the sum or property recovered, as compensation for his services in the action.

Id., § 321; 2 R. S. 619, § 44 (2 Edm. 643).

ARTICLE THIRD.

Miscellaneous provisions.

Sec. 3248. Certificate entitling party to costs or increased costs.
3249. Costs against infant plaintiff; collectible of guardian ad litem.
3250. This title not to affect special provisions of law.

3248. Certificate entitling party to costs or increased costs.

Where, upon the trial of an action, the title to real property comes in question, or any fact appears, whereby either party becomes entitled to costs, or to the increased costs specified in section 3258 of this act, the judge presiding at the trial, or the referee, must, upon the application of the party to be benefited thereby, either before or after the verdict, report, or decision is rendered, make a certificate, stating the fact. Such a certificate is the only competent evidence, as to the matter, before the taxing officer.

2 R. S. 653, § 8 (2 Edm. 73).

§ 3249. Costs against infant plaintiff; collectible of guardian ad litem.

Where costs are awarded against an infant plaintiff, they may be collected, by execution or otherwise, from his guardian ad litem, in like manner as if the latter was the plaintiff.

Co. Proc., § 316; 2 R. S. 653, §§ 15 and 16. See § 469, ante.

§ 3250. This title not to affect special provisions of law.

This title does not affect any provision contained elsewhere in this act, or in any other statute, remaining unrepealed after this chapter takes effect; whereby the award of costs is specially regulated, in a particular case, otherwise than as prescribed in this title.

TITLE II.

Fixing the amount of costs.

- Article 1. Sums allowed as costs; disbursements.
2. Taxation of costs.

ARTICLE FIRST.

Sums allowed as costs; disbursements.

- Sec. 3251. Amount of costs generally.
3252. Additional allowance to plaintiff in foreclosure, partition, etc.
3253. Additional allowance to either party in difficult cases, etc.
3254. Allowances under the foregoing sections limited.
3255. Costs upon adjournment of trial.
3256. Disbursements to be included in bill of costs.
3257. Increased damages not to carry increased costs.
3258. When defendant entitled to increased costs.
3259. Increased disbursements not allowed.
3260. Costs upon a settlement.
3261. This article not to affect special provisions of law.

§ 3251. [Am'd, 1895, 1896, 1901.] Amount of costs generally.

Costs, awarded to a party to an action, must be at the following rates:

1. To the plaintiff:

For all proceedings, before notice of trial, in an action specified in section 420 of this act, fifteen dollars; in every other action, twenty-five dollars.

For each additional defendant served with the summons, not exceeding ten, two dollars; and for each necessary defendant, in excess of that number, served with the summons, one dollar.

For procuring the appointment of a guardian or guardian ad litem, for one or more infant defendants, ten dollars.

For procuring an order directing the service of the summons by publication thereof, or personally, without the state, on one or more defendants, ten dollars.

For procuring an injunction order or an order of arrest, ten dollars.

2. To the defendant:

For all proceedings before notice of trial, except as otherwise prescribed in this article, ten dollars.

3. [Am'd, 1901.] To either party:

For all proceedings, after notice of trial, and before trial, except as otherwise prescribed in this article, fifteen dollars.

For taking the deposition of a witness or of a party, as prescribed in section eight hundred and seventy, section eight hundred and seventy-one, or section eight hundred and ninety-three of this act, ten dollars.

For drawing interrogatories, to be annexed to a commission, or to letters rogatory, issued as prescribed in sections eight hundred and eighty-eight, nine hundred and twelve, nine hundred and thirteen, and three thousand one hundred and seventy-one of this act, ten dollars.

For the trial of an issue of law, twenty dollars.

For the trial of an issue of fact, or the assessment of damages pursuant to section one hundred and ninety-four of this act, thirty dollars; and, where the trial necessarily occupies more than two days, ten dollars in addition thereto.

ARTICLE THIRD.

Miscellaneous provisions.

Sec. 3248. Certificate entitling party to costs or increased costs.

3249. Costs against infant plaintiff; collectible of guardian ad litem.

3250. This title not to affect special provisions of law.

3248. Certificate entitling party to costs or increased costs.

Where, upon the trial of an action, the title to real property comes in question, or any fact appears, whereby either party becomes entitled to costs, or to the increased costs specified in section 3258 of this act, the judge presiding at the trial, or the referee, must, upon the application of the party to be benefited thereby, either before or after the verdict, report, or decision is rendered, make a certificate, stating the fact. Such a certificate is the only competent evidence, as to the matter, before the taxing officer.

2 R. S. 653, § 8 (2 Edm. 73).

§ 3249. Costs against infant plaintiff; collectible of guardian ad litem.

Where costs are awarded against an infant plaintiff, they may be collected, by execution or otherwise, from his guardian ad litem, in like manner as if the latter was the plaintiff.

Co. Proc., § 316; 2 R. S. 653, §§ 15 and 16. See § 469, ante.

§ 3250. This title not to affect special provisions of law.

This title does not affect any provision contained elsewhere in this act, or in any other statute, remaining unrepealed after this chapter takes effect; whereby the award of costs is specially regulated, in a particular case, otherwise than as prescribed in this title.

TITLE II.

Fixing the amount of costs.

Article 1. Sums allowed as costs; disbursements.

2. Taxation of costs.

ARTICLE FIRST.

Sums allowed as costs; disbursements.

Sec. 3251. Amount of costs generally.

3252. Additional allowance to plaintiff in foreclosure, partition, etc.

3253. Additional allowance to either party in difficult cases, etc.

3254. Allowances under the foregoing sections limited.

3255. Costs upon adjournment of trial.

3256. Disbursements to be included in bill of costs.

3257. Increased damages not to carry increased costs.

3258. When defendant entitled to increased costs.

3259. Increased disbursements not allowed.

3260. Costs upon a settlement.

3261. This article not to affect special provisions of law.

§ 3251. [Am'd, 1895, 1896, 1901.] Amount of costs generally.

Costs, awarded to a party to an action, must be at the following rates:

1. To the plaintiff:

For all proceedings, before notice of trial, in an action specified in section 420 of this act, fifteen dollars; in every other action, twenty-five dollars.

For each additional defendant served with the summons, not exceeding ten, two dollars; and for each necessary defendant, in excess of that number, served with the summons, one dollar.

For procuring the appointment of a guardian or guardian ad litem, for one or more infant defendants, ten dollars.

For procuring an order directing the service of the summons by publication thereof, or personally, without the state, on one or more defendants, ten dollars.

For procuring an injunction order or an order of arrest, ten dollars.

2. To the defendant:

For all proceedings before notice of trial, except as otherwise prescribed in this article, ten dollars.

3. [Am'd, 1901.] To either party:

For all proceedings, after notice of trial, and before trial, except as otherwise prescribed in this article, fifteen dollars.

For taking the deposition of a witness or of a party, as prescribed in section eight hundred and seventy, section eight hundred and seventy-one, or section eight hundred and ninety-three of this act, ten dollars.

For drawing interrogatories, to be annexed to a commission, or to letters rogatory, issued as prescribed in sections eight hundred and eighty-eight, nine hundred and twelve, nine hundred and thirteen, and three thousand one hundred and seventy-one of this act, ten dollars.

For the trial of an issue of law, twenty dollars.

For the trial of an issue of fact, or the assessment of damages pursuant to section one hundred and ninety-four of this act, thirty dollars; and, where the trial necessarily occupies more than two days, ten dollars in addition thereto.

For making and serving a case, twenty dollars; and, when the case necessarily contains more than fifty folios, ten dollars in addition thereto.

For making and serving amendments to a case, twenty dollars.

Upon a motion for a new trial, upon a case, or an application for judgment upon a special verdict, the same sums as upon an appeal, as prescribed in subdivision fourth of this section.

Upon any other motion, or upon a reference specified in section three thousand two hundred and thirty-six of this act, to each party to whom costs are awarded, a sum fixed by the court or judge, not exceeding ten dollars, besides necessary disbursements for printing and referee's fees.

Where a new trial is had, pursuant to an order granting the same, or an assessment of damages, pursuant to section one hundred and ninety-four of this act, is had, for all proceedings after the granting of, and before the new trial, or an assessment of damages, pursuant to section one hundred ninety-four of this act, twenty-five dollars.

For one term of the city court of the city of New York, at which the case is necessarily on the calendar, and for each trial term or special term, of the supreme court, or a county court, not exceeding five, at which the cause is necessarily on the calendar, excluding the term at which it is tried, or otherwise finally disposed of, ten dollars.

L. 1901, ch. 527. In effect Sept. 1, 1901.

4. [Am'd, 1902.] To either party, upon an appeal to the supreme court from an inferior court, excepting upon an appeal to the supreme court from the city court of the city of New York; or upon an appeal to the appellate division of the supreme court, or to the supreme court from the city court of the city of New York, taken from an interlocutory or final judgment, or from an order granting or refusing a new trial, rendered or made at a trial term of the supreme court or of the city court of the city of New York; or upon an application to the appellate division of the supreme court for a new trial, or for judgment upon a verdict, rendered subject to the opinion of the court, or where exceptions are ordered to be heard, in the first instance, at a term of the appellate division of the supreme court; before argument, twenty dollars. For argument, forty dollars. For each term of the appellate division, not exceeding five, of the supreme court, at which the cause is necessarily on the calendar, excluding the term at which it is argued, or otherwise finally disposed of; ten dollars. In all appeals taken under section thirty-one hundred and eighty-nine costs awarded to the successful party shall not exceed ten dollars in addition to the taxable disbursements.

L. 1902, ch. 515. In effect Sept. 1, 1902.

5. To either party, upon an appeal to the court of appeals:

Before argument, thirty dollars.

For argument, sixty dollars.

For each term, not exceeding ten, at which the cause is on the calendar, excluding the term at which it is argued, or otherwise finally disposed of, ten dollars.

Where a judgment is affirmed by the court of appeals, the court may, in its discretion, also award damages, by way of costs, for the delay, not exceeding ten per centum upon the amount of the judgment; or, where it was rendered upon an appeal, upon the amount of the original judgment.

Co. Proc., §§ 307 and 315; L. 1895, ch. 946. In effect September 1, 1896.
L. 1896, ch. 226.

§ 3252. Additional allowance to plaintiff in foreclosure, partition, etc.

Where the action is brought to foreclose a mortgage upon real property; or for the partition of real property; or to procure an adjudication upon a will or other instrument in writing; or to compel the determination of a claim to real property; or where, in any action, a warrant of attachment against property has been issued; the plaintiff, if a final judgment is rendered in his favor, and he recovers costs, is entitled to recover, in addition to the costs prescribed in the last section, the following percentages, to be estimated upon the amount found to be due upon the mortgage; or the value of the property partitioned, affected by the adjudication upon the will or other instrument, or the claim to which is determined; or the value of the property attached, not exceeding the sum recovered, or claimed; as the case may be.

Upon a sum, not exceeding two hundred dollars, ten per centum.

Upon an additional sum, not exceeding four hundred dollars, five per centum.

Upon an additional sum, not exceeding one thousand dollars, two per centum.

Where such an action is settled before judgment, the plaintiff is entitled to a percentage upon the amount paid or secured upon the settlement, at one-half of those rates. In an action to foreclose a mortgage upon real property, where a part of the mortgage debt is not due, if the final judgment directs the sale of the whole property, as prescribed in section 1637 of this act, the percentages, specified in this section, must be computed upon the whole sum, unpaid upon the mortgage. But if it directs the sale of a part only, as prescribed in section 1636 of this act, they must be computed upon the sum actually due; and if the court thereafter grants an order, directing the sale of the remainder, or a part thereof, the percentages must be computed upon the amount then due; but the aggregate of the percentages shall not exceed the sum, which would have been allowed, if the entire sum secured by the mortgage had been due, when final judgment was rendered.

Co. Proc., §§ 308 and 309. See Rule 45.

§ 3253. [Am'd, 1896, 1898, 1899, 1903, 1909.] Additional allowance to either party in difficult and certain other cases.

In an action brought to foreclose a mortgage upon real property or for the partition of real property, or in a difficult and extraordinary case, (where a defense has been interposed in an action), or, except in the first and second judicial districts, in a special proceeding by certiorari to review an assessment under article thirteen of the tax law, and the acts amending the same, the court may also, in its discretion, award to any party a further sum, as follows:

1. In an action to foreclose a mortgage, a sum not exceeding two and one-half per centum upon the sum due, or claimed to be due upon the mortgage, nor the aggregate sum of two hundred dollars.

2. In any action, or special proceeding, specified in this section, where a defense has been interposed, or in an action for the partition of real property, a sum not exceeding five per centum upon the sum recovered or claimed, or the value of the subject matter involved.

Id., § 309; L. 1896, ch. 571; L. 1898, ch. 61; L. 1899, ch. 299; L. 1903, ch. 316. Am'd by L. 1909, ch. 63, § 3. See note 56 of notes of Board of Statutory Consolidation at end of code. See Rule 45.

§ 3254. Allowances under the foregoing sections limited.

But all the sums awarded to the plaintiff, as prescribed in section 3252 of this act, or to a party or two or more parties on the same side, as prescribed in the last sentence of section 3251 of this act, and in subdivision second of the last section, cannot exceed, in the aggregate, two thousand dollars.

Co. Proc., § 308.

§ 3255. [Am'd, 1895.] Costs upon adjournment of trial.

Where an application is made to a court or a referee, to adjourn a trial, the payment to the adverse party of a sum not exceeding ten dollars, or, in the city court of the city of New-York, a sum not exceeding five dollars, besides the fees of his witnesses, and other taxable disbursements, already made or incurred, which are rendered ineffectual by the adjournment, may be required, as a condition of granting the adjournment.

Id., § 314; L. 1853, ch. 617, part of § 4; L. 1895, ch. 946.

§ 3256. [Am'd, 1895.] Disbursements to be included in bill of costs.

A party to whom costs are awarded in an action is entitled to include in his bill of costs his necessary disbursements as follows: The legal fees of witnesses and of referees and other officers; the reasonable compensation of commissioners taking depositions; the legal fees for publication where publication is directed pursuant to law; the legal fees paid for a certified copy of a deposition, or other paper, recorded or filed in any public office, necessarily used or obtained for use on the trial; copies of opinions and charges of judges; the reasonable expenses of printing the papers for a hearing, when required by a rule of the court; prospective charges for the expenses of entering and docketing the judgment; and the sheriff's fees for receiving and returning one execution thereon, including the search for property and such other reasonable and necessary expenses, as are taxable, according to the course and practice of the court, or by express provision of law. Searches affecting property situate in any county in which the office of county clerk or register is a salaried one, when made and certified to by title insurance, abstract or searching companies, organized and doing business under the laws of this State, may be used in all actions or special proceedings in which official searches may be used, in place of and with the same legal effect as such official searches, and the expenses of searches so made by said companies shall be taxable at rates not exceeding the cost of similar official searches.

Id., § 311, am'd; L. 1895, ch. 331.

§ 3257. Increased damages not to carry increased costs.

A plaintiff, who recovers double or other increased damages, does not thereby become entitled to more than single costs; except where it is otherwise specially prescribed by law.

2 R. S. 616, § 23 (2 Edm. 640).

§ 3258. When defendant entitled to increased costs.

In either of the following cases, a defendant, in whose favor a final judgment is rendered, in an action wherein the complaint demands judgment for a sum of money only, or to recover a chattel; or a final order is made, in a special proceeding instituted by a State writ, is entitled to recover the costs, prescribed in section 3251 of this act, and, in addition thereto, one-half thereof:

1. Where the defendant is or was a public officer, appointed or elected under the authority of the State, or a person specially appointed, according to law, to perform the duties of such an officer; and the action or special proceeding was brought by reason of an act, done by him by virtue of his office, or an alleged omission by him, to do an act, which it was his official duty to perform.

2. Where the action was brought against the defendant, by reason of an act done, by the command of such an officer or person, or in his aid or assistance, touching the duties of the office or appointment.

3. Where the action was brought against the defendant, for taking a distress, making a sale, or doing any other act, by or under color of authority of a statute of the State.

But this section does not apply, where an officer, or other person, specified herein, unites in his answer with a person not entitled to such additional costs.

2 R. S. 616, § 24.

§ 3259. Increased disbursements not allowed.

The increase, specified in the last section, does not extend to the disbursements; and an officer, witness, or juror, is not entitled to any other fees in the action, except the single fee allowed by law for his services.

Id., § 25, am'd.

§ 3260. Costs upon a settlement.

Where an action, specified in section 3228 of this act, is settled before judgment, no greater sum shall be demanded as costs, than at the rates prescribed by section 3251 of this act.

Co. Proc., § 322.

§ 3261. This article not to affect special provisions of law.

This article does not affect any provision contained elsewhere in this act, or in any other statute remaining unrepealed after this act takes effect, whereby the amount of costs is specially fixed, in a particular case, otherwise than as prescribed in this article.

ARTICLE SECOND.

Taxation of costs.

Sec. 3262. Costs; how taxed. Allowances, etc.; how computed.

3263. Notice of taxation.

3264. Retaxation.

3265. Review of taxation.

3266. Duty of taxing officer.

3267. Affidavit respecting disbursements.

§ 3262. Costs; how taxed. Allowances, etc.; how computed.

Costs must be taxed by the clerk, upon the application of the party entitled thereto; except that the court may direct, that interlocutory costs, or costs in a special proceeding, be taxed by a judge. The clerk must insert, in the judgment or final order, the amount of the costs, as taxed. In a case where the costs are in the discretion of the court, the report or decision, or the direction of the court for final judgment, upon a default, or after a jury trial, must specify which party or parties are entitled to costs; but the amount of the costs must be ascertained by taxation. The allowance, specified in section 3252 of this act, must be computed by the clerk upon the taxation; but the value of property, required to be ascertained for that purpose, must be ascertained by the court, unless it has been fixed by the decision or report, or by the verdict of the jury, upon which the final judgment is entered; except that, in case of actual partition, it must be determined by the commissioners.

Co. Proc., part of §§ 311 and 309.

§ 3263. Notice of taxation.

Costs may be taxed, upon notice to the attorney for each adverse party, who has appeared, and is interested in reducing the amount thereof. Notice of taxation must be served, not less than five days before the taxation; unless the attorneys, serving and served with the notice, all reside, or have their offices, in the city or town, where the costs are to be taxed; in which case, a notice of two days is sufficient. A copy of the bill of costs, specifying the items, with the disbursements stated in detail, must be served with the notice of taxation.

Id., § 311.

§ 3264. Retaxation.

Costs may also be taxed without notice. But where they are so taxed, notice of retaxation thereof must immediately afterwards be given as prescribed in the last section, by the party at whose instance they were taxed; in default whereof, the court must, upon the application of a party entitled to notice, direct a retaxation, with costs of the motion, to be paid by the party in default. The court may, in its discretion, upon the application of a party interested, direct a retaxation of costs at any time. Any sum, deducted upon a retaxation, must be credited upon the execution, or other mandate issued to enforce the judgment.

§ 3265. Review of taxation.

A taxation or a retaxation may be reviewed by the court, upon a motion for a new taxation. The order, made upon such a

motion, may allow or disallow any item, objected to before the taxing officer, in which case, it has the effect of a new taxation; or it may direct a new taxation before the proper officer, specifying the grounds or the proof, upon which the item may be allowed or disallowed by him.

§ 3266. Duty of taxing officer.

An officer, authorized to tax costs in an action or a special proceeding, must, whether the taxation is opposed, or not, examine the bills presented to him for taxation; must satisfy himself that all the items allowed by him are correct and legal; and must strike out all charges for fees, other than the prospective charges expressly allowed by law, where it does not appear that the services, for which they are charged, were necessarily performed.

2 R. S. 663, § 5 (2 Edm. 672).

§ 3267. Affidavit respecting disbursements.

A charge, for the attendance of a witness, cannot be allowed without an affidavit, stating the number of days of his actual attendance; and, if travel fees are charged, the distance for which they are allowed. A charge, for a copy of a document or paper, cannot be allowed, without an affidavit, stating that it was actually and necessarily used, or was necessarily obtained for use. An item of disbursements, in a bill of costs, cannot be allowed, in any case, unless it is verified by affidavit, and appears to have been necessarily incurred, and to be reasonable in amount.

Id., § 7; Co. Proc., part of § 811.

TITLE III.

Security for costs.

Sec. 8268. When defendant may require security for costs.

- 3269. Id.; after action commenced.
- 3270. The last two sections qualified.
- 3271. Id.; in actions by and against executors, etc.
- 3272. Order to give security.
- 3273. Requisites of undertaking.
- 3274. Notice of exception; id. of justification.
- 3275. Justification of sureties. Allowance of undertaking.
- 3276. Order to give additional security. Proceedings.
- 3277. Effect of failure to obey order to give security.
- 3278. Liability of attorney for costs in certain actions.
- 3279. This title applies to special proceedings.

§ 3268. [Am'd, 1891, 1904, 1910.] When defendant may require security for costs.

The defendant, in an action brought in a court of record, may require security for costs to be given, as prescribed in this title, where the plaintiff was, when the action was commenced, either

1. A person residing without the state; or, if the action is brought in a county court, except in the counties of Albany, Kings, Queens and Richmond, or in the city court of the city of New York, the city court of Yonkers, or the city court of Albany, residing without the city or county, as the case may be, wherein the court is located; or

2. A foreign corporation; or

3. A person imprisoned under execution for a crime; or

4. The official assignee of a person so imprisoned; the official assignee or official trustee of a debtor; or an assignee in bankruptcy; where the action is brought upon a cause of action, arising before the assignment, the appointment of the trustee, or the adjudication in bankruptcy.

2 R. S. 620, § 1 (2 Edm. 614): L. 1891, ch. 170; L. 1904, ch. 524; L. 1910, ch. 118. In effect Sept. 1, 1910.

§ 3269. Id.; after action commenced.

The defendant, in a like action, may require security for costs to be given, where, after the commencement of the action, the plaintiff either

1. Ceases to be a resident of the State; or, where the action is brought in either of the local courts specified in subdivision first of the last section, ceases to be a resident of the city or county, as the case may be, wherein the court is located; or

2. Is adjudicated a bankrupt, or discharged from his debts, or exonerated from imprisonment, pursuant to a law of the State, or of the United States; or

3. Is sentenced to the State prison, for a term less than for life.

Id.

§ 3270. The last two sections qualified.

In a case specified in either of the last two sections, if there are two or more plaintiffs, the defendant cannot require security for costs to be given, unless he is entitled to require it of all the plaintiffs.

* So in original.

§ 3271. Id.; in actions by and against executors, etc.

In an action by or against an executor or administrator, in his representative capacity, or the trustee of an express trust, or a person expressly authorized by statute to sue, or to be sued; or by an official assignee, the assignee of a receiver, or the committee of a person judicially declared to be incompetent to manage his affairs; the court may, in its discretion, require the plaintiff to give security for costs.

Co. Proc., part of § 317; L. 1874, ch. 446, § 5.

§ 3272. Order to give security.

Where security for costs is required to be given, the court in which the action is pending, or, except in a case specified in the last section, a judge thereof, upon due proof, by affidavit, of the facts, must make an order requiring the plaintiff, within a time specified, either to pay into court, the sum of two hundred and fifty dollars, to be applied to the payment of the costs, if any, awarded against him, or, at his election, to file with the clerk an undertaking, and to serve a written notice of the payment or of the filing upon the defendant's attorney; and staying all other proceedings, on the part of the plaintiff, except to review or vacate the order, until the payment or filing, and notice thereof, and also, if an undertaking is given, the allowance of the same.

2 R. S. 620, part of § 3 (2 Edm. 644).

§ 3273. Requisites of undertaking.

The undertaking, specified in the last section, must be executed to the defendant by one or more sureties, and must be to the effect that they will pay, upon demand, to the defendant, all costs which may be awarded to him in the action, not exceeding a sum, specified in the undertaking, which must be at least two hundred and fifty dollars.

Id., § 4, am'd; L. 1875, ch. 305.

§ 3274. Notice of exception; id. of justification.

Within ten days after service of the notice of filing the undertaking, the defendant may serve upon the plaintiff's attorney a notice that he excepts to the sureties therein. Within ten days after service of such a notice, the plaintiff must serve, upon the defendant's attorney, a notice of the justification of the same or new sureties before a judge of court, or a county judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter, and the place to be within the county where the action is triable.

Id., §§ 5 and 6, am'd.

§ 3275. Justification of sureties. Allowance of undertaking.

Section 580 of this act applies to the justification of the sureties. Where the judge finds the sureties sufficient, he must annex the written examination, if any, to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk. Where the defendant fails duly to except to the sureties, the undertaking is deemed allowed, and must be indorsed and filed in like manner.

Id., §§ 5 and 6, am'd; L. 1875, ch. 305.

§ 3276. [Am'd, 1891.] Order to give additional security Proceedings.

At any time after the allowance of an undertaking, given pursuant to such an order, or as prescribed in section 3278 of this act, or after notice of the payment into court made pursuant to such an order, the court, or a judge thereof, upon satisfactory proof, by affidavit, that the sum specified in the undertaking, or the amount of such payment, is insufficient; or that one or more of the sureties have died, or become insolvent, or that his or their circumstances have become so precarious that there is reason to apprehend that the undertaking is insufficient for the security of the defendant; must make an order requiring the plaintiff to give an additional undertaking, or make an additional payment into court. The last four sections apply to such an order, and to the undertaking given, or payment made, pursuant thereto.

L. 1891, ch. 161.

§ 3277. Effect of failure to obey order to give security.

Where the plaintiff fails to comply with an order, made as prescribed in this title, or to procure the allowance of an undertaking given pursuant to such an order, the defendant is entitled to a judgment dismissing the complaint, and in his favor for costs. The defendant may apply therefor, as upon a motion.

2 R. S. 620, § 4, am'd; L. 1875, ch. 306.

§ 3278. Liability of attorney, for costs in certain actions.

Where a defendant is entitled to require security for costs, as prescribed in section 3268 of this act, the plaintiff's attorney is liable for the defendant's costs, to an amount not exceeding one hundred dollars, until security is given, as prescribed in this title. The plaintiff's attorney may relieve himself from that liability, although the defendant may not require security for costs to be given, by filing and procuring the allowance of an undertaking, as if an order had been made as prescribed in section 3272 of this act.

Id., §§ 7 and 8.

§ 3279. This title applies to special proceedings.

The foregoing sections of this title apply to a special proceeding instituted in a court of record, in like manner as to an action; for which purpose, the prosecuting party, other than the people, or, where the special proceeding is instituted in the name of the people upon the relation of a private corporation or individual, the relator, is deemed a plaintiff, and the adverse party, a defendant.

TITLE IV.

General provisions relating to fees.

- Sec. 3280. Taking fees not prescribed by law, prohibited.
 3281. Id.; for services not rendered, except, etc.
 3282. Penalty for extortion.
 3283. Clerk of court of appeals to account for and pay over fees.
 3284. [Repealed.]
 3285. Certain county clerks and registers must account for fees.
 3286. General provisions as to fees, etc., to be accounted for.
 3287. Fees of certain officers to be taxed upon demand.
 3288. Parties, attorneys, etc., when not allowed fees.
 3289. No fee for administering certain official oaths.
 3290. Certain searches to be gratuitous.
 3291. Officer, etc., may charge fee paid for oath, postage, etc.
 3292. Id.; his fees, etc., to be paid before required to transmit papers.
 3293. Provision where printers in county refuse to publish.
 3294. Affidavit of refusal to publish, etc.
 3295. Comptroller to audit certain charges.

§ 3280. [Repealed by L. 1909, chs. 35 and 51. See Consolidated Laws, tits. Judiciary Law, § 252, Public Officers Law, § 67.]

§§ 3281-3282. [Repealed by L. 1909, ch. 51. See Consolidated Laws, tit. Public Officers Law, § 67.]

§ 3283. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 256.]

§ 3284. [Repealed Jan. 1, 1896; L. 1895, ch. 946.]

§ 3285. [Repealed by L. 1909, ch. 16. See Consolidated Laws, tit. County Law, § 161.]

§ 3286. [Repealed by L. 1909, ch. 51. See Consolidated Laws, tit. Public Officers Law, § 70.]

§ 3287. [Am'd, 1895.] Fees of certain officers to be taxed upon demand.

Each county clerk or register of deeds, who claims any fees by virtue of his office; and each sheriff or coroner, who, upon the collection of an execution, or the settlement, either before or after judgment, of an action or a special proceeding, claims any fees, which have not been taxed: must, upon the written demand of the person liable to pay the same, cause them to be taxed within the county, upon notice to the person making the demand, by a justice of the supreme court, or the county judge. After such a demand is made, the officer cannot collect his fees, until they have been so taxed.

2 R. S. 652, §§ 1 and 2 (2 Edm. 671): L. 1844, ch. 127, §§ 2 and 3 (4 Edm. 694); L. 1895, ch. 946.

§ 3288. Parties, attorneys, etc., when not allowed fees.

A party to an action or a special proceeding is not entitled to a fee, for attending as a witness therein, in his own behalf, or in behalf of a party who pleads jointly, or is united in interest, with him; and an attorney or counsel, in an action or special

proceeding, is not entitled to a fee, for attending as a witness therein, in behalf of his client.

See 2 R. S. 651, § 15 (2 Edm. 671.)

§ 3289. [Repealed by L. 1909, ch. 51. See Consolidated Laws, tit. Public Officers Law, § 69.]

§ 3290. [Repealed by L. 1909, ch. 23. See Consolidated Laws, tit. Executive Law, § 84.]

§ 3291. [Repealed by L. 1909, ch. 51. See Consolidated Laws, tit. Public Officers Law, § 68.]

§ 3292. *Id.*; his fees, etc., to be paid before required to transmit paper.

Each provision of this act, requiring a judge, clerk, or other officer to transmit a paper to another officer, for the benefit of a party, is to be construed as requiring the transmission only at the request of the person so to be benefited, and upon payment by him of the fees allowed by law for the paper transmitted, or any copy or certificate connected therewith, and the expenses specified in the last section.

L. 1876, ch. 449, § 12.

§ 3293. Provision where printers in county refuse to publish.

If the proprietor of each newspaper, published in a city or county, in which any notice, order, citation, or other paper is required by law to be published, refuses to publish the same, for the fees prescribed by law for the publication, it may be published in the newspaper, printed at Albany, in which legal notices are required by law to be published. If it is required by law to be published in that newspaper, and also in another newspaper published in a city or county, and the proprietor of each newspaper in that city or county refuses to publish it for the fees so prescribed, it may be published in the newspaper, published nearest to the place, where a person is required to appear, or where an act is to be done, pursuant thereto, the proprietor of which will publish the same, for those fees. Publication, made as prescribed in this section, is as valid, as if it was made in the city or county, where the publication thereof is so required by law.

2 R. S. 648, §§ 46 and 47 (2 Edm. 667).

§ 3294. Affidavit of refusal to publish, etc.

Where publication is made, as prescribed in the last section, elsewhere than in the city or county where it is otherwise required by law to be made, the affidavit of publication must either be accompanied with an affidavit, or contain a statement, to the effect that an application to publish the advertisement was, before such publication, made to the proprietor of each newspaper published in the city or county: that the amount of the legal fees for such publication was at the same time tendered; and that the application was refused. Such an affidavit is presumptive evidence of the facts stated therein.

2 R. S. 648, § 49.

§ 3295. [Repealed by L. 1909, ch. 58. See Consolidated Laws, tit. State Finance Law, § 46.]

TITLE V.

Sums allowed as fees.

- Sec. 3296. Referee's fees generally.
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 3330. Certain special provisions excepted from this title.
 3331. Provision as to change in fees.
 3331a. Presentation of claims by jurors and disposition of unclaimed fees.
 3332. This title applies to civil cases only.

§ 3296. [Am'd, 1896.] Referee's fees generally.

A referee, in an action or a special proceeding brought in a court of record, or in a special proceeding, taken as prescribed in title twelve of chapter seventeen of this act, is entitled to ten dollars for each day spent in the business of the reference; unless at or before the commencement of the trial or hearing, a different rate of compensation is fixed, by the consent of the parties, other than those in default for failure to appear or plead, manifested by an entry in the minutes of the referee, or otherwise in writing, or a smaller compensation is fixed by the court or judge in the order appointing him.

Co. Proc., § 318, am'd. In effect March 11, 1896. L, 1896, ch. 90.

§ 3297. [Am'd, 1895.] Id.; upon sales of real property.

The fees of a referee appointed to sell real property pursuant to a judgment in an action, are the same as those allowed to the sheriff, and he is allowed the same disbursements as the sheriff. Where a referee is required to take security upon a sale, or to distribute, or apply, or ascertain and report upon the distribution or application of any of the proceeds of the sale, he is also entitled to one-half of the commissions upon the amount so secured,

distributed or applied, allowed by law to an executor or administrator for receiving and paying out money. But commissions shall not be allowed to him upon a sum bidden by a party, and applied upon the party's demand, as fixed by the judgment, without being paid to the referee, except to the amount of ten dollars. And a referee's compensation, including commissions, cannot, where the sale is under a judgment in an action to foreclose a mortgage, exceed fifty dollars, unless the property sold for ten thousand dollars or upwards, in which event the referee may receive such additional compensation as to the court may seem proper, or in any other cause five hundred dollars.

L. 1869, ch. 579, § 4, am'd; and see Co. Proc., § 300, am'd; L. 1876, ch. 431, § 11; L. 1896, ch. 241.

§ 3298. Fees for oaths and acknowledgments.

Any officer, authorized to perform the services specified in this section, and to receive fees therefor, is entitled to the following fees:

1. For administering an oath or affirmation, and certifying the same when required, except where another fee is specially prescribed by statute, twelve cents.

2. For taking and certifying the acknowledgment or proof of the execution of a written instrument; by one person, twenty-five cents; and by each additional person, twelve cents; for swearing each witness thereto, six cents.

2 R. S. 687, § 28 (2 Edm. 658); L. 1847, ch. 339 (4 Edm. 623); L. 1849, ch. 238, § 2 (3 Edm. 802).

§ 3299. Surveyors' and commissioners' fees in action for partition or dower, etc.

A surveyor, employed as prescribed by law, in an action for partition or dower, or to determine dower, is entitled to five dollars for each day, actually and necessarily occupied in surveying, laying out, marking, or mapping land therein. Each assistant, so employed, is entitled to two dollars for each day, actually and necessarily occupied in serving under the surveyor's direction. Each commissioner, appointed as prescribed by law, to make partition or admeasure dower, is entitled to five dollars for each day's actual and necessary service.

2 R. S. 643, §§ 34 and 35 (2 Edm. 662), am'd.

§ 3300. Fees of the clerk of the court of appeals.

The clerk of the court of appeals is entitled, for the services specified in this section, to the following fees:

For filing a notice of appeal to that court, and all the papers transmitted therewith, fifty cents.

For filing any other paper, ten cents.

For drawing an order, twenty cents for each folio.

For entering an order, twenty cents; and for each folio more than two, ten cents.

For drawing a judgment, twenty-five cents; and for each folio more than two, ten cents.

For entering a judgment, twenty-five cents; and for each folio more than two, ten cents.

For a certified copy of an order, record, or other paper, entered or filed in his office, ten cents for each folio.

For engrossing a remittitur, ten cents for each folio.

For a certificate, other than that a paper, for the copying of which he is entitled to a fee, is a copy, twenty-five cents.

For sealing any paper, when required, fifty cents.

2 B. S. 622, § 2 (2 Edm. 646); L. 1847, ch. 247, § 7.

§ 3301. [Am'd, 1890.] Clerk's fees in civil actions generally.

Except as otherwise prescribed in the next section, each clerk of the court of record is entitled for his services in an action or a special proceeding, brought in or transferred to the court of which he is clerk, to the following fees:

Upon the trial of the action, or the hearing, upon the merits, of the special proceeding, from the party bringing it on, one dollar.

For entering final judgment in the action, or entering a final order in the special proceeding, including the filing of the judgment-roll, and a copy of the judgment to insert therein, fifty cents; and ten cents in addition for each folio exceeding ten, contained in the order or judgment.

For entering any other order or an interlocutory judgment, ten cents for each folio, exceeding five.

For a certified or other copy of an order, record, or other paper, entered or filed in his office, five cents for each folio.

Where, on an appeal from a judgment or order, a party shall present to the clerk a printed copy of the judgment-roll or order appealed from, it shall be the duty of the clerk, as required, to compare and certify the same, for which service he shall be entitled to be paid at the rate of one cent per folio.

For a certified transcript of the docket of a judgment, twelve cents.

For filing a transcript and docketing or re-docketing a judgment thereupon, six cents.

He is not entitled to any fee, or other compensation, for any other service, in an action or a special proceeding in the court, except that where he is also county clerk, he may charge fees as prescribed in section 3304 of this act, subject to the limitations therein contained.

Where the attorneys for all the parties interested, other than parties in default or against whom a judgment or a final order has been taken, and is not appealed from, stipulate in writing that a paper is a copy of any paper whereof a certified copy is required by any provision of this act, the stipulation takes the place of a certificate, as to the parties so stipulating, and the clerk is not required to certify the same or entitled to any fee therefor.

And the paper so proved by stipulation shall be received by the clerks of all the courts and by the courts and shall be used or filed with the same force and effect as if certified by a clerk of the court.

See Co. Proc. § 312; L. 1890, ch. 312.

§ 3302. [Am'd, 1895.] The last section qualified.

The last section does not apply to the clerk of a surrogate's court, of the city court of the city of New-York, of the city court of Yonkers, of the justice's court of the city of Albany, or of a mayor's or recorder's court.

L. 1895, ch. 946.

§ 3303. [Repealed by L. 1909, ch. 35. See Consolidated Laws, tit. Judiciary Law, § 253.]

§ 3304. [Am'd, 1896.] **Fees of county clerks generally.**

A county clerk is entitled, for the services specified in this section, except where another fee is allowed therefor by special statutory provision, to the following fees to be paid in advance:

For searching and certifying the title to, and incumbrances upon real property, for each year for which the search is made, for each name, and each kind of conveyance or lien, five cents.

For a copy of an order, record, or other paper, entered or filed in his office, eight cents for each folio.

For filing a transcript, and making an entry as prescribed in section 1258 of this act, twelve cents.

For issuing an execution upon a judgment, a transcript whereof, or of the docket of which, has been filed in his office, fifty cents, to be paid by the party at whose request the execution is issued, and to be collected by the sheriff in addition to the sum due upon the judgment.

For recording and indexing a notice of the pendency of an action, filed in his office, ten cents for each folio contained in the notice.

For cancelling such a notice, or a notice filed in his office, as prescribed in section 649 of this act, twenty-five cents.

For recording any instrument, which must or may legally be recorded by him, ten cents for each folio.

For filing a certificate of satisfaction, or other satisfaction-piece of a mortgage, and entering the satisfaction, twenty-five cents.

For affixing and indexing a notice of foreclosure of a mortgage as prescribed in section 2300 of this act, twenty-five cents.

For entering a minute that a mortgage has been foreclosed, ten cents.

For filing and entering a satisfaction of an assignment of a judgment, twelve cents.

For filing and entering the bond of a collector or other officer authorized to receive taxes, twelve cents.

For searching for such a bond, six cents.

For entering satisfaction thereof, twelve cents.

For sealing any paper, when required, twelve cents.

For filing and docketing notice of a mechanic's lien, ten cents.

For filing and entering specifications and all other papers relating to a lien against a vessel, twenty-five cents.

For filing any paper required by law to be filed in his office, other than as expressly provided for in this section, six cents.

For filing any paper deposited with him for safe keeping, six cents; and for searching for such a paper, when required, three cents for each paper necessarily opened and examined.

For a certificate, other than that a paper, for the copying of which he is entitled to a fee, is a copy, twenty-five cents.

For inquiring into, determining, and certifying the sufficiency of the sureties of a sheriff, fifty cents.

For attending upon the canvassing of votes, given at an election, two dollars.

For drawing the necessary certificates of the result of the canvass, eighteen cents for each folio; and for the necessary copies thereof, nine cents for each folio.

For notifying the governor that any person has taken an oath of office, ten cents and the necessary postage.

For notifying the governor that any person has neglected to take an oath of office, or to file or renew any security, within the time prescribed by law, or of a vacancy in an office in his county, ten cents and the necessary postage.

For notifying any person of his appointment to office, twenty-five cents, and the expenses, actually and necessarily incurred in giving the notice, which the comptroller deems reasonable.

For entering, in the minutes of the county court, a license to keep a ferry, and for a copy thereof, one dollar.

For taking and entering a recognizance, from any person authorized to keep a ferry, twenty-five cents.

But a county clerk is not entitled to any fee, under this section, for a copy of, or for filing or certifying, any paper, in a civil action or special proceeding, in a court of which he is ex-officio clerk.

2 R. S. 638, § 30 (2 Edm. 659); L. 1864, ch. 53, § 4 (6 Edm. 231); 2 R. S. 545, § 3 (2 Edm. 505); L. 1873, ch. 489, § 4 (9 Edm. 622); L. 1896, ch. 572. In effect May 12, 1896.

3305-07. Added L. 1914 ch. 345-
§ 3305. Certain provisions not affected by the last section.

The last section does not affect any special statutory provision, remaining unrepealed after this title takes effect, whereby a fee, different from the fee therein allowed, is allowed to the clerk of the city and county of New-York, or of the county of Kings, for a service therein specified.

L. 1853, ch. 142, §§ 1 and 2; Co. Proc., § 256; L. 1874, ch. 304; L. 1868, ch. 720; L. 1871, ch. 734.

§ 3306. Fees of register and other clerks.

The register of any county, or the clerk of any court of record, is entitled, for any services specified in the last section but one, which he is authorized to perform, to the fees specified therein, subject to the qualifications therein contained.

Am'd L. 1910 ch. 625
§ 3306a. [Added, 1909.] Fees of county clerk for entries of moneys deposited with county treasurer.

The county clerk shall be entitled to receive, for making the entries required of him by law of moneys deposited with the county treasurer the sum of fifty cents in each case, to be paid by the party to the action or proceeding, and taxed as a disbursement therein.

Added by L. 1909, ch. 65. Derivation — L. 1889, ch. 330, § 2, as am'd by L. 1895, ch. 544, § 2. See note 20 of notes of Board of Statutory Consolidation at end of code.

§ 3307. [Am'd, 1884, 1894, 1907.] Sheriff's fees.

Am'd L. 1915 ch. 565.
 A sheriff is entitled, for the services specified in this section, to the following fees:

1. For serving a summons with or without either a copy of the complaint, or a notice specified in section 419 or section 423 of this act; or for serving or executing an order of arrest, or any other mandate, for the service or execution of which no other fee is specially prescribed by law, except a subpoena, one dollar for each person served or as to whom it is executed; and for necessary travelling to serve or execute the same, six cents for each mile travelled, going and returning; the travelling fees to be computed from the court house of the county; or, if there are two or more court houses, from that nearest to the place of service or execution. But where two or more mandates are delivered

to a sheriff, to be served upon or executed against one person, at one time, in one action or special proceeding; or where a mandate is served upon or executed against two or more persons, in one action or special proceeding, and in the course of one journey; the sheriff is entitled, in all, to six cents only, for each mile travelled.

2. For levying a warrant of attachment, against the property of a defendant, issued as prescribed in title third of chapter seventh of this act, or for executing a requisition to replevy one or more chattels, one dollar; and, also, such additional compensation, for his trouble and expenses, in taking possession of and preserving the property, as the judge, issuing the warrant, or in case of a replevin, as the court or a judge thereof allows, and the judge or court may make an order requiring the party liable therefor to pay the same to the sheriff. For making and filing a description of real property, or an inventory of personal property attached, twenty-five cents for each folio; for each necessary copy thereof, twelve cents for each folio; together with such compensation to the appraisers, as the judge issuing the warrant allows, not exceeding two dollars to each appraiser, for each day actually employed. For advertising, during the pendency of the action, personal property attached, the same fees as are allowed to a sheriff for advertising personal property for sale, by virtue of an execution. If the action is settled, either before or after judgment, the sheriff is entitled to poundage, upon the value of the property attached, not exceeding the sum at which the settlement is made.

3. For a copy, necessarily made by him, of a summons or other mandate, or of a complaint, affidavit, or other paper served by him, where no fee therefor is specially prescribed by law, twelve cents for each folio.

4. [Am'd, 1907.] For notifying jurors to attend a trial term of a court of record, fifty cents for each cause placed upon the calendar for trial by a jury, to be paid by the party first putting the cause on the calendar for that term. But the sheriff is not entitled to more than one dollar and fifty cents for calendar fees in one action. The clerk shall not put a cause upon the calendar, for trial by a jury, until the fee, specified in this subdivision, is paid to him, for the use of the sheriff. And where the cause is tried at a subsequent term, without a new note of issue, as prescribed in section 977 of this act, the party moving the trial must pay to the clerk, for the use of the sheriff, the calendar fee or fees remaining unpaid. No sheriff who receives an annual salary in whole or in part for his services shall be entitled to the fees provided by this subdivision, and in all counties where the sheriff receives such annual salary, the clerk shall place all causes upon the calendar for trial without the payment or collection of any fee therefor.*

*L. 1907, ch. 253, which adds last sentence provides that the amendment "shall not affect the right of any sheriff now in office to receive the fees provided for herein until the end of his term of office, provided he is now lawfully entitled to receive the same."

5. For notifying jurors drawn to attend upon a writ of inquiry, or to try the validity of a claim to personal property, seized by virtue of a warrant of attachment or an execution, or in obedience to a precept issued by commissioners appointed to inquire concerning the incompetency of a person to manage himself or his affairs, in consequence of idiocy, lunacy, or habitual drunkenness, or in any case not provided for in the last preceding subdivision of this section, including the making and return of the inquisition

when required, for each juror notified, twenty-five cents. For attending a jury, when required, in such a case, two dollars.

6. For receiving an execution against property, entering it in his books, searching for property, and postage on the return, when made through the post-office, fifty cents. If required by the sheriff, that fee, together with his fee for returning the execution, must be paid, by the person in whose behalf the execution is issued, at the time when it is delivered to the sheriff, who is not bound to execute it unless the fee is so paid. For mileage upon an execution, for each mile, going only, ten cents; to be computed as prescribed in subdivision first of this section.

7. For collecting money by virtue of an execution, a warrant of attachment, or an attachment for the payment of money in an action or a special proceeding; or by virtue of a warrant for the collection of money, issued by the comptroller, or by a county treasurer; in any county except New-York, Kings, or Westchester, three per centum upon the sum collected, not exceeding two hundred and fifty dollars, and two per centum upon the residue of the sum collected; and in either of the counties of New-York, Kings, or Westchester, two and one-half per centum upon the sum collected, not exceeding two hundred and fifty dollars, and one and one-quarter per centum upon the residue of the sum collected; and also, where an execution is stayed after a levy, by order of the court or otherwise, or where a levy is upon a live animal, or speedily perishable property, such additional compensation, for his trouble and expenses in taking care of and preserving the property, as the court or a judge thereof allows. Where a settlement is made after a levy by virtue of an execution, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the sum at which the settlement is made, and to the additional compensation, if any, provided for in this subdivision.

8. For advertising real or personal property for sale, by virtue of an execution, warrant of attachment, or other warrant specified in the last preceding subdivision, two dollars, unless it is stayed or settled before sale; and in that case, one dollar.

9. For making duplicate certificates of the sale of real property, by virtue of an execution, twenty-five cents for each folio. For drawing and executing a conveyance, upon a sale of real property, two dollars, to be paid by the grantee. The sheriff is also entitled to the printer's fees, as prescribed by law, paid by him for the publication, not more than six weeks, of a notice of the sale of real property, and he may require the party directing the sale to advance the printer's fees, in which case he must repay the same out of the proceeds. Where the notice is published more than six weeks, or the sale is postponed, the expense of continuing the publication, or of publishing the notice of postponement, must be paid by the person requesting it. Where two or more executions against the property of one judgment debtor are in the hands of the sheriff, at the time when the property is first advertised, the sheriff is entitled to printer's fees upon only one execution, and he must elect upon which execution he will receive the same.

10. For returning any mandate, which he is required by law to return, twelve cents. For a certified copy of an execution, and of the return of satisfaction thereupon, delivered as prescribed in section 1266 of this act, twenty-five cents.

11. For posting and publishing the notice of sale, selling, and conveying real property, in pursuance of a direction contained in a judgment, the like fees, as for the same services upon the sale of real property by virtue of an execution; but where real property is sold under a judgment in an action to foreclose a mortgage, the sheriff's entire compensation cannot exceed fifty dollars.

12. For taking a bond for the liberties of the jail, one dollar. For taking any other bond, or any undertaking, which he is authorized to take, fifty cents. For a certified copy of such a bond or undertaking, twenty-five cents.

13. For executing any mandate, requiring him to put a person into possession of real property, other than a warrant specified in subdivision eighteenth of this section, and removing the person in possession, one dollar and fifty cents, and the same travel fees as upon the service of a summons.

14. For each person committed to or discharged from prison, in an action or a special proceeding, one dollar, to be paid by the person at whose instance he is imprisoned. For attending before an officer for the purpose of surrendering a prisoner, or receiving into custody a prisoner surrendered, in exoneration of his bail, including all his services upon such a surrender or receipt, one dollar.

15. For attending a view, two dollars for each day, and for travelling, going and returning, eight cents for each mile.

16. For bringing up a prisoner, upon a writ of habeas corpus to inquire into the cause of detention, one dollar and fifty cents; and for travelling to and from the jail, twelve cents for each mile. For bringing up a prisoner, upon any other writ of habeas corpus, the same fees; and for attending the court or judge thereupon, one dollar for each day. The sheriff is entitled, in addition to the sums specified in this subdivision, to his actual and necessary expenses.

17. For any services, which may be rendered by a constable, other than those specially provided for in this section, the same fees as are allowed by law to a constable for those services.

18. For executing a warrant, to remove any person from lands, belonging to the people of the State, or to Indians, such a sum as the comptroller audits, and certifies to be a reasonable compensation.

19. For giving notice of any general or special election, to all the officers, to whom he is required by law to give such a notice, one dollar for each town or ward, in addition to the expense of publishing the notices, as required by law; payable from the county treasury.

20. For notifying constables to attend a court, fifty cents for each constable notified.

21. For attending a term of a court, which he is required by law to attend, for each day, three dollars.

L. 1871, ch. 415 (9 Edm. 87), § 1, am'd; L. 1872, ch. 26; 2 R. S. 644, § 38, and subsequent sections; also, L. 1859, ch. 225, § 1 (4 Edm. 638). Am'd; L. 1907, ch. 253. In effect Sept. 1, 1907.

§ 3308. The last section qualified.

The last section, except the limitation of amount contained in subdivision eleventh thereof, does not affect any special statutory provision, remaining unrepealed after this title takes effect, relating to the fees and expenses of the sheriff of the city and county of New York, or the sheriff of the county of Kings.

L. 1869, ch. 560, § 2; L. 1873, ch. 166, § 2; L. 1874, ch. 192, and L. 1876, ch. 439, § 2.

§ 3309. Id.; how collected.

The fees of a sheriff, upon an execution against property, other than those with respect to which it is specially prescribed by statute, either that they must be paid by a particular person, or that they may be included in the costs of the party in whose favor the execution is issued, must be collected by virtue of the execution, in the same manner as the sum therein directed to be collected.

2 R. S. 644, § 38.

§ 3310. Coroner's fees.

A coroner is entitled for the services specified in this section, to the following fees:

1. For performing any duty of a sheriff, in an action or a special proceeding, in which the sheriff is, for any cause, disqualified, the same fees to which a sheriff is entitled for the same services.

2. For confining a sheriff in a house, by virtue of a mandate, and maintaining him while there, two dollars for each day, to be paid by the sheriff, before he is entitled to be discharged.

2 R. S. 647, § 39 (2 Edm. 666); L. 1873, ch. 833.

§ 3311. [Am'd, 1805.] Stenographer's fees.

Except where otherwise agreed, or when special provision is otherwise made by statute, a stenographer is entitled, for a copy fully written out from his stenographic notes of the testimony, or any other proceeding, taken in an action, or a special proceeding in a court of record, or before a judge or justice thereof, and furnished, upon request, to a party or his attorney, to the following fees for each folio: In a trial term of the supreme court, or at a special term of the supreme court in the third, fourth, fifth, sixth, seventh or eighth judicial districts, six cents; in any other court or courts, ten cents; and for the copy of the testimony required to be made in any proceeding for the records of the surrogate's court of either of the counties of New York or Kings, ten cents; and the surrogate may order that the fees for such record copy be paid out of the estate to which the proceeding relates.

L. 1895, ch. 946.

§ 3312. [Am'd, 1881, 1896, 1899, 1903, 1904, 1905, 1906, 1909, 1913.] Compensation of deputy sheriffs and constables attending courts.

A constable or a deputy sheriff is entitled, for attending a sitting of a court of record, pursuant to a notice from the sheriff, to a fee for each day's actual attendance, in any county in the state, to be fixed by the board of supervisors thereof, and mileage as allowed by law to trial jurors in courts of record. Such fees must be paid by the county treasurer, upon the production of the certificate of the clerk, stating the number of days that the constable or deputy sheriff attended. If a constable or deputy sheriff attending a sitting of a court of record pursuant to a notice from the sheriff is unable to reach his home upon the day he is excused from attendance, he shall be entitled to compensation for an additional day, and the clerk shall certify accordingly upon satisfactory proof of such fact by affidavit. But the provisions of this section shall not be applicable to the counties of Kings, New York and Erie. All other acts or sections of acts conflicting herewith are hereby repealed.

2 R. S. 647, § 40 (2 Edm. 666); L. 1860, ch. 427; L. 1864, ch. 371; L. 1896, ch. 420; L. 1899, ch. 525; L. 1903, ch. 487; L. 1904, ch. 162; L. 1905, ch. 304; L. 1906, ch. 117; L. 1909, ch. 174; L. 1913, ch. 257. In effect Sept. 1, 1913.

§ 3313. Fees of trial jurors.

A trial juror, in an action or a special proceeding, in a court of record, is entitled, except as otherwise specially prescribed by statute in a particular court, or a particular county, to the following fees: twenty-five cents for each cause in which he is empanelled, to be paid by the party noticing the cause for trial; or, if it is noticed by more than one party, by the party whom the court directs to pay it.

2 R. S. 643, § 37 (2 Edm. 662).

§ 3314. [Am'd, 1897, 1898, 1899, 1900, 1903, 1904, 1906, 1907, 1913.] Supervisors may make allowance to grand and trial jurors.

In the counties within the city of New York the board of aldermen, and in any other county the board of supervisors, may direct that a sum, not exceeding three dollars in addition to the fees prescribed in the last section, or in any other statutory provision, be allowed to each grand juror, and each trial juror for each day's attendance at a term of a court of record, of civil or criminal jurisdiction, held within their county. If a different rate is not otherwise established as herein provided, each juror is entitled to five cents for each mile necessarily traveled by him in going to and returning from the term; but such board of aldermen or board of supervisors may establish a lower rate. A juror is entitled to mileage for actual travel once in each calendar week during the term, except that in the counties of Queens, Rockland and Orange, grand and trial jurors may be paid four cents a mile for each mile necessarily traveled in going to and returning for each day of actual travel during the term in lieu of any other mileage. The sum so established or allowed must be paid by the county treasurer upon the certificate of the clerk of the court, stating the number of days that the juror actually attended, and the number of miles traveled by him in order to attend. If a juror in attendance at a term of a court of record cannot reach his home upon the day he is excused from attendance, he shall be entitled to compensation for an additional day, and the clerk shall certify accordingly upon satisfactory proof of such fact by affidavit. The amount so paid must be raised in the same manner as other county charges are raised.

2 R. S. 643, § 37, am'd, L. 1866, ch. 307 (6 Edm. 716), am'd, L. 1897, ch. 23; L. 1898, ch. 393; L. 1899, ch. 439; L. 1900, ch. 585; L. 1906, ch. 247; L. 1904, ch. 181; L. 1907, ch. 77; L. 1906, ch. 834; L. 1907, ch. 148; L. 1913, ch. 257. In effect Sept. 1, 1913.

§ 3315. Id.; extra pay upon protracted trials.

Where the trial, by a jury, of an issue of fact, in either a civil or a criminal action or special proceeding, in a court of record, occupies more than thirty days, the court, by an order entered in the minutes, may fix and allow, to each juror, such an extra compensation as it deems reasonable, for his services thereupon; the amount of which compensation, together with the expenses, actually and necessarily incurred, for food for the jurors during the trial, is a county charge.

L. 1876, ch. 835, am'd.

§ 3316. Juror's fees in special proceedings.

A trial juror, sworn in a special proceeding, before a judge of a court of record; or upon a writ of inquiry; or upon a trial, before a sheriff, of a claim to personal property, seized by virtue of a warrant of attachment or an execution; is entitled to twenty-five cents, to be paid by the person at whose instance the jury is empanelled.

2 R. S. 643, part of § 37.

§ 3317. [Am'd, 1900.] Fees of printers.

Except as otherwise specially prescribed by law, the proprietor of a newspaper is entitled, for publishing summons, notice, order, citation or other advertisement, required by law to be published, other than the session laws, for each folio, to seventy-five cents for the first insertion, and fifty cents for each subsequent insertion. In counties containing wholly or partially cities of the first class, the proprietor of a newspaper is entitled for publishing such notices, matters and advertisements aforesaid, other than the session laws, for each folio, to one dollar for the first insertion, and seventy-five cents for each subsequent insertion. The compensation for publishing the session laws must be fixed by the board of supervisors at not more than fifty cents for each folio.

L. 1859, ch. 252 (4 Edm. 700); L. 1868, ch. 831 (7 Edm. 482); L. 1874, ch. 416 (9 Edm. 908); L. 1900, ch. 407. In effect April 12, 1900.

§ 3318. Witnesses' fees generally.

A witness in an action or a special proceeding, attending before a court of record, or a judge thereof, is entitled, except where another fee is specially prescribed by law, to fifty cents for each day's attendance; and, if he resides more than three miles from the place of attendance, to eight cents for each mile, going to the place of attendance.

L. 1840, ch. 386, § 8 (4 Edm. 689).

§ 3319. Id.; on deposition to be used in another State.

A witness, attending before a commissioner or an officer, authorized to take his deposition to be used without the State, in a case other than one specified in section 3327 of this act, is entitled to two dollars for each day's actual attendance and to eight cents for each mile, going to the place of attendance.

2 R. S. 398, § 31, am'd; L. 1867, ch. 68, § 2 (7 Edm. 53).

§ 3320. [Am'd, 1892, 1899, 1902, 1904, 1909.] Receiver's commissions; cost of bonds; trustees' commissions.

A receiver, except as otherwise specially prescribed by statute, is entitled, in addition to his necessary expenses, to such commissions, not exceeding five per centum upon the sums received and disbursed by him, as the court by which, or the judge by whom, he is appointed allows. But if in any case the commissions of a temporary or permanent receiver, so computed, shall not amount to one hundred dollars, said court or judge may, in its or his discretion, allow said receiver such a sum, not exceeding one hundred dollars, for his commissions as shall be commensurate with the services rendered by said receiver. Any receiver, assignee, guardian, trustee, committee, executor, administrator or person appointed under section one hundred and eleven of the real property law or under section twenty of the personal property law required by law to give a bond as such may include as a part of his necessary expenses, such reasonable sum, not exceeding one per centum per annum upon the amount of such bond paid his surety thereon, as such court or judge allows. A trustee of an express trust is entitled, and two or more trustees of such a trust are entitled, to be apportioned between or among them according to the services rendered by them respectively, as compensation for services as such, over and above expenses, to commissions as follows: For receiving and paying out all sums of principal not exceeding one thousand

dollars, at the rate of five per centum. For receiving and paying out any additional sums of principal not exceeding ten thousand dollars, at the rate of two and one-half per centum. For receiving and paying out all sums of principal above eleven thousand dollars, at the rate of one per centum. And for receiving and paying out income in each year, at the like rates. In all cases a just and reasonable allowance must be made for the necessary expenses actually paid by such trustee or trustees. If the value of the principal of the trust estate or fund equals or exceeds one hundred thousand dollars, each such trustee is entitled to the full commission on principal, and on income for each year, to which a sole trustee is entitled, unless the trustees are more than three, in which case three full commissions at the rates aforesaid must be apportioned between or among them according to the services rendered by them respectively. If the instrument creating the trust provides specific compensation for the services of the trustee or trustees, no other compensation for such services shall be allowed unless the trustee or trustees shall, before receiving any compensation for such services, by a written instrument duly acknowledged, renounce such specific compensation.

L. 1892, ch. 465; L. 1899, ch. 94; L. 1902, ch. 404; L. 1904, ch. 755, am'd by L. 1909, ch. 65, § 3. See note 87 of notes of Board of Statutory Consolidation at end of code.

§ 3321. Fees of county treasurer and chamberlain of New York.

A county treasurer, or, in the city and county of New York, the chamberlain, is entitled, for the services specified in this section, to the following fees:

For receiving money paid into court, one-half of one per centum, upon the sum so received.

For paying out the same, one-half of one per centum, upon the sum so paid out.

For investing money, pursuant to the direction of a court, one-half of one per centum upon the sum invested, not exceeding two hundred dollars, and one-quarter of one per centum upon the excess, over two hundred dollars.

For receiving the interest upon an investment, and paying the same to the person entitled thereto, one-half of one per centum upon the interest so received and paid.

2 R. S. 639, § 30 (2 Edm. 661), and L. 1849, ch. 357 (4 Edm. 597).

§ 3322. [Am'd, 1904, 1910.] Fees of a justice of the peace.

A justice of the peace is entitled, for the services specified in this section, to the following fees:

1. In an action brought before a justice of the peace:

For a summons, twenty-five cents.

For an order of arrest, twenty-five cents.

For a warrant of attachment, twenty-five cents.

For a requisition in an action for a chattel, twenty-five cents.

For a subpoena, including all the names inserted therein, twenty-five cents.

For the acknowledgment of a power of attorney, twenty-five cents.

For taking an affidavit, or administering an oath, ten cents.

For drawing an affidavit, application, or notice, required by statute, five cents for each folio.

For drawing a bond or an undertaking, twenty-five cents.

For hearing an application for a commission to examine one or more witnesses, fifty cents.

For an order for such commission, and attending, settling, and certifying interrogatories, fifty cents.

For hearing an application to discharge a defendant from arrest, or to vacate or modify a warrant of attachment, or increase the plaintiff's security thereupon, fifty cents.

For an adjournment, except where it is made by the justice upon his own motion, twenty-five cents.

For a venire, twenty-five cents.

For empanelling and swearing a jury, twenty-five cents.

For hearing the plaintiff's evidence, where the defendant does not appear, twenty-five cents.

For the trial of a demurrer, twenty-five cents.

For the trial of an issue of fact, where the defendant appears, one dollar and fifty cents for each day actually spent in the trial.

For receiving and entering the verdict of a jury, twenty-five cents.

For entering judgment, twenty-five cents.

For filing each paper required by statute to be filed, five cents.

For a transcript of a judgment, twenty-five cents.

For a copy of any paper for which a fee is not expressly prescribed by law, six cents for each folio.

For an execution or the renewal of an execution, twenty-five cents.

For making a return upon an appeal from a judgment, two dollars.

For an order directing an action or a special proceeding to be continued before another justice, twenty-five cents.

For services when associated with another justice, in any case where a fee therefor is not expressly prescribed by law, for each day actually spent, two dollars.

2. In a special proceeding, or an action not brought before a justice of the peace:

For a warrant, in a case where a fee therefor is not expressly prescribed by law, twenty-five cents.

For a warrant for the apprehension of a person charged with being the father of a bastard, fifty cents; for indorsing a warrant, issued from another county, twenty-five cents.

For services when associated with another justice, in any case where a fee therefor is not expressly prescribed by law, for each day actually spent, two dollars.

For a precept or other mandate, whereby a special proceeding is commenced, in a case where a fee therefor is not specially prescribed by law, twenty-five cents.

For a view of real property, in a case where it is required by law, fifty cents.

For a warrant of attachment to arrest a delinquent juror or witness, twenty-five cents.

For drawing, signing, and depositing with the clerk, a minute or record of conviction of such a juror or witness, or of any person for contempt, in any case where a fee therefor is not specially prescribed by law, fifty cents.

For an execution upon such a conviction before him, twenty-five cents.

For drawing, copying, and certifying a bond, an undertaking, a recognizance or other written security, and filing the same with the county clerk, or other officer with whom it must be filed, twenty-five cents.

For a warrant of commitment for any cause, twenty-five cents.
For a subpoena, including all the names inserted therein, twenty-five cents.

For a precept to notify a jury, fifty cents.

For empanelling and swearing a jury, twenty-five cents; except in proceedings to alter or lay out a highway, in which case he is entitled to two dollars.

For hearing the matter, concerning which a jury is called, seventy-five cents for each day actually spent.

For receiving and entering the verdict of the jury, and the order, if any, thereupon, twenty-five cents.

For any service for which a fee is not expressly allowed by this subdivision, and for which, if rendered in an action before a justice, a fee is allowed by the first subdivision of this section, the fee allowed in such an action for the same service.

For taking the deposition of a witness, upon an order made, or commission issued, by a court of record of the state, or a court in another state or a territory, or a foreign country, ten cents for each folio.

For making the necessary return and certificate thereto, fifty cents.

For taking an affidavit or administering an oath, ten cents.

2 R. S. 264, § 228 (2 Edm. 272), am'd, and 2 R. S. 637, § 29 (2 Edm. 358), am'd; L. 1904, ch. 282, and L. 1910, ch. 324. In effect Sept. 1. 1910.

§ 3323. [Am'd, 1890.] Constable's fees.

A constable is entitled, for the services specified in this section, to the following fees:

1. In an action brought before a justice of the peace, or in a justices' court of a city.

For serving a summons, twenty-five cents.

For serving a summons and executing an order of arrest, one dollar.

For serving a summons and levying a warrant of attachment, one dollar.

For serving a summons and affidavit, and executing a requisition, in an action for a chattel, one dollar.

For serving an order, directing the action to be continued before a justice, other than the one before whom it is pending, and for attending before the latter, fifty cents, and fifty cents in addition if he so attends with a person in his custody.

For collecting money by virtue of an execution, for every dollar collected, to the amount of fifty dollars, five cents; for every dollar collected over fifty dollars, two and one-half cents. Where a judgment or an execution is settled after a levy, the constable is entitled to poundage upon the sum at which the settlement is made, not exceeding the value of the property levied upon.

For each mile necessarily traveled, going and returning, to serve a summons or to serve or execute any other mandate, except a venire, the distance to be computed from the place of abode of the person served, or the place where it is served, to

the place where it is returnable, ten cents; but where two or more mandates in one action are served or executed upon one journey, or where a mandate is served upon or executed against two or more persons in one action, he is entitled, in all, to only ten cents for each mile necessarily travelled.

For notifying the plaintiff of the execution of an order of arrest, twenty-five cents; and for going to the plaintiff's residence, or, if he is found elsewhere, to the place where he is found, to serve such a notice, for each mile travelled, going and returning, ten cents.

For subpoenaing each witness, not exceeding four, twenty-five cents.

For notifying the jurors to attend a trial, one dollar and fifty cents.

For taking charge of a jury during their deliberations, fifty cents.

Where witnesses, not exceeding four, are subpoenaed by any person other than a constable, the fee therefor is ten cents each. (Subd. am'd by L. 1890, ch. 21.)

2. In a special proceeding.

For notifying jurors to attend to assess damages, in proceedings relating to highways, two dollars.

For notifying jurors to attend in any other case, unless a fee therefor is specially prescribed by law, for each person notified, ten cents; and for each mile actually and necessarily travelled, going from and returning to his place of residence, ten cents.

For serving a precept or other mandate, by which the special proceeding is commenced, twenty-five cents.

For serving a warrant, in any case where a fee therefor is not specially prescribed by law, fifty cents.

For serving an order, directing the special proceeding to be continued before a justice other than the one before whom it is pending, and for attending before the latter, with or without a person in his custody, one dollar.

For arresting and committing any person, pursuant to process, one dollar.

For subpoenaing each witness, not exceeding four, twenty-five cents.

For each mile necessarily travelled, going and returning, to serve or execute a mandate, the distance to be computed from the place where it is served or executed, to the place where it is returnable, unless a different rate of travel fees upon the service or execution thereof is specially prescribed by statute, ten cents. Where two or more mandates are served or executed in one special proceeding, the limitation upon the amount of travel fees specified in the last preceding subdivision applies.

2 R. S. 265, § 228 (2 Edm. 273), am'd; also, § 228, R. S.; L. 1866, ch. 692, § 7 (6 Edm. 806); L. 1869, ch. 820, § 1 (7 Edm. 490); L. 1875, ch. 334, § 1.

§ 3324. Id.: affidavit upon claim for travel fees.

A constable, who charges any travelling fees, must show, by affidavit, that the travel was necessary, to perform the service with respect to which it is charged; that no more miles are charged for, than were actually and in good faith travelled for that purpose; that he had, at the time, no other official or private business upon the route so travelled; and that the travelling fees are charged upon one mandate only, which must be attached to or described in the affidavit. The justice taxing the fees must be satisfied that the miles charged for were actually and necessarily travelled, as stated in the affidavit.

L. 1869, ch. 820, § 2 (7 Edm. 490).

§ 3325. Justice's court, fees upon a commission.

A party recovering costs in an action before a justice of the peace, in whose behalf a commission has been issued, and who introduces in evidence a deposition taken thereunder, is entitled to recover his actual disbursements thereupon, not exceeding the following sums: commissioners' fees for taking and returning testimony, one dollar; each subpoena issued, or oath administered, by the commissioner, six cents; expense of serving each subpoena, twenty-five cents; each witness's fees for each day's attendance before the commissioner, twenty-five cents; postage for sending and returning the commission and papers annexed thereto, one dollar.

L. 1841, ch. 138, § 3 (4 Edm. 546).

§ 3326. Id.; jurors' fees.

Except as otherwise specially prescribed by law, a person, notified to attend as a juror, is entitled to twenty-five cents for attending and serving upon the trial of an action or the hearing of a special proceeding, before a justice of the peace; and to ten cents for attending to serve, where he is not sworn.

2 R. S. 265, § 228 (2 Edm. 273); L. 1866, ch. 692, § 9 (6 Edm. 806).

§ 3327. Id.; witnesses' fees.

A witness is entitled to twenty-five cents for each day's actual attendance, before a justice of the peace, in an action or a special proceeding, or before a commissioner appointed by a justice of the peace, or before a justice of the peace taking a deposition to be used in a court, not of record, of another State, or a territory of the United States.

Part of § 228, R. S., and § 10 of act of 1866.

§ 3328. Id.; fees to be paid before services rendered.

A justice of the peace, or a constable, juror, or witness, before a justice of the peace, is not obliged to render any service specified in this title, without the previous payment or tender of his fee therefor.

2 R. S. 650, part of § 6 (2 Edm. 670).

§ 3329. Id.; by whom fees to be paid.

In an action before a justice of the peace, if any services are rendered for a party, and he neglects to pay the fees allowed therefor by law, the other party may pay those fees, and the amount thereof must be taxed as part of his costs, if he recovers costs.

§ 3330. Certain special provisions excepted from this title.

The allowance of a fee, by this title, does not apply to a case, where special provision is otherwise made by statute for compensation for a particular service.

§ 3331. Provision as to change in fees.

Where an officer has, when this title takes effect, commenced the performance of a service, for which a fee is allowed by the statutes heretofore in force, he is entitled to the fee so allowed, for the completion of that service, and he is not entitled to the fee for the same, or a corresponding service, allowed by this title.

§ 3331a. [Added, 1909.] Presentation of claims by jurors and disposition of unclaimed fees.

All jurors including those in a criminal action or special proceeding in a court or before an officer duly summoned and who served as provided for by the laws of this state and are entitled to payment therefor, must present their claims to the proper official designated by law for the payment of juror's fees, on or before the thirty-first day of December of the year succeeding or following the year in which such services were rendered and performed, and failure to comply with this provision shall be a forfeiture of the payment for such claims or services thereafter. All notices issued requiring jurors to attend at a term of court or at a meeting of the grand jury, shall have printed thereon the foregoing provision relating to forfeiture of fees. All moneys or jurors' fees forfeited by the provisions of this section shall be transferred and applied to the fund of such county or city, from which they were paid, on or before the first day of March, in each year.

Added by L. 1909, ch. 65. Derivation — L. 1899, ch. 150, §§ 1-3. See note 21 of notes of Board of Statutory Consolidation at end of code.

§ 3332. This title applies to civil cases only.

Except as otherwise expressly prescribed therein, this title does not apply to a service rendered in a criminal action or special proceeding, in a court or before an officer.

CHAPTER XXII.

Definitions and Regulations Concerning the Construction, Effect, and Application of this Act.

TITLE I.—General Definitions, and Rules of Construction.

TITLE II.—Provisions Regulating the Effect and Application of this Act.

TITLE I.

General definitions, and rules of construction.

Sec. 3333. Definition of "action".

3334. Id.: "special proceeding".

3335. Division of actions into civil and criminal.

3336. Definition of "criminal action".

3337. Id.: "civil action".

3338. Parties to a civil action.

3339. Only one form of civil action.

3340. Rule of construction as to publication, etc., in certain cases.

3341. Id.: as to certain special provisions relating to New-York city.

3342. Id.: as to county court.

3343. Miscellaneous general definitions and rules of construction.

§ 3333. Definition of "action".

The word "action", as used in the New Revision of the Statutes, when applied to judicial proceedings, signifies an ordinary prosecution, in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

Co. Proc., § 2.

§ 3334. Id.; "special proceeding".

Every other prosecution by a party, for either of the purposes specified in the last section, is a special proceeding.

Id., § 3.

§ 3335. Division of actions into civil and criminal.

Actions are of two kinds;

1. Civil.

2. Criminal.

Id., § 4.

§ 3336. Definition of "criminal action".

A criminal action is prosecuted by the people of the State, as a party, against a person charged with a public offence, for the punishment thereof.

Id., § 5.

§ 3337. Id.; "civil action".

Every other action is a civil action.

Id., § 6.

§ 3338. Parties to a civil action.

The party prosecuting a civil action is styled the plaintiff; the adverse party is styled the defendant.

Id., § 70.

§ 3339. Only one form of civil action.

There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished.

Co. Proc., § 69.

§ 3340. Rule of construction as to publication, etc., in certain cases.

Each provision of this act, requiring the publication of a summons, notice, or other paper, in one or more newspapers, or authorizing or requiring a court, or a judge, to designate one or more newspapers, in which such a publication must be made, or requiring the posting of a notice or other paper, is to be construed as not affecting any special provision of the statutes, remaining unrepealed after the former provision takes effect, prescribing one or more particular newspapers, in which such a publication must or may be made, or one or more particular places in which notices or other legal papers must or may be posted, in a particular locality, or in a particular case.

§ 3341. Id.; as to certain special provisions relating to New-York city.

Each provision of this act is to be construed as not affecting any special provision of the statutes, remaining unrepealed after the former provision takes effect, which is applicable exclusively to an action against the mayor, aldermen, and commonalty of the city of New-York, including the recovery, entry, and collection of a judgment in such an action.

§ 3342. Id.; as to county court.

Each provision of this act conferring power upon, or authorizing a proceeding to be taken, at a general, special, or trial term, which is applicable to a county court, is to be construed as applying to any term of the county court, held pursuant to an appointment made as prescribed by law.

§ 3343. [Am'd, 1909.] Miscellaneous general definitions and rules of construction.

In construing this act, the following rules must be observed, except where a contrary intent is expressly declared in the provision to be construed, or plainly apparent from the context thereof:

1. [Subdiv. 1 repealed Jan. 1, 1896; L. 1895, ch. 946.]

2. The word "mandate", includes a writ, process, or other written direction, issued pursuant to law, out of a court, or made pursuant to law, by a court, or a judge, or a person acting as a judicial officer, and commanding a court, board, or other body, or an officer, or other person, named or otherwise designated therein, to do, or to refrain from doing, an act therein specified.

3. The word, "judge", includes a justice, surrogate, recorder, justice of the peace, or other judicial officer, authorized or required to act, or prohibited from acting, in or with respect to the matter or thing, referred to in the provision wherein that word is used.

4. The word, "clerk", signifies the clerk of the court, wherein the action or special proceeding is brought, or wherein, or by whose authority, the act is to be done, which is referred to in the provision in which it is used. If the action or special proceeding is brought, or the act is to be done, in or by the authority of the supreme court, it signifies the clerk of the county wherein the action or special proceeding is triable, or the act is to be done.

5. The word, "report", when used in connection with a trial, or other inquiry, or a judgment, means a referee's report; and the word, "decision", when used in the same connection, means the decision of the court upon a hearing, or the trial of an issue, before the court, without a jury.

6, 7, 8. [Repealed, 1892, ch. 677.]

9. A "personal injury" includes libel, slander, criminal conversation, seduction, and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff, or of another. (See § 1910, subd. 1.)

10. An "injury to property" is an actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract.

11. The word, "affidavit", includes a verified pleading in an action, or a verified petition or answer in a special proceeding.

12. A warrant of attachment against property is said to be "annulled", when the action, in which it was granted, abates or is discontinued; or a final judgment, rendered therein in favor of the plaintiff, is fully paid; or a final judgment is rendered therein in favor of the defendant. But, in the case last specified, a stay of proceedings suspends the effect of the annulment, and the reversal or vacating of the judgment revives the warrant.

13. The term, "judgment creditor", signifies the person who is entitled to collect, or otherwise enforce, in his own right, a judgment for a sum of money, or directing the payment of a sum of money.

14. A "judgment creditor's action" is an action brought as prescribed in article first of title fourth of chapter fifteenth of this act, or any other action, brought by a judgment creditor to aid the collection of a judgment for a sum of money, or directing the payment of a sum of money.

15. [Repealed, 1892, ch. 677.]

16. A "distinct parcel" of real property is a part of the property which is or may be set off by boundary lines, as distinguished from an undivided share or interest therein.

17. [Repealed, 1892, ch. 677.]

18. A "domestic corporation" is a corporation created by or under the laws of the State; or located in the State, and created by or under the laws of the United States, or by or pursuant to the laws, in force in the colony of New-York, before the 19th day of April, in the year 1775. Every other corporation is a "foreign corporation".

19. The terms, "trial juror", and "trial jury", are respectively equivalent to the terms, "petit juror", and "petit jury", as used

in the constitution and laws of the State. The word, "notify", as used, with respect to procuring the attendance of a juror, is equivalent to the word, "summon", as used in the like connection, in the same constitution and laws.

20. The word, "action", refers to a civil action; the word "judgment", to a judgment in such an action; the term, "special proceeding", to a civil special proceeding; the word, "order", to an order made in such an action or special proceeding; the words, "an action of ejectment", to an action to recover the immediate possession of real property.

21-24. [Repealed, 1892, ch. 677.]

L. 1876, ch. 449, § 2; Co. Proc., § 466; Id., § 462; Id., § 463; Id., § 464; L. 1875, ch. 27; 2 R. S. 650, § 4 (2 Edm. 669). Am'd. L. 1909, ch. 65, § 3. See note 88 of notes of Board of Statutory Consolidation at end of code.

TITLE II.**Provisions regulating the effect and application of this act.****Sec. 3344. Short title of this act.****3345. Rule of strict construction not applicable thereto.****3346. Punishment of crimes and misdemeanors created thereby.****3347. Application of certain portions thereof regulated and qualified.****3348. Id.; what deemed commencement of action, etc.****3349. Id.; when proceedings to be under former statutes.****3350. Effect of this act upon trial jurors and juries, in criminal causes.****3351. Id.; upon grand jurors and juries.****3352. Id.; upon proceedings taken, or rights accrued, etc., under former statutes.****3353. Id.; upon former appointment of terms.****3354. Id.; upon officers and offices.****3355. When this act deemed to have been passed, etc.****3356. When this act takes effect.****§ 3344. Short title of this act.**

This act constitutes a portion of the New Revision of the Statutes. It may be styled, in any act of the legislature or proceeding in a court of justice, or wherever it is otherwise referred to, "The Code of Civil Procedure".

L. 1876, ch. 449, § 1.

§ 3345. Rule of strict construction not applicable thereto.

The rule of the common law, that a statute in derogation of the common law is strictly construed, does not apply to this act.

Co. Proc., § 467.

§ 3346. Punishment of crimes and misdemeanors created thereby.

Where it is prescribed, in a provision of this act, that a person doing or omitting to do any act is guilty of a particular crime, or, generally, of a misdemeanor, he shall be punished therefor in the manner and to the extent, prescribed by the statutes remaining unrepealed after the provision in question takes effect, for the punishment of the crime so specified; or for the punishment of a misdemeanor, the punishment of which is not specially prescribed in the statute defining it.

§ 3347. [Am'd. 1895, 1909.] Application of certain portions thereof regulated and qualified.

The application and effect of certain portions of this act are declared and regulated as follows: except that, where a particular provision, included within a chapter or a portion of a chapter, specified in a subdivision of this section, expressly designates the courts, persons, or proceedings, affected thereby, that provision is deemed excluded from the application and effect, prescribed in the subdivision.

1. [Am'd. 1909.] In chapter second, the prisoners referred to are civil prisoners only, except that article third of title second thereof, applies to all prisoners, civil or criminal.

2. In chapter third, sections 303, 304, 305, and 306 apply to trial jurors upon the trial of an indictment or other criminal cause; as prescribed in subdivision seventh of this section, with respect to the application of titles third and fourth of chapter tenth, and as specified in the next two sections.

3. [Am'd, 1913.] In chapter fifth, sections four hundred and forty-six, four hundred and forty-nine, four hundred and fifty, four hundred and fifty-four, four hundred and fifty-five, and four hundred and fifty-eight to four hundred and sixty-eight, both inclusive, and in chapter sixth, section five hundred and thirty-two, apply to an action commenced, in any court of the state.

4. [Am'd, 1895, 1913.] The remainder of chapters fifth and sixth, apply only to an action commenced in a court of record.

5. [Am'd, 1909.] Chapter seventh, excluding articles first and second of title fourth thereof, applies only to an action, in one of the courts specified in subdivision fourth of this section, in which an application for an order of arrest, an injunction order, or a warrant of attachment against property, is made, on or after the first day of September, 1877. Articles first and second of title fourth of that chapter apply only to proceedings taken, in one of those courts, on or after that date.

6. [Am'd, 1882.] Chapter eight applies only to the proceedings taken on or after the first day of September, 1877, in an action or special proceeding in one of the courts specified in subdivision fourth of this section; except that sections 721, 722, 724 to 727, both inclusive, and 817 to 819, both inclusive, apply to all courts of record; sections 728, 729, 730, 749, 787, 788, 810 to 816, both inclusive, and 828, to proceedings, taken on or after that day, in any court or before any officer or body; and sections 723, 764, 765, 785, 789, 790, and 825, to all courts.

7. [Am'd, 1909.] In chapter tenth, titles first, second, and sixth, and article second of title fifth, apply only to proceedings taken, on or after the first day of September, 1877, in one of the courts specified in subdivision fourth of this section. Article third of title third and article first of title fifth, of that chapter apply only to jurors drawn for, and juries formed at, a term of a court, commencing not less than twenty days after the first day of May, 1877. Subject to that qualification, they apply to jurors selected under the statutes, remaining unrepealed after that day, and the lists and ballots prepared accordingly, until new jurors are selected, and new lists and ballots are prepared, as prescribed in those titles. The same portions of chapter tenth, excluding article third of title third, apply equally to a criminal and a civil action or special proceeding, and to a court of criminal and a court of civil jurisdiction. Article third of title third of this act and article sixteen of the judiciary law do not affect any special provision of law, remaining unrepealed after the first day of May, 1877, whereby trial jurors are directed to be procured, for a particular court of record, from a particular locality; or whereby a county is divided into two or more jury districts, and the selecting, drawing, summoning, or attendance of jurors from the particular locality, or the different jury districts, is regulated. Each of those provisions becomes applicable to and affects the selecting, drawing, notifying, or attendance of jurors, as prescribed in those articles, in like manner as they applied to and affected the statutes previously in force, upon the same subject. So much of the provisions of articles seventeen and eighteen of the judiciary law, as relates to the remission or enforcement of a fine imposed upon a trial juror, applies to a fine imposed upon a grand juror, as prescribed in the statutes remaining unrepealed after the first day of May, 1877.

8. In chapter eleventh, articles first and second of title first, and the whole of title third, apply only to proceedings in one of the courts specified in subdivision fourth of this section, taken

TITLE II.

Provisions regulating the effect and application of this act.

Sec. 3344. Short title of this act.

- 3345. Rule of strict construction not applicable thereto.
- 3346. Punishment of crimes and misdemeanors created thereby.
- 3347. Application of certain portions thereof regulated and qualified.
- 3348. Id.; what deemed commencement of action, etc.
- 3349. Id.; when proceedings to be under former statutes.
- 3350. Effect of this act upon trial jurors and juries, in criminal causes.
- 3351. Id.; upon grand jurors and juries.
- 3352. Id.; upon proceedings taken, or rights accrued, etc., under former statutes.
- 3353. Id.; upon former appointment of terms.
- 3354. Id.; upon officers and offices.
- 3355. When this act deemed to have been passed, etc.
- 3356. When this act takes effect.

§ 3344. Short title of this act.

This act constitutes a portion of the New Revision of the Statutes. It may be styled, in any act of the legislature or proceeding in a court of justice, or wherever it is otherwise referred to, "The Code of Civil Procedure".

L. 1876, ch. 449, § 1.

§ 3345. Rule of strict construction not applicable thereto.

The rule of the common law, that a statute in derogation of the common law is strictly construed, does not apply to this act.

Co. Proc., § 467.

§ 3346. Punishment of crimes and misdemeanors created thereby.

Where it is prescribed, in a provision of this act, that a person doing or omitting to do any act is guilty of a particular crime, or, generally, of a misdemeanor, he shall be punished therefor in the manner and to the extent, prescribed by the statutes remaining unrepealed after the provision in question takes effect, for the punishment of the crime so specified; or for the punishment of a misdemeanor, the punishment of which is not specially prescribed in the statute defining it.

§ 3347. [Am'd, 1895, 1909.] Application of certain portions thereof regulated and qualified.

The application and effect of certain portions of this act are declared and regulated as follows: except that, where a particular provision, included within a chapter or a portion of a chapter, specified in a subdivision of this section, expressly designates the courts, persons, or proceedings, affected thereby, that provision is deemed excluded from the application and effect, prescribed in the subdivision.

1. [Am'd, 1909.] In chapter second, the prisoners referred to are civil prisoners only, except that article third of title second thereof, applies to all prisoners, civil or criminal.

2. In chapter third, sections 303, 304, 305, and 306 apply to trial jurors upon the trial of an indictment or other criminal cause; as prescribed in subdivision seventh of this section, with respect to the application of titles third and fourth of chapter tenth, and as specified in the next two sections.

3. [Am'd, 1913.] In chapter fifth, sections four hundred and forty-six, four hundred and forty-nine, four hundred and fifty, four hundred and fifty-four, four hundred and fifty-five, and four hundred and fifty-eight to four hundred and sixty-eight, both inclusive, and in chapter sixth, section five hundred and thirty-two, apply to an action commenced, in any court of the state.

4. [Am'd, 1895, 1913.] The remainder of chapters fifth and sixth, apply only to an action commenced in a court of record.

5. [Am'd, 1909.] Chapter seventh, excluding articles first and second of title fourth thereof, applies only to an action, in one of the courts specified in subdivision fourth of this section, in which an application for an order of arrest, an injunction order, or a warrant of attachment against property, is made, on or after the first day of September, 1877. Articles first and second of title fourth of that chapter apply only to proceedings taken, in one of those courts, on or after that date.

6. [Am'd, 1882.] Chapter eight applies only to the proceedings taken on or after the first day of September, 1877, in an action or special proceeding in one of the courts specified in subdivision fourth of this section; except that sections 721, 722, 724 to 727, both inclusive, and 817 to 819, both inclusive, apply to all courts of record; sections 728, 729, 730, 749, 787, 788, 810 to 816, both inclusive, and 826, to proceedings, taken on or after that day, in any court or before any officer or body; and sections 723, 764, 765, 785, 789, 790, and 825, to all courts.

7. [Am'd, 1909.] In chapter tenth, titles first, second, and sixth, and article second of title fifth, apply only to proceedings taken, on or after the first day of September, 1877, in one of the courts specified in subdivision fourth of this section. Article third of title third and article first of title fifth, of that chapter apply only to jurors drawn for, and juries formed at, a term of a court, commencing not less than twenty days after the first day of May, 1877. Subject to that qualification, they apply to jurors selected under the statutes, remaining unrepealed after that day, and the lists and ballots prepared accordingly, until new jurors are selected, and new lists and ballots are prepared, as prescribed in those titles. The same portions of chapter tenth, excluding article third of title third, apply equally to a criminal and a civil action or special proceeding, and to a court of criminal and a court of civil jurisdiction. Article third of title third of this act and article sixteen of the judiciary law do not affect any special provision of law, remaining unrepealed after the first day of May, 1877, whereby trial jurors are directed to be procured, for a particular court of record, from a particular locality; or whereby a county is divided into two or more jury districts, and the selecting, drawing, summoning, or attendance of jurors from the particular locality, or the different jury districts, is regulated. Each of those provisions becomes applicable to and affects the selecting, drawing, notifying, or attendance of jurors, as prescribed in those articles, in like manner as they applied to and affected the statutes previously in force, upon the same subject. So much of the provisions of articles seventeen and eighteen of the judiciary law, as relates to the remission or enforcement of a fine imposed upon a trial juror, applies to a fine imposed upon a grand juror, as prescribed in the statutes remaining unrepealed after the first day of May, 1877.

8. In chapter eleventh, articles first and second of title first, and the whole of title third, apply only to proceedings in one of the courts specified in subdivision fourth of this section, taken

on or after the first day of September, 1877. But where an action has been commenced in either of those courts, before that date, a judgment by default must be taken therein, as prescribed by the statutes in force on the thirty-first day of August, 1877.

9. Chapter twelfth does not affect the statutes remaining unrepealed after the first day of September, 1877, touching the review of proceedings in a criminal cause.

10. Chapter thirteenth applies only to an execution issued, on or after the first day of September, 1877, out of a court of record, other than an execution issued out of such a court, and directed, pursuant to law, to a constable or marshal; and to sales and other proceedings, by virtue of an execution directed to a sheriff, and delivered to him, after that date. Sections 1413 and 1414, and sections 1417 to 1427, both inclusive, apply only to a case where such an execution is issued out of one of the courts specified in subdivision fourth of this section; or where a warrant of attachment against property is granted on or after that date, in an action brought in one of those courts. Title third of that chapter applies only to an execution, issued upon a judgment rendered in one of those courts.

11. [Am'd, 1893, 1909.] So much of chapters fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth and twentieth, as regulates the proceedings to be taken in an action or special proceeding, and the effect thereof, applies only to an action or a special proceeding commenced on or after the first day of September, 1880. And all appeals taken from any order, sentence, decree or determination of a surrogate's court made or entered in such court on or after the first day of September, 1880, in any matter or proceeding pending or undetermined in such court on the first day of September, 1880; and all appeals to the court of appeals from any order or judgment of the supreme court affirming, reversing or modifying any such order, sentence, decree or determination of a surrogate's court shall be taken and perfected, heard and decided in conformity to the laws and practice regulating appeals from orders, sentences and decrees of surrogate's court, and the hearing and decision thereof, in force in this State on the thirtieth day of April, 1877, and all appeals from any order, sentence, decree or determination of such court brought in conformity thereto since the first day of September, 1880, are hereby declared to be valid and effectual, except that sections 1670 to 1685, both inclusive, apply also to the proceedings therein specified, taken, after that date, in an action theretofore commenced, or upon a judgment theretofore rendered, and section 1674 applies to a notice of pendency of action theretofore or thereafter filed; sections 1881 to 1892, both inclusive, do not apply to an action upon any bond therein specified, where an order, allowing any person to prosecute the bond in the name of the people, has been duly made before that date and is then in force, in which case future actions upon the same bond are regulated by the laws in force on the day before that date, notwithstanding the repeal thereof; sections 2253 to 2265, both inclusive, apply also where a final determination has been made before the first day of September, 1880, in proceedings taken under any statute superseded by the title containing those sections, and to the process issued thereupon; sections 2320 to 2344, both inclusive, apply also to proceedings taken before that date, under any statute superseded by the title containing them, whether a com-

mittee has or has not been appointed; section 2537 applies also to every payment or deposit therein specified made on or after the first day of September, 1880; section 2756, except the words "upon the hearing before the surrogate" applies to actions theretofore or thereafter commenced pursuant to article second of title three of chapter fifteen; and sections 2798 to 2801, both inclusive, apply also to a case, where a decree for the sale or other disposition of the real property of a decedent, has been duly made, before that date, in a surrogate's court.

12. So much of chapters nineteenth and twentieth, as relates to the jurisdiction of the several courts therein specified, applies only to an action or special proceeding commenced on or after the first day of September, 1880.

13. In chapter twenty-first, titles first, second, and third apply only to an action in one of the courts specified in subdivision fourth of this section.

14. [Added, 1894.] The disqualification of jurors, as provided in section eleven hundred and sixty-six of this act, shall apply to all courts.

Am'd, L. 1893, ch. 42; L. 1894, ch. 725; L. 1895, ch. 946; L. 1909, ch. 65, § 3; L. 1913, ch. 485. In effect Sept. 1, 1913. See notes 89, 90, 91, 92 of notes of Board of Statutory Consolidation at end of code.

§ 3348. Id.; what deemed commencement of action, etc.

Where a provision of this act is made applicable by the last section, to an action or special proceeding commenced on or after a day therein specified, if, before that date, a summons in an action, or a citation issued from a surrogate's court, has been served upon one or more, but not upon all, of the persons to be served; or an order for the service of a summons as prescribed in article second of title first of chapter fifth of this act has been made; or, in a special proceeding, elsewhere than in a surrogate's court, the petition or other paper, upon which the first order, process, or other mandate may be made or issued, has not been presented, the action or special proceeding is not deemed to have been commenced within the meaning of that section.

§ 3349. Id.; when proceedings to be under former statutes.

Where any provision of this act is made applicable to future proceedings in an action or special proceeding, the proceedings therein, until the provision in question becomes applicable, are governed by, and must be conducted according to the laws in force on the day before the provision takes effect, except as otherwise prescribed in subdivision seventh of the last section but one.

§ 3350. Effect of this act, upon trial jurors and juries, in criminal causes.

A jury, for the trial of an indictment or other criminal cause, at a term of a court of record, commencing on or after the twenty-first day of May, 1877, must be procured from the trial jurors selected, drawn, and notified, as prescribed in this act, for the term of the court at which it is triable, including the talesmen or additional jurors, procured as prescribed therein; and the same must be tried by the jury so formed. But the statutes remaining unrevoked after the first day of September, 1877, relating to challenges or disqualifications of petit jurors in a criminal cause, or prescribing the cases where talesmen or additional petit jurors

must be summoned in a criminal cause, remain unaffected by this act, and are applicable to the proceedings taken as prescribed in this act, and to the trial jurors therein specified.

§ 3351. Id.; upon grand jurors and juries.

This act does not affect any provision of the statutes, remaining unrepealed after the first day of September, 1877, relating to grand jurors or grand juries; except as follows:

1. A fine imposed, after the first day of September, 1877, upon a person drawn as a grand juror, and duly summoned to attend a term of a court of record as a grand juror, as prescribed in those statutes, must be imposed as prescribed in article fourth of title third of chapter tenth of this act; and sections 1073 to 1077 of this act, both inclusive, apply to such a person, as if he had been drawn, and notified to attend as a trial juror.

2. Where a provision of those statutes refers to the lists of petit jurors, the ballots containing their names, the box or boxes in which those ballots are deposited or contained, the selecting, drawing, summoning, or empanelling of petit jurors, the imposition of a fine upon a petit juror, or the enforcement, reduction, or remission thereof, it is deemed to refer to the same subject, as provided for in this act, in like manner as it refers to those statutes.

See 2 R. S. 483, 484, §§ 16-21 (2 Edm. 505, 506); 2 R. S. 722, § 13 (2 Edm. 745).

§ 3352. Id.; upon proceedings taken, or rights accrued, etc., under former statutes.

Nothing contained in any provision of this act, other than in chapter fourth, renders ineffectual, or otherwise impairs, any proceeding in an action or a special proceeding, had or taken, pursuant to law, or any other lawful act done, or right, defence, or limitation, lawfully accrued or established, before the provision in question takes effect; unless the contrary is expressly declared in the provision in question. As far as it may be necessary, for the purpose of avoiding such a result, or carrying into effect such a proceeding or other act, or enforcing or protecting such a right, defence, or limitation, the statutes in force on the day before the provision takes effect, are deemed to remain in force, notwithstanding the repeal thereof.

§ 3353. Id.; upon former appointment of terms.

This act does not affect the appointment of a term, or the designation of one or more judges to hold a term, made pursuant to the statutes in force on the thirty-first day of August, 1877, until new terms are appointed, or one or more judges are newly designated, as prescribed in this act.

§ 3354. Id.; upon officers and offices.

This act does not create a vacancy in any office or employment, designated or referred to therein, by the title or description thereof, contained in the statutes in force on the day before the provision referring thereto takes effect, or by another title or description: nor does it affect any provisions of those statutes, relating to the amount, or the time or the mode of payment, of the compensation of an officer or employee, so designated or referred to, who is in office or employed on that day; except that where the tenure of his office or employment is not prescribed in this act,

he may be removed at pleasure by the court, officer, or officers, authorized by this act to appoint a person to discharge the same duties. Until he is removed, or his office or place becomes otherwise vacant, the provisions of this act apply to him, and to the discharge of his duties. The court, officer, or officers, authorized by this act to appoint a person to an office or employment, may from time to time thus fill a vacancy therein.

§ 3355. [Am'd, 1882.] When this act deemed to have been passed, etc.

For the purpose of determining the effect of the different provisions of this act with respect to each other, they are deemed to have been enacted simultaneously. For the purpose of determining the effect of this act upon other acts, and the effect of other acts upon this act, chapters fourteen to twenty-two of this act, both inclusive, are deemed to have been enacted on the sixth day of January, in the year eighteen hundred and eighty; and all acts passed after the last-mentioned date are to have the same effect as if they were passed after this act.

§ 3356. When this act takes effect.

Subject to the qualifications contained in the foregoing sections of this title, this act shall take effect as follows: titles third and fourth, and article first of title fifth of chapter tenth, on the first day of May, in the year 1877; the remainder of chapters first to thirteenth, both inclusive, on the first day of September, in the year 1877; chapters fourteenth to twenty-first, both inclusive, on the first day of September, 1880; and this chapter immediately.

CHAPTER XXIII.

Supplemental Provisions.

TITLE I. — Proceedings for the Condemnation of Real Property.

TITLE II. — Proceedings for the Sale of Corporate Real Property.

TITLE I.

Proceedings for the condemnation of real property.

- Sec. 3357. Title.
 3358. Definitions.
 3359. Proceedings to be taken as prescribed in this title.
 3360. Petition; what to contain.
 3361. Notice to be annexed to petition; service of.
 3362. Service of petition and notice.
 3363. Appearance of infant, idiot, lunatic or habitual drunkard.
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 3365. Answer; what to contain.
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 3382. Power of court to make necessary orders.
 3383. Repealing clause; limitations.
 3384. When act takes effect.

§ 3357. Title.

This title shall be known as the condemnation law.

§ 3358. [Am'd, 1896.] Definitions.

The term "person," when used herein, includes a natural person and also a corporation, joint-stock association, the state and a political division thereof, and any commission, board, board of managers or trustees in charge or having control of any of the charitable or other institutions of the state; the term "real property," any right, interest or easement therein or appurtenances thereto; and the term "owner," all persons having any estate, interest, or easement in the property to be taken, or any lien, charge, or incumbrance thereon. The person instituting the proceedings shall be termed the plaintiff; and the person against whom the proceeding is brought, the defendant.

L. 1896. ch. 589. In effect May 12, 1896.

§ 3359. Proceedings to be taken as prescribed in this title.

Whenever any person is authorized to acquire title to real property, for a public use by condemnation, the proceeding for that purpose shall be taken in the manner prescribed in this title.

§ 3360. Petition; what to contain.

The proceeding shall be instituted by the presentation of a petition by the plaintiff to the supreme court, setting forth the following facts:

1. [Am'd, 1896.] His name, place of residence, and the business in which engaged; if a corporation or joint-stock association, whether foreign or domestic, its principal place of business within the state, the names and places of residence of its principal officers, and of its directors, trustees or board of managers, as the case may be, and the object or purpose of its incorporation or association; if a political division of the state, the names and places of residence of its principal officers; and if the state, or any commission or board of managers or trustees in charge or having control of any of the charitable or other institutions of the state, the name, place of residence of the officer acting in its or their behalf in the proceedings.

2. A specific description of the property to be condemned, and its location, by metes and bounds, with reasonable certainty.

3. The public use for which the property is required and a concise statement of the facts showing the necessity of its acquisition for such use.

4. The names and places of residence of the owners of the property; if an infant, the name and place of residence of his general guardian, if he has one; if not, the name and place of residence of the person with whom he resides; if a lunatic, idiot, or habitual drunkard, the name and place of residence of his committee or trustee, if he has one; if not, the name and place of residence of the person with whom he resides. If a non-resident, having an agent or attorney residing in the state authorized to contract for the sale of the property, the name and place of residence of such agent or attorney; if the name or place of residence of any owner cannot after diligent inquiry be ascertained, it may be so stated with a specific statement of the extent of the inquiry which has been made.

5. That the plaintiff has been unable to agree with the owner of the property for its purchase, and the reason of such inability.

6. The value of the property to be condemned.

7. A statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement, for which the property is to be condemned; and that all the preliminary steps required by law have been taken to entitle him to institute the proceeding.

8. A demand for relief, that it may be adjudged that the public use requires the condemnation of the real property described, and that the plaintiff is entitled to take and hold such property for the public use specified, upon making compensation therefor, and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners for the property so taken.

L. 1896, ch. 589. In effect May 12, 1896.

§ 3361. Notice to be annexed to petition; service of.

There must be annexed to the petition a notice of the time and place at which it will be presented to a special term of the supreme court, held in the judicial district where the property or some portion of it is situated, and a copy of the petition and notice must be served upon all the owners of the property at least eight days prior to its presentation.

§ 3362. Service of petition and notice.

Service of the petition and notice must be made in the same manner as the service of a summons in an action in the supreme court is required to be made, and all the provisions of articles one and two of title one of chapter five of this act, which relate to the service of a summons, either personally or in any other way, and the mode of proving service, shall apply to the service of the petition and notice. If the defendant has an agent or attorney residing in this state, authorized to contract for the sale of the real property described in the petition, service upon such agent or attorney will be sufficient service upon such defendant. In case the defendant is an infant of the age of fourteen years or upwards, a copy of the petition and notice shall also be served upon his general guardian, if he has one; if not, upon the person with whom he resides.

§ 3363. Appearance of infant, idiot, lunatic or habitual drunkard.

If a defendant is an infant, idiot, lunatic or habitual drunkard, it shall be the duty of his general guardian, committee or trustee, if he has one, to appear for him upon the presentation of the petition and attend to his interests, and in case he has none, or in case his general guardian, committee or trustee fails to appear for him, the court shall, upon the presentation of the petition and notice, with proof of service, without further notice, appoint a guardian ad litem for such defendant, whose duty it shall be to appear for him and attend to his interests in the proceeding, and, if deemed necessary to protect his rights, the court may require a general guardian, committee or trustee, or a guardian ad litem to give security in such sum and with such sureties as the court may approve. If a service other than personal has been made upon any defendant, and he does not appear upon the presentation of the petition, the court shall appoint some competent attorney to appear for him and attend to his interests in the proceeding.

§ 3364. Appearance.

The provisions of law and of the rules and practice of the court, relating to the appearance of parties in person or by attorney in actions in the supreme court, shall apply to the proceeding from and after the service of the petition, and all subsequent orders, notices and papers may be served upon the attorney appearing and upon a guardian ad litem in the same manner and with the same effect as the service of papers in an action in the supreme court may be made.

§ 3365. Answer; what to contain.

Upon presentation of the petition and notice with proof of service thereof, an owner of the property may appear and interpose an answer, which must contain a general or specific denial of each material allegation of the petition controverted by him, or of any knowledge or information thereof sufficient to form a belief, or a statement of new matter constituting a defence to the proceeding.

§ 3366. Verification of petition or answer.

A petition or answer must be verified, and the provisions of this act relating to the form and contents of the verification of pleadings in courts of record, and the persons by whom it may be made, shall apply to the verification.

§ 3367. Trial of issues.

The court shall try any issue raised by the petition and answer at such time and place as it may direct, or it may order the same to be referred to a referee to hear and determine, and upon such trial the court or referee shall file a decision in writing, or deliver the same to the attorney for the prevailing party, within twenty days after the final submission of the proofs and allegations of the parties, and the provisions of this act relating to the form and contents of decisions upon the trial of issues of fact by the court or a referee, and to making and filing exceptions thereto, and the making and settlement of a case for the review thereof upon appeal, and to the proceedings which may be had in case such decision is not filed or delivered within the time herein required, and to the powers of the court and referee upon such trial, shall be applicable to a trial and decision under the title.

§ 3368. Certain provisions applicable.

The provisions of title one of chapter eight of this act shall also apply to proceedings had under this title.

§ 3369. [Am'd, 1895.] Judgment; costs when to defendant; commissioners.

Judgment shall be entered pursuant to the direction of the court or referee in the decision filed. If in favor of the defendant, the petition shall be dismissed, with costs to be taxed by the clerk, at the same rates as are allowed, of course, to a defendant prevailing in an action in the supreme court, including the allowances for proceedings before and after notice of trial. If the decision is in favor of the plaintiff, or if no answer has been interposed and it appears from the petition that he is entitled to the relief demanded, judgment shall be entered, adjudging that the condemnation of the real property described is necessary for the public use, and that the plaintiff is entitled to take and hold the property for the public use specified, upon making compensation therefor, and the court shall thereupon appoint three disinterested and competent freeholders, residents of the judicial district embracing the county where the real property or some part of it is situated, or of some county adjoining such judicial district, commissioners to ascertain the compensation to be made to the owners for the property to be taken for the public use specified, and fix the time and place for the first meeting of the commissioners. Provided, however, that in any such proceeding instituted within the first or second judicial district, such commissioners shall be residents of the county where the real property, or some part of it, is situated, or of some adjoining county. If a trial has been had, at least eight days' notice of such appointment must be given to all the defendants who have appeared. The parties may waive, in writing, the provisions of this section as to the residence of the commissioners, and in that case they may be residents of any county in the State. Where owners of separate properties are joined in the same proceeding, or separate properties of the same owner are to be condemned, more than one set of commissioners may be appointed.

L. 1895, ch. 530.

§ 3370. [Am'd, 1898, 1913.] Duties and powers of commissioners.

The commissioners shall take and subscribe the constitutional oath of office. Any of them may issue subpoenas and administer oaths to witnesses; a majority of them may adjourn the proceeding before them, from time to time in their discretion. Whenever they meet, except by appointment of the court or pursuant to

adjournment, they shall cause at least eight days' notice of such meeting to be given to the defendants who have appeared, or their agents or attorneys. They shall view the premises described in the petition, and hear the proof and allegations of the parties, and reduce the testimony taken by them, if any, to writing, and after the testimony in each case is closed, they, or a majority of them, all being present, shall, without unnecessary delay ascertain and determine the compensation which ought justly to be made by the plaintiff to the owners of the property appraised by them; and, in fixing the amount of such compensation, they shall not make any allowance or deduction on account of any real or supposed benefits which the owners may derive from the public use for which the property is to be taken, or the construction of any proposed improvement connected with such public use. But in case the plaintiff is a railroad corporation and such real property shall belong to any other railroad corporation, the commissioners on fixing the amount of such compensation, shall fix the same at its fair value for railroad purposes. They shall make a report of their proceedings to the supreme court with the minutes of the testimony taken by them, if any; and they shall each be entitled to six dollars for services for every day they are actually engaged in the performance of their duties, and their necessary expenses to be paid by the plaintiff; provided, that in proceedings within the counties of New York and Kings such commissioners shall be entitled to such additional compensation not exceeding twenty-five dollars for every such day, as may be awarded by the court, and provided that in proceedings instituted by a village or any board thereof under this title such commissioners shall be entitled to such additional compensation, not exceeding five dollars for every such day, as may be awarded by the court.

Am'd L. 1898, ch. 384; L. 1913, ch. 232. In effect Sept. 1, 1913.

§ 3371. Confirmation or setting aside report; deposit when payable.

Upon filing the report of the commissioners, any party may move for its confirmation at a special term, held in the district where the property or some part of it is situated, upon notice to the other parties who have appeared, and upon such motion, the court may confirm the report, or may set it aside for irregularity, or for error of law in the proceedings before the commissioners, or upon the ground that the award is excessive or insufficient. If the report is set aside, the court may direct a rehearing before the same commissioners, or may appoint new commissioners for that purpose, and the proceedings upon such rehearing shall be conducted in the manner prescribed for the original hearing, and the same proceedings shall be had for the confirmation of the second report, as are herein prescribed for the confirmation of the first report. If the report is confirmed, the court shall enter a final order in the proceeding, directing that compensation shall be made to the owners of the property, pursuant to the determination of the commissioners, and that upon payment of such compensation, the plaintiff shall be entitled to enter into the possession of the property condemned, and take and hold it for the public use specified in the judgment. Deposit of the money to the credit of, or payable to the order of the owner, pursuant to the direction of the court, shall be deemed a payment within the provisions of this title.

§ 3372. Offer to purchase; costs; additional allowance.

In all cases where the owner is a resident and not under legal disability to convey title to real property the plaintiff, before

service of his petition and notice, may make a written offer to purchase the property at a specified price, which must within ten days thereafter be filed in the office of the clerk of the county where the property is situated; and which cannot be given in evidence before the commissioners, or considered by them. The owner may at the time of the presentation of the petition, or at any time previously, serve notice in writing of the acceptance of plaintiff's offer, and thereupon the plaintiff may, upon filing the petition, with proof of the making of the offer and its acceptance, enter an order that upon payment of the compensation agreed upon, he may enter into possession of the real property described in the petition, and take and hold it for the public use therein specified. If the offer is not accepted, and the compensation awarded by the commissioners does not exceed the amount of the offer with interest from the time it was made, no costs shall be allowed to either party. If the compensation awarded shall exceed the amount of the offer with interest from the time it was made, or if no offer was made, the court shall, in the final order, direct that the defendant recover of the plaintiff the cost of the proceeding, to be taxed by the clerk at the same rate as is allowed, of course, to the defendant when he is the prevailing party in an action in the supreme court, including the allowances for proceedings, before and after notice of trial, and the court may also grant an additional allowance of costs, not exceeding five per centum upon the amount awarded. The court shall also direct in the final order what sum shall be paid to the general or special guardian, or committee or trustee of an infant, idiot, lunatic or habitual drunkard, or to an attorney appointed by the court to attend to the interests of any defendant upon whom other than personal service of the petition and notice may have been made, and who has not appeared, for costs, expenses and counsel fees, and by whom or out of what fund the same shall be paid. If a trial has been had, and all the issues determined in favor of the plaintiff, costs of the trial shall not be allowed to the defendant, but the plaintiff shall recover of any defendant answering the costs of such trial caused by the interposition of the unsuccessful defence, to be taxed by the clerk at the same rate as is allowed to the prevailing party for the trial of an action in the supreme court.

§ 3373. Judgment, how enforced; delivery possession of premises; when writ of assistance to issue.

Upon the entry of the final order, the same shall be attached to the judgment-roll in the proceeding, and the amount directed to be paid, either as compensation to the owners, or for the costs or expenses of the proceeding, shall be docketed as a judgment against the person who is directed to pay the same, and it shall have all the force and effect of a money judgment in an action in the supreme court, and collection thereof may be enforced by execution and by the same proceedings as judgments for the recovery of money in the supreme court may be enforced under the provisions of this act. When payment of the compensation awarded, and costs of the proceeding, if any, has been made, as directed in the final order, and a certified copy of such order has been served upon the owner, he shall, upon demand of the plaintiff, deliver possession thereof to him, and in case possession is not delivered when demanded, the plaintiff may apply to the court without notice, unless the court shall require notice to be given, upon proof of such payment and of service of the copy order, and of the demand and non-compliance therewith, for

a writ of assistance, and the court shall thereupon cause such writ to be issued, which shall be executed in the same manner as when issued in other cases for the delivery of possession of real property.

§ 3374. [Am'd, 1894.] Abandonment and discontinuance of proceeding.

Upon the application of the plaintiff to be made at any time after the presentation of the petition and before the expiration of thirty days after the entry of the final order, upon eight days' notice of motion to all other parties to the proceeding who have appeared therein or upon an order to show cause, the court may, in its discretion, and for good cause shown, authorize and direct the abandonment and discontinuance of the proceeding, upon payment of the fees and expenses, if any, of the commissioners, and the costs and expenses directed to be paid in such final order. If such final order shall have been entered, and upon such other terms and conditions as the court may prescribe; and upon the entry of the order granting such application and upon compliance with the terms and conditions therein prescribed, payment of the amount awarded for compensation, if such compensation shall have been theretofore awarded, shall not be enforced, but in such case, if such abandonment and discontinuance of the proceeding be directed upon the application of the plaintiff, the order granting such application, if permitting a renewal of such proceedings, shall provide that proceedings to acquire title to such lands or any part thereof shall not be renewed by the plaintiff without a tender or deposit in court of the amount of the award and interest thereon.

L. 1894, ch. 475.

§ 3375. [Am'd, 1895.] Appeal from final orders; stay.

Appeal may be taken to the appellate division of the supreme court from the final order, within the time provided for appeals from orders by title four of chapter twelve of this act; and all the provisions of such chapter relating to appeals to the appellate division of the supreme court from orders of the special term shall apply to such appeals. Such appeal will bring up for review all the proceedings subsequent to the judgment, but the judgment and proceedings antecedent thereto may be reviewed on such appeal, if the appellant states in his notice that the same will be brought up for review, and exceptions shall have been filed to the decision of the court or the referee, and a case or a case and exceptions shall have been made, settled and allowed, as required by the provisions of this act, for the review of the trial of actions in the supreme court without a jury. The proceedings of the plaintiff shall not be stayed upon such an appeal, except by order of the court, upon notice to him, and the appeal shall not affect his possession of the property taken, and the appeal of a defendant shall not be heard except on his stipulation not to disturb such possession.

L. 1895, ch. 946.

§ 3376. [Am'd, 1895.] Appeal from judgment by plaintiff.

If a trial has been had and judgment entered in favor of the defendant, the plaintiff may appeal therefrom to the appellate division of the supreme court within the time provided for appeals from judgments by title four of chapter twelve of this act,

and all the provisions of said chapter relating to appeals from judgments shall apply to such appeals; and on the hearing of the appeal the appellate division may affirm, reverse or modify the judgment, and in case of reversal may grant a new trial, or direct that judgment be entered in favor of the plaintiff. If the judgment is affirmed, costs shall be allowed to the respondent, but if reversed or modified, no costs of the appeal shall be allowed to either party.

L. 1896, ch. 946.

§ 3377. When general term may direct a new appraisal.

On the hearing of the appeal from the final order the court may direct a new appraisal before the same or new commissioners, in its discretion, and the report of such commissioners shall be final and conclusive upon all parties interested. If the amount of the compensation to be paid is increased by the last report, the difference shall be a lien upon the land appraised, and shall be paid to the parties entitled to the same, or shall be deposited as the court shall direct; and if the amount is diminished, the difference shall be refunded to the plaintiff by the party to whom the same may have been paid, and judgment therefor may be rendered by the court, on the filing of the last report, against the parties liable to pay the same.

§ 3378. Conflicting claimants.

If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the property taken, the court may direct the money to be paid into the court by the plaintiff, and may determine who is entitled to the same, and direct to whom the same shall be paid, and may, in its discretion, order a reference to ascertain the facts on which such determination and direction are to be made.

§ 3379. [Am'd, 1900.] Party in possession may stay on giving security.

At any stage of the proceeding the court may authorize the plaintiff, if in possession of the property sought to be condemned, to continue in possession, and may stay all actions or proceedings against him on account thereof, upon giving security, or depositing such sum of money as the court may direct to be held as security for the payment of the compensation which may be finally awarded to the owner therefor and the costs of the proceedings, and in every such case the owner may conduct the proceeding to a conclusion, if the plaintiff delays or neglects to prosecute the same. When the final award to any owner is less than fifty dollars, in proceedings to condemn a right of way, for telephone or telegraph poles and wires, the allowance of costs, if any, and the amount thereof not exceeding that prescribed by statute, shall be in the discretion of the court in any action or proceeding that may have been or may hereafter be stayed, if the telephone or telegraph poles and wires, in such action or proceeding so stayed, shall have been erected for more than three years prior to the commencement thereof.

L. 1900, ch. 74. In effect Sept. 1, 1900.

§ 3380. Temporary possession pending proceedings.

When an answer to the petition has been interposed, and it appears to the satisfaction of the court that the public interest will be prejudiced by delay, it may direct that the plaintiff be permitted to enter immediately upon the real property to be taken, and devote it temporarily to the public use specified in the petition, upon depositing with the court the sum stated in the answer as the value of the property, and which sum shall be applied, so far as it may be necessary for that purpose, to the payment of the award that may be made, and the costs and expenses of the proceeding, and the residue, if any, returned to the plaintiff, and, in case the petition should be dismissed, or no award should be made, or the proceedings should be abandoned, by the plaintiff, the court shall direct that the money so deposited, so far as it may be necessary, shall be applied to the payment of any damages which the defendant may have sustained by such entry upon and use of his property, and his costs and expenses of the proceeding, such damages to be ascertained by the court, or a referee to be appointed for that purpose, and if the sum so deposited shall be insufficient to pay such damages, and all costs and expenses awarded to the defendant, judgment shall be entered against the plaintiff for the deficiency, to be enforced and collected in the same manner as a judgment in the supreme court; and the possession of the property shall be restored to the defendant.

§ 3381. Notice of pendency of action to be filed.

Upon service of the petition, or at any time afterwards before the entry of the final order, the plaintiff may file in the clerk's office of each county where any part of the property is situated, a notice of the pendency of the proceeding, stating the names of the parties and the object of the proceeding, and containing a brief description of the property affected thereby, and from the time of filing, such notice shall be constructive notice to a purchaser, or incumbrancer of the property affected thereby, from or against a defendant with respect to whom the notice is directed to be indexed, as herein prescribed, and a person whose conveyance or incumbrance is subsequently executed or subsequently recorded, is bound by all proceedings taken in the proceeding after the filing of the notice, to the same extent as if he was a party thereto. The county clerk must immediately record such notice when filed in the book in his office kept for the purpose of recording notices of pendency of actions, and index it to the name of each defendant specified in the direction appended at the foot of the notice, and subscribed by the plaintiff or his attorney.

§ 3382. Power of court to make necessary orders.

In proceedings under this title, where the mode or manner of conducting all or any of the proceedings therein is not expressly provided for by law, the court before whom such proceedings may be pending, shall have the power to make all necessary orders and give necessary directions to carry into effect the object and intent of this title, and of the several acts conferring authority to condemn lands for public use, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court.

§ 3383. Repealing clause; limitations.

So much of all acts and parts of acts as prescribe a method of procedure in proceedings for the condemnation of real property for a public use is repealed, except such acts and parts of acts as prescribe a method of procedure for the condemnation of real property for public use as a highway, or as a street, avenue, or public place in an incorporated city or village, or as may prescribe methods of procedure for such condemnation for any public use for, by, on behalf, on the part, or in the name of the corporation of the city of New-York, known as the mayor, aldermen, and commonalty of the city of New-York, or by whatever name known, or by or on the application of any board, department, commissioners or other officers acting for or on behalf or in the name of such corporation or city, or where the title to the real property so to be acquired vests in such corporation or in such city; and all proceedings for the condemnation of real property embraced within the exceptions enumerated in this section are exempted from the operation of this title.

L. 1890, ch. 247.

§ 3384. When act takes effect.

This title shall take effect on the first day of May, one thousand eight hundred and ninety, and shall not affect any proceeding previously commenced.

TITLE II.

Proceedings for the sale of corporate real property.

Sec. 3390. Proceedings by corporations, etc., to be pursuant to the provisions of this title.

3391. Petition and contents.

3392. Hearing of application; notice; referee to take proofs.

3393. Order; when application for, may be opposed.

3394. Insolvent corporation or association; notice to creditors.

3395. Service of notices.

3396. Power of court to make necessary orders.

3397. When act takes effect.

§§ 3390-3397. [Repealed by L. 1909, chs. 28 and 34. See Consolidated Laws, tits. General Corporation Law, §§ 70-76, 330, Joint Stock Association Law, § 8.]

TITLE III.

[Added by L. 1897, ch. 419. In effect Sept. 1, 1897.]

[NOTE.—Ch. 419 provides that this and following title shall be inserted in ch. 22 of the code. Evidently error for ch. 22, and they are here inserted according to section numbers.]

**Proceedings for the enforcement of mechanics' liens on
real property.**

- Sec. 3398. Purpose of title; definitions.
3399. Enforcement of a mechanic's lien on real property.
3400. Enforcement of a lien under contracts for a public improvement.
3401. Action in a court of record; consolidation.
3402. Parties to action in a court of record.
3403. Equities of lienors to be determined.
3404. Action in a court not of record.
3405. When personal service can not be made.
3406. Proceedings on return of summons; judgment by defaults.
3407. Issue; how tried.
3408. Executions.
3409. Appeals from judgments in courts not of record.
3410. Transcripts of judgment in courts not of record.
3411. Cost and disbursements.
3412. Judgment in case of failure to establish lien.
3413. Offer to pay into court.
3414. Preference over contractors.
3415. Judgment may direct delivery of property in lieu of money.
3416. Judgment for deficiency.
3417. Discharge of mechanics' lien by order of court.
3418. Judgments in actions to foreclose liens on account of public improvements.
3419. Judgment in action to foreclose a mechanic's lien on property of a railroad corporation.

§§ 3398-3419. [Repealed by L. 1909, ch. 38. See Consolidated Laws, tit. Lien Law, §§ 40-61.]

TITLE IV.

[Added by L. 1897, ch. 419. In effect Sept. 1, 1897.]

[NOTE.—The duplicate § 3419, and arrangement of section numbers in syllabus of this title are so in the original.]

Proceedings to enforce liens on vessels.

- Sec. 3419. Enforcement of liens on vessels.
- 3420. Application for warrant.
- 3421. Undertaking to accompany application.
- 3422. Warrant; execution thereof.
- 3423. Order to show cause; contents; service.
- 3424. Notice of service to be published and served.
- 3425. Proceedings upon return of order to show cause.
- 3426. Order of sale.
- 3427. Sale and proceeds.
- 3428. Notice of the distribution of the proceeds of sale.
- 3429. Liens for which no warrants are issued.
- 3430. Contested claims.
- 3431. Trial of issues and appeal.
- 3432. Distribution of proceeds.
- 3433. Payment of uncontested claims.
- 3434. Distribution of surplus.
- 3435. Application for a discharge of warrant.
- 3436. Undertaking to accompany application for discharge.
- 3437. Discharge of warrant.
- 3438. Action on undertaking.
- 3439. Costs of proceedings.
- 3440. Sheriff must return warrant.
- 3441. Discharge of lien before issue of warrant.

§§ 3419-3441. [Repealed by L. 1909, ch. 38. See Consolidated Laws, tit. Lien Law, §§ 85-107.]

SCHEDULE OF LAWS REPEALED.

SCHEDULE OF LAWS REPEALED

by

L. 1909, ch. 65, (an act to amend the Code of Civil Procedure, generally) together with previous repeals and notes as compiled by Board of Statutory Consolidation.

STATUTES HEREBY REPEALED

PREVIOUS REPEALS

REVISED STATUTES				Section	Section	REPEALING STATUTES			See note
Pt.	Ch.	Tit.	Art.			L.	Ch.	§	
1	9	12	..	1-5, 8.....	1.....	1830	320	63	*
					1-5, 8.....	1880	245	1	
1	9	13	..	All.....	All.....	1880	245	1	
2	5	1	1	All.....	3.....	1845	153	1	*
					8.....	1840	354	1	*
					12.....	1841	207		*
					All.....	1877	417	1	
					All.....	1880	245	1	
2	5	1	2	All.....	All.....	1880	245	1	
2	5	2	..	All.....	23.....	1880	423	1	*
					25.....	1865	724	1	*
					All.....	1880	245	1	
2	6	1	1	6-20.....	6-20.....	1880	245	1	
					7.....	1830	320	14	
					7-9, 12.....	1837	460	71	
2	6	1	2	23-39.....	23-27.....	1837	460	71	
					23-39.....	1880	245	1	
2	6	1	3	54-68.....	54-68.....	1880	245	1	
2	6	2	..	All.....	56.....	1830	320	15	*
					1, 2, 6-14, 17-21, 23-26, 30, 31, 35-59..	1880	245	1	
					2.....	1837	460	71	
					3, subd. 3.....	1830	320	17	*
					3.....	1873	79	1	*
					7.....	1873	657	1	*
					27.....	1867	782	6	
					30.....	1867	782	12	
					32, 48, 53.....	1830	320	18-20	*
					38, 39.....	1837	460	71	
					49.....	1843	121	1	*
					54.....	1830	320	21	
					All.....	1893	686	1	
2	6	3	1	All.....	1.....	1873	225	1	*
					9.....	1874	470	1	*
					16.....	1888	302	1	*
					17-22.....	1880	245	1	
					All.....	1893	686	1	
2	6	3	2	All.....	31, 32, 38; 39 pt. beginning "but may prove such notice," to end of section;				
					40-42.....	1880	245	1	*
					34.....	1800	456	1	*
					36.....	1859	261	2	*
					46-51.....	1900	554	1	
					All.....	1893	686	1	

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED					PREVIOUS REPEALS				
REVISED STATUTES				Section	Section	REPEALING STATUTES			See note
Pt.	Ch.	Tit.	Art.			L.	Ch.	§	
2	6	3	3	All.....	52.....	1859	261	1	*
					52-56, 59-74, 80-83.	1880	245	1	*
					58.....	1849	160	1	*
					66.....	1850	272	1	*
					72.....	1878	30	1	*
					75, subd. 8.....	1845	236	1	*
					79.....	1867	782	11	*
					All.....	1893	686	1	*
2	6	4	..	1-54, 56, 57, 59-75	1.....	1830	320	22	*
					1-54, 56, 57, 59-75..	1880	245	1	*
					30.....	1880	231	1	*
					36.....	1863	400	1	*
					48, 56.....	1837	460	71, 74	*
					56.....	1835	264	2	*
2	6	5	..	7-22, 24.....	7-22, 24.....	1880	245	1	*
2	6	6	..	All.....	45.....	1866	302	1	*
					74.....	1877	456	1	*
					All.....	1893	686	1	*
3	1	1	3	All.....	All.....	1877	417	1	*
					All.....	1880	245	1	*
3	1	2	..	All.....	1-37, 40-42, 44, 46-150.....	1877	417	1	*
					37.....	1862	460	39	*
					37.....	1863	392	2	*
					54, 55.....	1830	76	1	*
					61, 64, subd. 1, 95..	1830	320	32-34	*
					123, 124.....	1842	277	2, 3	*
					128.....	1839	74	1	*
					All.....	1880	245	1	*
3	1	3	..	All.....	7.....	1830	320	35	*
					7.....	1864	290	5	*
					All.....	1877	417	1 ¶ 3	*
					All.....	1880	245	1	*
3	1	4	..	1-22, 24-28, 35, 36, 40, 45.....	1-22, 24-27, 45.....	1877	417	1	[100]
					1-22, 24-27, 45.....	1880	245	1	
					28.....	1886	593	1	
3	1	5	..	1, 2, 8-10, 12, 13, 15-26, 32-34.	1, 2, 8-10, 12, 13, 15-20, 22, 23, 26, 32-34	1877	417	1	
					1, 2, 8-10, 12, 13, 15-19, 20, except part fixing places where courts of common pleas and general sessions shall be held, 22, 23, 26, 32-34.....	1880	245	1	
					20, subd. 2.....	1840	41	3	
					20, subd. 5.....	1838	83		
					20, subd. 10.....	1830	105	2	
					20, subd. 13.....	1830	3	5	
					20, subd. 15.....	1835	119	2	
					20, subd. 30.....	1833	205	3	[101]
					20, subd. 38.....	1829	80	2	[102]
					20, subd. 38.....	1830	5	2	

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED

PREVIOUS REPEALS

REVISED STATUTES				Section	Section	REPEALING STATUTES			See note
Pt.	Ch.	Tit.	Art.			L.	Ch.	§	
					20, subd. 40.....	1852	65	1	
					20, subd. 43.....	1836	265	4	
					20, subd. 47.....	1836	40	1	
					21, 24, 25.....	1896	548	1	
					24.....	1843	88	4	
3	1	6	..	All.....	1-3.....	1867	272	1	
3	2	1	..	All.....	All.....	1880	245	1	
					1, pt. beginning "and in no other; and no," to end of section.....	1837	460	71	
					6, subd. 1.....	1830	320	36	*
					7, pt. requiring surrogate to record accounts of administrators, executors and guardians.....	1837	460	2	
3	2	3	..	All.....	All.....	1880	245	1	
3	2	4	..	1-22, 25-267, 271-281.....	All.....	1880	245	1	
					1-22, 25-230, 232-267, 271-281.....	1880	245	1	
					2, 3.....	1840	317	1	*
					2-4.....	1848	379	45	
					15.....	1876	277	1	*
					44.....	1864	421	1	*
					47.....	1845	25	1	*
					52, 53, 58.....	1840	317	3	*
					59-66.....	1848	379	45	*
					112.....	1873	146	1	*
					118.....	1838	243	1	*
					137-139.....	1831	300	41	
					189, subd. 1.....	1844	11	1	*
					222.....	1842	38	1	*
					231.....	1896	548	1	
					245-248.....	1877	417	1	
					258.....	1840	347	1	*
3	3	1	..	1-9, 11.....	1-9, 11.....	1877	417	1	
3	3	2	..	1-39, 42, 43, 46, 47, 49-53, 62-66.....	1-9, 11.....	1880	245	1	
					6.....	1830	320	38	*
					11-39, 42, 43, 46, 47, 49-53, 62-66.....	1877	417	1	
					11-39, 42, 43, 46, 47, 49-53, 62-66.....	1880	245	1	
3	4	All.....	33.....	1828	20	15 ¶ 53	
					Tit. 2, §§ 18-53.....	1848	379	66	
					All.....	1849	438	73	
					All.....	1880	245	1	
3	5	All.....	Tit. 1, § 12.....	1847	337	1	*
					Tit. 1, § 36.....	1861	221	1	*
					Tit. 1, § 37.....	1878	292	1	*
					Tit. 2, § 1.....	1848	50	1	*
					Tit. 2, § 2, subd. 1.....	1348	50	2	*
					Tit. 2, § 3.....	1864	219	1	*
					Tit. 2, § 4.....	1855	511	1	
					Tit. 2, §§ 5-7.....	1355	511	2-4	*

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED

PREVIOUS REPEALS

REVISED STATUTES			Section	REPEALING STATUTES			See note
Pt.	Ch.	Tit. Art.		Section	L.	Ch.	
				Tit. 2, §§ 8-12.....	1855	511	5
				Tit. 2, §§ 13-16, 20..	1855	511	6-10 *
				Tit. 3, §§ 42, 43.....	1830	320	42, 43
				Tit. 3, §§ 8, 44, 80, 86	1830	320	40, 44, 46, 48 *
				Tit. 5, §§ 22-29.....	1877	417	1
				All.....	1880	245	1
3	6	...	All.....	Tit. 1, All.....	1877	417	1
				Tit. 2, §§ 1-11, 14-28	1877	417	1
				Tit. 3, All.....	1877	417	1
				Tit. 4, §§ 1-13, 15-27	1877	417	1
				Tit. 5, §§ 9.....	1844	324	2 *
				Tit. 5, §§ 22, subd. 1..	1860	152	1 *
				Tit. 5, §§ 51.....	1847	410	1 *
				Tit. 5, All.....	1877	417	1
				Tit. 6, §§ 16-53.....	1877	417	1
				Tit. 6, §§ 39.....	1845	163	3 *
				All.....	1880	245	1
3	7	1 ..	All.....	All.....	1877	417	1
				All.....	1880	245	1
2	7	2 ..	All.....	1-14.....	1877	417	1
				All.....	1880	245	1
3	7	3 ..	1-60, 71-90	3.....	1851	472	1 *
				14.....	1875	420	1 *
				25, subd. 2.....	1865	421	3 *
				29-31.....	1867	68	1, 2 *
				1-60, 71-73, 77-90...	1877	417	1
				1-60, 71-90.....	1880	245	1
3	7	4 ..	1-9, 53-61, 64-66, 68-83.....	1-9, 53-61, 64-66, 68-83.....	1877	417	1
				1-9, 53-61, 64-66, 68-83.....	1880	245	1
3	7	5 ..	All.....	All.....	1877	417	1
				All.....	1880	245	1
3	7	6 ..	All.....	80.....	1845	69	18 *
				All.....	1877	417	1
				All.....	1880	245	1
3	8	1 ..	All.....	All.....	1877	417	1
				All.....	1880	245	1
3	8	2 ..	All.....	All.....	1877	417	1
				All.....	1880	245	1
3	8	3 ..	3-10, 12-16, 19-66.....	8.....	1877	417	1
				33.....	1859	110	1 *
				42.....	1837	400	74
				3-10, 12-16, 19-66...	1880	245	1
3	8	4 ..	1, 3-41, 43-65, 92-101, 107-108.....	1, 3-41, 43-65, 92-101, 107-108.....	1880	245	1
				3.....	1864	422	1 *
				4-11, 16-30.....	1877	417	1
				15.....	1849	107	1
				21, 24.....	1840	354	2, 3 *
				24.....	1842	197	6
				42.....	1858	348	1

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED

PREVIOUS REPEALS

REVISED STATUTES				Section	Section	REPEALING STATUTES			See note
Pt.	Ch.	Tit.	Art.			L.	Ch.	§	
3	8	5	..	All.....	All.....	1880	245	1	
3	8	6	..	1-15, 22-43	16-21, relating to petit jurors, 37-42.	1877	417	1	
					43.....	1830	320	52	
					All.....	1880	245	1	
3	8	7	..	All.....	13, subds. 1, 3.....	1869	433	1, 2	*
					All.....	1880	245	1	
3	8	9	..	All.....	All.....	1880	245	1	
3	8	10	..	All.....	28, 34-36.....	1849	193	1-4	*
					30.....	1851	460	1	*
					32, 47.....	1868	828	2, 5	*
					39, 44.....	1857	684	3, 4	*
					All.....	1880	245	1	
3	8	12	..	All.....	All.....	1880	245	1	
3	8	13	..	All.....	1.....	1877	417	1	
					20.....	1843	9	1	*
					All.....	1880	245	1	
3	8	14	..	All.....	5.....	1843	187	1	*
					All.....	1880	245	1	
3	8	15	..	All.....	3.....	1842	277	5	*
					8.....	1840	342	12	*
					10.....	1844	346	2	*
					14.....	1838	266	8	*
					All.....	1880	245	1	
3	8	17	..	1-26, 31-34, 36-46....	1-26, 31, 33, 34, 36-46.....	1880	245	1	[104]
					2-12, 16-26, 31, 33, 34, 36-46.....	1877	417	1	
					43, 46.....	1832	210	1	
3	9	1	..	All.....	15-17.....	1840	225	13	
					All.....	1880	245	1	
3	9	2	..	All.....	39.....	1830	320	53	*
					All.....	1880	245	1	
3	9	3	..	1-3, 5-120.	35.....	1844	312	1	*
					1-3, 5-65, 67-120; part relating to appeals from surrogate's courts.....	1877	417	1	
					1-3, 5-120.....	1880	245	1	
3	10	1	..	All.....	13.....	1840	386	40	
					All.....	1880	245	1	
3	10	2	..	All.....	4, 5.....	1875	305	1, 2	*
					6.....	1875	16	1	*
					All.....	1880	245	1	
3	10	3	..	2-40, 42-50	2-40, 43-50.....	1880	245	1	
					4.....	1844	346	3	
					17-19, 22, 27, 30 part prescribing fees for clerks, 31, 33.....	1840	386	40	
					32.....	1814	300	1	
					42.....	1896	548	1	
3	10	4	..	1-3, 5-17...	1, 2.....	1896	548	1	
					3, 5-17.....	1880	245	1	
3	10	5	..	All.....	All.....	1880	245	1	
4	2	5	..	3.....	3.....	1886	593	1	
4	2	8	..	1.....					[105]

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED			PREVIOUS REPEALS				
L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1778	12	3, 4, 6, 7.....	[106]
1778	14	All.....	[107]
1778	25	All.....	All.....	1801	193	
1779	14	All (2d Sess.)..	All.....	1848	379	15	
1779	19	All (2d Sess.)..	[108]
1779	12	All (3d Sess.)..	All.....	1786	29	1	
1779	17	All (3d Sess.)..	[109]
1780	42	All.....	All.....	1848	379	15	
1780	44	All.....	All.....	1782	36	12	
			All.....	1787	89	24	
1780	56	3.....	[110]
1780	9	All (4th Sess.)..	All.....	1782	36	12	
1781	21	All (4th Sess.)..	All.....	1782	36	12	
1781	25	All (4th Sess.)..	All.....	1788	73	2	
1781	47	All (4th Sess.)..	All.....	1788	5	13	
			All.....	1788	73	2	
1781	6	All (5th Sess.)..	All.....	1782	36	12	
1781	13	All (5th Sess.)..	All.....	1786	29	1	
1782	24	All.....	[111]
1782	36	All.....	15.....	1784	7	1	
			All.....	1787	89	24	
1782	1	All (6th Sess.)..	[112]
1782	8	All (6th Sess.)..	All.....	1848	379	15	
1783	14	All.....	[113]
1783	31	All.....	Part beginning " and if any such action shall be brought in an inferior court " to end of statute.	1787	71	1	[114]
			All.....	1788	73	2	
1783	39	All.....	[115]
1783	41	All.....	[117]
1784	7	All (7th Sess.)..	
1784	26	All.....	All.....	1828	21*	1 ¶ 2	
1784	41	All.....	All.....	1786	41	25	
1784	48	All.....	[118]
1784	54	All.....	All.....	1801	193	[119]
1784	59	All.....	
1784	11	7-13 (8th Sess.).....	7-13.....	1801	193	[120]
1784	12	All (8th Sess.)..	
1785	20	All.....	All.....	1786	41	25	
1785	27	All.....	All.....	1801	193	
1785	39	All.....	All.....	1801	193	
1785	58	All.....	All.....	1787	89	24	
1785	61	1-5, 7.....	1-5, 7.....	1797	8	6	
1785	71	All.....	All.....	1789	25	8	
			All.....	1801	190	5	
1786	7	All.....	All.....	1828	21*	1 ¶ 4	
1786	16	All.....	[121]
1786	24	All.....	All.....	1801	193	
1786	27	All.....	1-14.....	1801	193	
			15 pt., allowing judge of court of probate three per cent. on all moneys brought into court.....	1790	51	3	
			15.....	1801	190	5	

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SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED			PREVIOUS REPEALS				
L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1786	29	1.....	[122]
1786	33	7.....	7.....	1787	89	24	
			7.....	1788	73	2	
1786	41	1-7, 17, 20, 21, 25, 26.....	1-7, 17, 20, 21, 25, 26...	1801	193		
1787	3	All.....	All.....	1828	21*	1 ¶ 7	[123]
1787	5	All.....				
1787	6	All.....	All.....	1828	21*	1 ¶ 10	
1787	10	All.....	All.....	1801	193		
1787	14	All.....	4, pt. exempting plaintiff in certain cases from payment of costs on having caused an affida- vit or oath to be made and filed before com- mencement of certain actions.....	1800	98	1	
			All.....	1801	193		
1787	18	3.....	3.....	1798	22	5	
			3.....	1801	193		
1787	19	All.....	All.....	1801	193		
1787	26	7.....				[124]
1787	27	All.....	All.....	1801	193		
1787	32	4-6, 9-11.....	4-6, 9-11.....	1801	193		
1787	33	All.....	All.....	1801	193		
1787	35	All.....	8, pt. providing that every attorney neglect- ing to file his warrant of attorney shall forfeit £10.....	1788	73	2	
			All.....	1801	193		
1787	38	All.....	17.....	1789	25	8	
			All.....	1801	193		
1787	39	1-4, 7, 10-12..	1-4, 7, 10-12.....	1801	193		
1787	50	All.....	All.....	1828	21*	1 ¶ 17	
1787	53	All.....	All.....	1801	193		
1787	54	All.....	All.....	1801	193		
1787	56	All.....	All.....	1801	193		
1787	65	10.....	10.....	1801	193		
1787	69	All.....	All.....	1813	202		
1787	71	All.....				[125]
1787	72	All.....	All.....	1801	193		
1787	89	All.....	20.....	1797	20	20	
			Part relating to the city of New York.....	1804	27	54	
			All.....	1801	193		
1787	94	All.....				[126]
1788	2	All.....	All.....	1801	193		
1788	3	All.....	All.....	1800	90	3	
1788	4	All.....	All.....	1828	21*	1 ¶ 18	
1788	5	All.....	All.....	1828	21*	1 ¶ 19	
1788	6	All.....	All.....	1828	21*	1 ¶ 20	
1788	8	All.....	All.....	1801	193		
1788	9	All.....	All.....	1828	21*	1 ¶ 21	
1788	10	All.....	All.....	1828	21*	1 ¶ 22	
1788	11	All.....	All.....	1828	21*	1 ¶ 23	

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STATUTES HEREBY REPEALED			PREVIOUS REPEALS				
L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1788	12	All.....	All.....	1801	193		
1788	17	7.....	7.....	1801	193		
1788	18	1.....	1.....	1801	193		
1788	32	All.....	All.....	1828	21*	1 ¶ 32	
1788	34	2.....	2.....	1828	21*	1 ¶ 33	
1788	36	1-25, 29-31...	1-25, 29-31.....	1813	202		
1788	37	12, 13.....	12, 13.....	1801	193		
1788	41	All.....		[127]
1788	43	1-13.....	1-13.....	1801	193		
1788	46	1-31.....	1-31.....	1801	193		
1788	73	2, pt. repeal- ing L. 1781, Chs. 25, 47, L. 1783, Ch. 39, L. 1786, Ch. 33, § 7, L. 1787, Ch. 35, pt.....		[128]
1789	1	All.....	All.....	1801	193		
1789	25	All.....	1, part allowing costs to be paid out of a fine for a misdemeanor.....	1796	8	5	
			All.....	1801	190	5	
			All.....	1801	193		
1789	28	All.....	3.....	1797	8	6	
			All.....	1801	193		
1790	1	All.....	All.....	1801	193		
1790	51	All.....	All.....	1801	193		
1790	57	All.....	Part relating to adver- tisement of sales of goods and chattels....	1791	8	1	
			All.....	1801	193		
1790	58	1, 2.....	1, 2.....	1801	193		
1791	7	All.....	All.....	1801	193		
1791	8	All.....		[129]
1791	12	All.....	All.....	1801	193		
1791	20	All.....	All.....	1828	21*	1 ¶ 36.	
1791	38	All.....	All.....	1801	193		
1792	28	All.....		[130]
1792	35	1-4.....	1-4.....	1801	193		
1792	43	All.....	3.....	1793	36	5	
			All.....	1801	193		
1793	36	All.....	All.....	1801	193		
1794	35	All.....	All.....	1801	193		
1795	1	All.....		[131]
1795	74	All.....	All.....	1801	193		
1796	2	All.....		[132]
1796	8	5.....	5.....	1801	193		
1796	10	All.....	All.....	1801	193		
1796	46	1.....	1.....	1801	193		
			Part relating to the city of New York.....	1881	537	1	
1796	70	All.....	All.....	1801	193		
1797	3	All.....	All.....	1801	193		
1797	5	All.....	All.....	1801	193		
1797	8	All.....	All.....	1801	193		

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SCHEDULE OF LAWS REPEALED.

STATUTE HEREBY REPEALED			PREVIOUS REPEALS			
L.	Ch.	Section	Section	REPEALING STAT- UTES		
				L.	Ch.	§ See note
1797	13	All.	All.	1801	193	
1797	20	20.				[133]
1797	31	6, 7, 10, 11.	6, 7, 10, 11.	1801	193	
1797	84	All.	All.	1801	193	
1798	8	All.	All.	1801	193	
1798	22	4, 5.	4, 5.	1801	193	
1798	52	All.				[135]
1798	68	18.				[136]
1798	75	9.	9.	1801	193	
1798	91	All.	All.	1801	193	
1798	100	All.				[137]
1798	105	All.	All.	1801	193	
1798	108	All.	All.	1801	193	
1798	111	All.	1.	1848	379	15
			All.	1801	193	
1799	1	All.	All.	1801	193	
1799	5	All.	All.	1801	193	
1799	44	2-6.	2-6.	1801	193	
1799	64	All.	All.	1801	193	
1799	65	All.	All.	1801	193	
1799	87	All.	All.	1801	193	
1799	92	1.	1.	1801	193	
1800	12	All.	All.	1801	193	
1800	22	All.	Part relating to the city of New York.	1881	537	1 [138]
1800	41	All.	All.	1801	193	
1800	60	1, 2.	1, 2.	1801	193	
1800	90	All.	All.	1801	193	
1800	94	1, 2.	1, 2.	1800	122	3
1800	98	All.	All.	1801	193	
1800	100	All.	All.	1801	193	
1800	122	All.	All.	1801	193	
1801	8	All.	All.	1813	202	
1801	10	7-11.	7-11.	1828	21*	1 ¶ 45
1801	13	All.	All.	1828	21*	1 ¶ 44
1801	25	All.	All.	1828	21*	1 ¶ 46
1801	30	All.	All.	1828	21*	1 ¶ 48
1801	32	All.	All.	1813	202	
1801	47	All.	All.	1828	21*	1 ¶ 54
1801	49	All.	21 pt. relating to attach- ment of vessels.	1822	226	4
			Part relating to the city of New York.	1881	537	1
1801	50	All.	All.	1828	21*	1 ¶ 56
1801	52	2.	All.	1813	202	
1801	60	19.	2.	1828	21*	1 ¶ 58
1801	65	1-5, 7-9.	19.	1813	202	
1801	70	4.	1-5, 7-9.	1813	202	
1801	73	All.	4.	1813	202	
1801	75	All.	All.	1813	202	
1801	77	1, 2, 4-14, 20- 24.	All.	1813	202	
			1, 2, 4-14, 20-24; pt. re- lating to the city of New York.	1881	537	1
			1, 2, 4-14, 20-24.	1813	202	

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SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED			PREVIOUS REPEALS				See note
L.	Ch.	Section	Section	REPEALING STAT- UTES			
				L.	Ch.	§	
1801	87	1.....	1.....	1828	21*	1 ¶ 62	
1801	90	1-18, 20-24...	1-18, 20-24.....	1813	202		
1801	91	5, 6.....	5, 6, pt. relating to the city of New York.....	1881	537	1	
			5, 6.....	1813	202		
1801	98	1-8, 10, 21, 24 -27.....	1-8, 10, 21, 24-27.....	1813	202		
1801	102	All.....	All.....	1813	202		
1801	105	All.....	All.....	1813	202		
1801	110	6, 7, 9, 11-13, 14 to pro- visos, 15-18..	6, 7, 9, 11-13, 14 to pro- visos, 15-18.....	1813	202		
			9, pt. relating to time of holding courts in Onon- daga county.....	1824	2	2	
			9, pt. relating to time of holding courts in Gen- esee county.....	1824	23	2	
			9, pt. relating to time of holding courts in Onelida county.....	1824	181	4	
			9.....	1828	21*	1 ¶ 550	
1801	115	All.....	All.....	1813	202		
1801	133	All.....	All.....	1813	202		
1801	141	All.....	All.....	1813	202		
1801	165	1-10, 12-22...	1-10, 12-22.....	1808	204	31	
			6, pt. affecting Columbia county.....	1803	55	2	
			6, pt. to the words "city of".....	1805	93	5	
1801	170	All.....	4, first proviso.....	1803	103	33	
			All.....	1813	202		
1801	174	All.....	All.....	1813	202		
1801	176	All.....	1-9, 11.....	1813	202		
			3, provisos.....	1811	43	2	[139]
1801	183	1-5.....	1-5.....	1828	21*	1 ¶ 67	
1801	190	All.....	All..... R.L.	1813	83	6	
1802	15	All.....	1, proviso.....	1804	58	6	
			All.....	1813	202		
1802	31	All.....	All.....	1813	202		
1802	83	2-5.....	2-5.....	1813	202		
			5..... R.L.	1813	83	6	
1802	110	All.....	All.....	1813	202		
1803	2	All.....	1.....	1813	202		[140]
1803	32	All.....	All.....	1813	202		
1803	55	2.....	[141]
1803	99	All.....	All.....	1813	202		
1803	103	19, 32, 33.....	19, 32, 33.....	1813	202		
1804	27	54.....	54.....	1807	139	62	
			54.....	1881	537	1	
1804	55	All.....	All.....	1813	202		
1804	59	All.....	All.....	1813	202		
1804	68	All.....	All.....	1813	202		
1804	78	1, 2 to first period.....	1, 2 to first period.....	1813	202		

* Second meeting.

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED			PREVIOUS REPEALS				
L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1804	108	All.....	All.....	1813	202		
1804	109	30, 31.....	30, 31.....	1813	202		
1805	17	2, 3.....	2, 3, except part relating to state printing in city of Albany.....	1809	164	13	
			2, 3.....	1828	21*	1 ¶ 56	
1805	93	All.....	6.....	1813	202		
			All.....	1808	204	31	
1805	94	All.....	All.....	1813	202		
1805	99	All.....	All.....	1813	202		
1805	102	1.....	1.....	1813	202		
1805	135	4, 29.....	29.....	1813	202		[142]
1806	10	2, 8.....	2, 3.....	1813	202		
1806	92	All.....	All.....	1811	43	2	
1806	126	12.....	12.....	1881	537	1	
1807	63	All.....	All.....	1813	202		
1807	89	All.....	All.....	1813	202		
1807	107	1-3, 5-8.....	1-3, 5-8.....	1813	202		
1807	130	All.....	All.....	1813	202		
1807	183	All.....	3.....	1808	145	2	
			All.....	1813	202		
1807	145	All.....	All.....	1813	202		
1807	158	All.....	All.....	1811	43	2	
1807	183	29, 30.....	29, 30.....	1813	202		
1808	2	All.....	All.....	1813	202		
1808	8	All.....	All.....	1813	202		[143]
1808	145	All.....	All.....	1813	202		
1808	155	21.....	21.....	1813	202		
1808	156	All.....	All.....	1813	202		
1808	173	All.....	All.....	1813	202		
1808	200	All.....	All.....	1813	202		
1808	204	1-7, 9-31.....	1-7, 9-31.....	1813	202		
			25.....	1810	193	14	
1808	219	All.....	All.....	1813	202		
1809	83	All.....	All.....	1813	202		
1809	124	All.....	All.....	1813	202		
1809	137	All.....	All.....	1813	202		
1809	148	All.....	All.....	1813	202		
1809	186	1, 2, 5.....	1, 2, 5.....	1813	202		
1810	36	All.....	All.....	1813	202		
1810	64	All.....	All.....	1813	202		
1810	187	1-4.....	1-4.....	1813	202		
1810	193	14, 35.....	35.....	1813	202		[144]
1810	194	2.....	2.....	1813	202		
1810	196	All.....	All.....	1813	202		
1811	1	1.....	1.....	1813	202		
1811	43	All.....	All.....	1813	202		
1811	88	1, 2.....	1, 2.....	1813	202		
1811	196	2.....	2.....	1813	202		
1811	202	18.....	18, pt. relating to the city of New York.....	1881	537	1	
			18.....	1813	202		
1811	238	1, 3, 5-8.....	1, 3, 5-8.....	1813	202		
1811	246	44, 46, 47.....	44, 46, 47.....	1813	202		
1812	185	All.....	All.....	1813	202		
1813	129	All.....	All.....	1828	21*	1 ¶ 112	

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STATUTES HEREBY REPEALED			PREVIOUS REPEALS				
L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1813	203	25, 34, 50	25, 34	1828	21*	1	165
1813	204	All	All	1828	21*	1	68
1813†	4	1-8	1-8; pt. relating to the city of New York	1881	537	1	
			1-8	1828	21*	1	88
1813†	16	All	All	1828	21*	1	86
1813†	17	All	All	1828	21*	1	87
1813†	48	All	9	1818	259	18	
			All	1828	21*	1	107
1813†	50	All	All	1828	21*	1	122
1813†	53	All	11, pt. exempting de- fendant's body from ex- ecution	1816	236	53	
			All	1824	238	43	
			All	1828	21*	1	101
1813†	55	5, 6	5, 6	1828	21*	1	119
1813†	56	1-27, 29; 30, first sentence, 31-35	1-27, 29; 30, first sen- tence, 31-35	1828	21*	1	124
			All	1828	21*	1	92
1813†	57	All	All	1828	21*	1	93
1813†	58	All	All	1828	21*	1	113
1813†	61	All	All	1828	21*	1	110
1813†	63	All	4, pt. relating to time of holding courts of com- mon pleas and general sessions in Rensselaer county	1815	112	3	
1813†	65	All	4, pt. relating to Catta- raugus county	1823	101	3	
			4, pt. relating to Onon- daga county	1824	2	2	
			4, pt. relating to Genesee county	1824	23	2	
			4, pt. relating to Oneida county	1824	181	4	
			4, pt. providing that courts shall be held al- ternately at Bedford and White Plains, West- chester county	1870	550	1	
			11, pt. requiring the men- tion of assistant justices in the caption and con- tinuance of records	1818	60	3	
			All	1828	21*	1	131
1813†	66	1-14	1-14, pt. relating to the city of New York	1881	537	1	
			1-14	1828	21*	1	89
1813†	79	All	17-22	1815	157	8	
			24	1819	166	4	
			Part relating to the city of New York	1881	537	1	
			All	1828	21*	1	111

* Second meeting.

† Revised Laws.

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED			PREVIOUS REPEALS			
L.	Ch.	Section	Section	REPEALING STAT- UTES		
				L.	Ch.	§ See note
1813† 83	All.	1, pt. relating to coroners' fees in counties of Richmond, Kings, Queens and Suffolk for viewing each body and taking and returning the inquisition.....	1815	183	1
			1, pt. relating to fees of counselors, solicitors and sergeants.....	1818	230	3
			1, pt. relating to fees of masters, register and assistant register, clerk, examiner and sergeant-at-arms.....	1823	269	9
			1, pt. relating to taking inquisitions.....	1826	62	2
			All.....	1828	21*	1 126
1813† 86	29.	29, pt. relating to the city of New York.....	1881	537	1
1813† 93	All.	29.....	1815	157	8
1813† 95	1-23.	All.....	1828	21*	1 84
			1-23.....	1828	21*	1 120
			19, pt. requiring the register in chancery in New York to keep an account with the Bank of New York.....	1823	269	10
			20.....	1814	163	2
1813† 96	All.	All.....	1828	21*	1 90
1813†100	All.	All.....	1828	21*	1 123
1813†102	All.	All.....	1828	21*	1 138
1814 19	All.	All.....	1828	21*	1 167
1814 108	All.	All.....	1828	21*	1 170
1814 141	All.	[146]
1814 162	1.	[147]
1814 163	All.	All.....	1828	21*	1 172
1814 193	All.	[148]
1814 198	All.	All.....	1828	21*	1 176
1814 200	37, 40.	37, 40.....	1828	21*	1 177
1814 23	All (38 Sess.)	All.....	1828	21*	1 182
1815 38	All.	All.....	1828	21*	1 183
1815 77	All.	All.....	1828	21*	1 126
1815 82	All.	All.....	1828	21*	1 185
1815 106	All.	All.....	1828	21*	1 189
1815 150	All.	All.....	1828	21*	1 194
1815 227	All.	All.....	1828	21*	1 202
1815 266	27.	27.....	1828	21*	1 126, 207
1816 177	All.	All.....	1828	21*	1 214
1816 210	1.	1.....	1828	21*	1 215
1816 236	23, 45, 49, 53.	23, 45, 49, 53.....	1828	21*	1 217
			45.....	1824	238	43
1817 21	All.	Part relating to the city of New York.....	1881	537	1
			All.....	1824	238	43

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† Revised Laws.

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED			PREVIOUS REPEALS			
L.	Ch.	Section	Section	REPEALING STAT- UTES		
				L.	Ch.	§
1817	28	All.	All.	1828	21*	1 221
1817	32	All.	All.	1828	21*	1 222
1817	69	2.	2.	1828	21*	1 226
1817	90	All.	All.	1828	21*	1 233
1817	179	All.	All.	1828	21*	1 240
1817	251	All.	All.	1828	21*	1 243
1817	278	1, 2.	1, 2.	1828	21*	1 244
1817	280	4.	4.	1828	21*	1 245
1818	5	All.	All.	1828	21*	1 245
1818	60	1, 3, 4.				
1818	94	All.	8, pt. relating to assistant justices in the city of New York.	1820	160	4
			All.	1824	238	43
1818	171	All.	All.	1828	21*	1 255
1818	175	All.	4.	1828	21*	1 86
			All.	1828	21*	1 256
1818	195	All.	2.	1828	21*	1 86
			All.	1828	21*	1 257
1818	226	All.	All.	1828	21*	1 261
1818	227	All.	Part relating to the city of New York.	1881	537	1
			All.	1820	194	10
1818	230	All.	All.	1828	21*	1 126
1818	259	1, 2, 4-16, 18, 19.	1, 2, 4-16, 18, 19.	1828	21*	1 265
			8.	1821	38	1
1818	265	All.	Part relating to the city of New York.	1881	537	1
			All.	1824	238	43
1818	269	All.	All.	1828	21*	1 549
1818	272	2.	2.	1828	21*	1 266
1818	277	All.	All.	1828	21*	1 268
1818	283	8.	8.	1828	21*	1 269
1819	27	All.	Part relating to the city of New York.	1881	537	1
			All.	1828	21*	1 271
1819	40	All.	All.	1828	21*	1 248
1819	156	All.	All.	1828	21*	1 549
1819	166	All.	All.	1828	21*	1 283
1819	178	All.				
1819	232	All.	All.	1828	21*	1 550
1820	122	2.	2.	1828	21*	1 299
1820	159	All.	All.	1828	21*	1 301
1820	160	4, pt. affecting L. 1818, Ch. 94, § 8.	4, pt. relating to the city of New York.	1881	537	1
			4, pt. affecting L. 1818, Ch. 94, § 8.	1824	238	43
1820	184	All.	All.	1828	21*	1 308
1820	194	All.	6, pt. relating to fees for services of justices and sheriffs.	1823	269	35
			All.	1828	21*	1 304
1820	214	All.	All.	1828	21*	1 308
1820	216	All.	All.	1828	21*	1 309
1820	219	All.	All.	1828	21*	1 310

* Second meeting.

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED			PREVIOUS REPEALS			
L.	Ch.	Section	Section	REPEALING STAT- UTES		
				L.	Ch.	§
1820	245	5-7	5-7	1828	21*	1
1821	38	All.	All.	1828	21*	1
1821	56	All.	All.	1828	21*	1
1821	109	All.	All.	1828	21*	1
1821	130	All.	All.	1828	21*	1
1821	195	All.	All.	1828	21*	1
1821	203	1	All.	1828	21*	1
1821	222	All.	All.	1828	21*	1
1821	238	All.	All.	1828	21*	1
1821	240	3	3	1828	21*	1
1822	69	All.	All.	1828	21*	1
1822	104	All.	All.	1828	21*	1
1822	114	All.	All.	1828	21*	1
1822	217	All.	All.	1828	21*	1
1822	245	5, 7	5, 7	1828	21*	1
1822	247	All.	All.	1828	21*	1
1822	252	All.	All.	1828	21*	1
1822	260	1, 2	1, 2	1828	21*	1
1822	272	All.	All.	1828	21*	1
1823	28	2	2	1849	194	4
1823	47	1, 2, 4, 5	1, 2, 4, 5	1828	21*	1
1823	54	1	1-6, 8	1828	21*	1
1823	70	1-6, 8	13, 15, 16	1828	21*	1
1823	182	13, 15, 16	13, 15, 16; pt. relating to city of New York	1881	537	1
1823	207	All.	13, 15, 16	1828	21*	1
1823	269	6-17, 35	All.	1828	21*	1
			6-17, 35; pt. relating to the city of New York	1881	537	1
			6-17, 35	1828	21*	1
			11, 14, 15, 16, pt. relating to fees, 17, 35	1828	21*	1
1824	26	All.	All.	1828	21*	1
1824	44	All.	All.	1828	21*	1
1824	48	All.	All.	1828	21*	1
1824	55	All.	All.	1828	21*	1
1824	81	All.	All.	1828	21*	1
1824	205	12	12	1828	21*	1
1824	233	All.	All.	1828	21*	1
1824	238	1-26, 28-43, 45, 46	1-26, 28-43, 45, 46	1828	21*	1
1824	261	All.	All.	1828	21*	1
1824	325	1-4	1-4	1828	21*	1
1825	4	All.	Part fixing salary of reporter	1828	21*	1
1825	263	All.	All.	1828	21*	1
1825	323	All.	All.	1828	21*	1
1826	62	2	2	1828	21*	1
1826	87	All.	All.	1848	379	15
1826	157	All.	All.	1828	21*	1
1826	289	4	4	1828	21*	1
1826	308	All.	All.	1828	21*	1
1826	309	1-3	1-3	1828	21*	1
1827	77	All.	All.	1828	21*	1

* Second meeting.

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED			PREVIOUS REPEALS				
L.	Ch.	Section	Section	REPEALING STATUTES			See note
				L.	Ch.	§	
1827	203	All.....	All.....	1828	21*	1 ¶ 509	
1827	234	All.....	Part relating to the city of New York.....	1881	537	1	
			All.....	1828	21*	1 ¶ 515	
1827	250	All.....	Part relating to the city of New York.....	1881	537	1	
			All.....	1828	21*	1 ¶ 519	
1828	134	All.....					[161]
1828	20*	15, ¶¶ 18, 37-44, 48-50, 52-55.....	15, ¶ 37.....	1830	320	14	[162]*
			15, ¶¶ 8, 38, 39, 43, 44, 48-50, 52-55.....	1880	245	2	
			15, ¶¶ 48, 53-55.....	1877	417	2	
1828	21*	1, ¶¶ 2, 7, 10, 17, 18-23, 32, 33, 36, 44, 46, 48, 54, 56, 58, 62, 67, 68, 84, 86-90, 92, 93, 101, 107, 110-113, 119, 120, 122-124, 126, 131, 138, 165, 167, 170, 172, 176, 177, 182, 183, 185, 189, 194, 202, 214, 215, 217, 221, 222, 233, 240, 243, 244, 251, 255-257, 261, 265, 266, 268, 271, 283, 299, 301, 302, 304, 308-310, 314, 319, 323, 326, 333, 339, 340, 343, 347, 360, 364, 367, 372, 379, 382, 390, 392, 401, 403, 405, 409, 410, 417, 449, 456, 463, 472, 486, 489, 499, 509, 515, 519, 550.					
1829	39	All.....	All.....	1880	245	2	[163]
1829	108	All.....					[164]
1829	225	All.....					[165]
1829	252	All.....					[166]
1830	5	3.....					[168]
1830	12	All.....					[169]
1830	28	All.....					[170]

* Second meeting.

† Ed.—¶ 4 is also repealed, according to section 4 of L. 1909, ch. 65.

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED			PREVIOUS REPEALS				
L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1830	76	All.....	Part relating to the city of New York.....	1881	537	1	
			All.....	1880	245	1 ¶ 8	
1830	105	2.....					[171]
1830	185	All.....	Part relating to the city of New York.....	1881	537	1	
			All.....	1880	245	1 ¶ 8	[172]
1830	238	All.....					
1830	320	14-23, 30-38, 40-50, 52-57, 63, 64, 68.	14, 15, 16 pt. adding §§ 63-68 to R. S., pt. 2, ch. 6, tit. 1, §§ 19-23, 32-34, 36-38, 40-49, 52-57, 63, 64.....	1880	245	2	[173]*
			17.....	1873	79	1	
			18.....	1893	686	1	
			35.....	1847	429	1	*
			35.....	1864	280	5	
			50.....	1862	482	34	
1831	16	All.....	Part relating to the city of New York.....	1881	537	1	[174]
1831	24	All.....	All.....	1880	245	1 ¶ 9	
1831	191	All.....	3.....	1886	593	1 ¶ 6	
			All.....	1877	417	1 ¶ 5	
1831	200	All.....	2, pt. relating to order of publication of notice and time.....	1842	277	4	
			All.....	1880	245	1 ¶ 9	
			All.....	1880	245	1 ¶ 9	
1831	287	All.....	2, pt. declaring that the provisions of § 1 shall not extend to persons who have not been resi- dents for one year.....	1840	165	1	
			26.....	1886	593	1 ¶ 6	
			30, ¶ 1.....	1840	377	2	
			34.....	1840	317	2	*
			All.....	1880	245	1 ¶ 9	
1832	7	All.....	All.....	1880	245	1 ¶ 10	
1832	24	All.....	Part relating to the city of New York.....	1881	537	1	
			All.....	1880	245	2	
1832	128	1-5, 7, 8.....	1-5, 7, 8; pt. relating to the city of New York..	1881	537	1	
			1-5, 7, 8.....	1877	417	1 ¶ 6	
			5.....	1848	379	15	
1832	158	All.....	Part relating to the city of New York.....	1881	537	1	
			All.....	1877	417	1 ¶ 6	
1832	210	All.....	All.....	1880	245	1 ¶ 10	[175]
1832	211	All.....	3.....	1896	548	1	
1832	246	3.....	2.....	1835	211	1	
1832	276	All.....	3.....	1837	93	1	
			All.....	1877	417	1 ¶ 6	
			All.....	1880	245	1 ¶ 10	
1832	295	All.....					[176]
1832	308	All.....					

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STATUTES HEREBY REPEALED			PREVIOUS REPEALS		REPEALING STAT- UTES			See note
L.	Ch.	Section	Section		L.	Ch.	§	
1833	14	All	All		1877	417	1 § 7	
1833	42	All	All		1880	245	1 § 11	
1833	159	All	1, pt. relating to terms of supreme court		1848	379	15	
			All		1877	417	1 § 7	
1833	187	All	All		1877	417	1 § 7	
1833	223	All	All		1880	245	1 § 11	
1833	227	All	All		1880	245	1 § 11	
1833	271	All	1-5, 7-9		1877	417	1 § 7	
			All		1880	245	1 § 11	
1834	1	All						[177]
1834	38	All	All		1837	460	71	
1834	88	All	All		1880	245	1 § 12	
1834	109	All						[178]
1834	235	All	All		1880	245	1 § 12	
1834	245	All	All		1880	245	1 § 12	
1834	262	All	All		1877	417	1 § 8	
1834	308	All	All		1880	245	1 § 12	
1835	159	All	All		1877	417	1 § 9	
1835	189	All	1		1867	116	1	
			All		1877	417	1 § 9	
1835	197	All	All		1877	417	1 § 9	
1835	211	All	All		1877	417	1 § 9	
1835	265	All	All		1840	386	20	
1836	30	All						[179]
1836	439	All	All		1877	417	1 § 10	
1836	499	All	All		1877	417	1 § 10	
1836	525	All	All		1877	417	1 § 10	
1836	526	All	All		1880	245	1 § 13	
1837	93	All	All		1877	417	1 § 11	
1837	367	All	All		1880	245	1 § 14	
1837	410	All	All		1838	266	9	
1837	418	All	All		1880	245	1 § 14	
1837	430	2, 3						[180]
1837	460	All	6		1863	362	1	
			8, subd. 3		1840	384	1	*
			25-33, 36		1862	229	1-10	*
			40		1874	267	1	*
			64		1844	104	1	*
			72		1843	172	1	*
			All		1880	245	1 § 14	
1837	462	All	All		1877	417	1 § 11	
1837	465	All	1		1880	245	1 § 14	[181]
1837	465	All	1		1880	245	1 § 14	
1837	468	All	Part relating to the city of New York		1881	537	1	
			All		1877	417	1 § 11	
1838	129	All	All		1877	417	1 § 12	
1838	138	All	All		1880	245	1 § 15	
1838	149	All	All		1880	245	1 § 15	
1838	212	All	All		1880	245	1 § 15	
1838	243	All	1		1875	334	1	*
			3		1847	329	1	*
			All		1880	245	1 § 15	
1838	258	All	All		1839	317	1	
1838	266	All	8		1880	245	2	[182]

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STATUTES HEREBY REPEALED			PREVIOUS REPEALS				
L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1839	74	All.....	All.....	1880	245	2	
1839	101	All.....	Part relating to the city of New York.....	1881	537	1	[183]
1839	211	All.....	Part relating to the city of New York.....	1881	537	1	[184]
1839	303	All.....	1.....	1841	272	1	
1839	307	All.....	All.....	1877	417	1 ¶ 13	[185]
1839	317	All.....	All.....	1877	417	1 ¶ 13	
1839	342	All.....	Part relating to the city of New York.....	1881	537	1	
1839	346	All.....	All.....	1880	245	1 ¶ 16	
1839	367	1, 3.....	All.....	1877	417	1 ¶ 13	
1840	38	All.....	1, 3.....	1847	349	4	[187]
1840	41	3, pt. repealing R. S., pt. 3, ch. 1, tit. 5, § 20, subd. 2	
1840	162	All.....	All.....	1842	240	2	[188]
1840	165	All.....	All.....	1880	245	2	
1840	177	All.....	All.....	1880	245	1 ¶ 17	
1840	238	2, 3.....	All.....	1880	245	1 ¶ 17	[189]
1840	239	All.....	2.....	1880	245	1 ¶ 17	
1840	314	All.....	All.....	1880	245	1 ¶ 17	
1840	317	All.....	Part relating to the city of New York.....	1881	537	1	[190]
1840	320	All.....	1, 2.....	1848	379	45	
1840	320	All.....	2.....	1842	107	2	*
1840	342	All.....	All.....	1880	245	1 ¶ 17	[191]
1840	347	All.....	4.....	1841	237	1	*
1840	354	All.....	5.....	1841	237	2	*
1840	377	All.....	9.....	1844	346	5	*
1840	379	All.....	12.....	1842	277	6	*
1840	384	All.....	All.....	1880	245	1 ¶ 17	
1840	386	All.....	All.....	1880	245	1 ¶ 17	
1841	38	All.....	3.....	1842	197	6	
1841	56	All.....	All.....	1877	417	2	
1841	129	All.....	All.....	1880	245	2	
1841	138	All.....	All.....	1880	245	1 ¶ 17	
1841	141	All.....	All.....	1880	245	1 ¶ 17	
1841	193	All.....	10.....	1842	202	2	
1841	193	All.....	31.....	1844	312	3	
1841	193	All.....	32, 33, 38.....	1844	104	8	
1841	193	All.....	All.....	1880	245	1 ¶ 17	
1841	38	All.....	Part relating to the city of New York.....	1881	537	1	
1841	56	All.....	All.....	1880	245	1 ¶ 18	
1841	129	All.....	All.....	1882	402	1	
1841	138	All.....	All.....	1880	245	1 ¶ 18	
1841	141	All.....	All.....	1880	245	1 ¶ 18	
1841	193	All.....	All.....	1880	245	1 ¶ 18	
1841	193	All.....	All.....	1877	417	1 ¶ 15	

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STATUTES HEREBY REPEALED			PREVIOUS REPEALS				
L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1841	224	All.....	Part relating to the city of New York.....	1881	537	1	
			All.....	1877	417	1 ¶ 15	
1841	237	All.....	3.....	1842	202	2	[192]
1841	242	All.....	All.....	1877	417	1 ¶ 15	
1841	257	All.....	All.....	1880	245	1 ¶ 18	
1841	272	All.....	All.....	1877	417	1 ¶ 15	
1841	282	All.....	All.....	1877	417	1 ¶ 15	
1841	297	All.....	All.....	1877	417	2	
			All.....	1880	245	2	
1841	321	All.....	All.....	1880	245	1 ¶ 18	
1842	38	All.....	All.....	1880	245	2	
1842	107	All.....	All.....	1880	245	1 ¶ 19	
1842	157	1, 2.....	1.....	1866	782	1	*
			1.....	1877	417	1 ¶ 16	
			1, 2.....	1893	686	1	
			2.....	1889	406	2	*
1842	197	All.....	All.....	1880	245	1 ¶ 19	
1842	202	All.....	All.....	1880	245	1 ¶ 19	[193]
1842	240	All.....	All.....	1880	245	1 ¶ 19	
1842	277	All.....	6, pt. amending R. S., pt. 3, ch. 8, tit. 15, § 8.....	1844	346	4	
			All.....	1880	245	1 ¶ 19	
1842	309	All.....	1.....	1844	341	1	[194]*
			3.....	1844	341	3	
1842	324	All.....	All.....	1880	245	2	[195]
1843	9	All.....	All.....	1880	245	1 ¶ 20	
1843	121	All.....	All.....	1880	245	1 ¶ 20	
1843	172	All.....	All.....	1880	245	1 ¶ 20	
1843	177	4.....	4.....	1880	245	1 ¶ 20	
1843	187	All.....	All.....	1880	245	2	
1843	201	All.....	All.....	1877	417	1 ¶ 20	
1843	205	All.....	All.....	1896	548	1	
1844	11	All.....	All.....	1880	245	1 ¶ 21	
1844	104	All.....	1, 3-8.....	1877	417	1 ¶ 18	
			Part relating to the city of New York.....	1881	537	1	
			All.....	1880	245	1 ¶ 21	
1844	127	All.....	All.....	1880	245	1 ¶ 21	
1844	148	4, 5.....	4, 5; pt. relating to the city of New York.....	1881	537	1	
			4, 5.....	1877	417	1 ¶ 18	
1844	170	All.....	All.....	1845	214	3	
1844	273	All.....	All.....	1880	245	1 ¶ 21	
1844	300	All.....	All.....	1880	245	1 ¶ 21	
1844	312	All.....	1.....	1845	10	1	*
			All.....	1880	245	1 ¶ 21	
1844	324	All.....	3.....	1869	807	1	*
			All.....	1877	417	1 ¶ 18	
1844	341	All.....	2.....	1857	308	2	[196]*
1844	346	All.....	All.....	1880	245	1 ¶ 21	
			All.....	1880	245	2	
1845	10	All.....	All.....	1877	417	1 ¶ 19	
1845	24	All.....	All.....	1880	245	2	
1845	25	All.....	All.....	1880	245	2	
1845	87	All.....	All.....	1882	402	1	

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L.	Ch.	Section	Section	REPEALING STAT- UTES			
				L.	Ch.	§	
1845	112	All.....	1.....	1877	417	1 ¶ 19	
			All.....	1880	245	1 ¶ 22	
1845	153	All.....	All.....	1880	245	2	
1845	163	All.....	All.....	1877	417	1 ¶ 19	
1845	210	All.....	All.....	1880	245	1 ¶ 22	
1845	214	All.....	All.....	1880	245	1 ¶ 22	
1845	231	All.....	All.....	1877	417	1 ¶ 19	
1845	234	All.....	All.....	1877	417	1 ¶ 19	
1845	235	All.....	1877	417	1 ¶ 19	
1845	236	All.....	All.....	1893	686	1	[197]
1845	242	All.....	All.....	1880	245	1 ¶ 22	
1845	303	All.....	All.....	1877	417	1 ¶ 19	
1846	120	All.....	3.....	1886	593	1 ¶ 21	
			All.....	1877	417	1 ¶ 20	
1846	140	All.....	All.....	1880	245	1 ¶ 23	
1846	150	All.....	All.....	1877	417	1 ¶ 20	
			All.....	1886	593	1 ¶ 21	
1846	159	All.....	All.....	1880	245	1 ¶ 23	
1846	182	1, 2, 4, 5.....	1.....	1869	748	1	*
			1, 2, 4, 5.....	1880	245	1 ¶ 23	
1846	209	All.....	All.....	1880	245	1 ¶ 23	
1846	240	All.....	All.....	1877	417	1 ¶ 20	
1846	276	All.....	1.....	1879	305	1	*
			All.....	1880	245	1 ¶ 23	
1846	288	All.....	All.....	1880	245	1 ¶ 23	
1847	80	All.....	1.....	1888	571	1	*
			All.....	1893	686	1	
1847	85	All.....	All.....	1877	417	1 ¶ 21	
1847	119	All.....	All.....	1880	245	1 ¶ 24	
1847	134	1.....	1.....	1877	417	1 ¶ 21	
1847	280	7-13, 16-37, 45-64, 66-83..	7-13, 16-21, 23, 24, 26, 27; 28 except pt. relat- ing to surrogates' courts, 29-31, 34-36; 45 ex- cept pt. relating to sur- rogates' courts, 46-64, 66-83.....	1877	417	1 ¶ 21	
			7-13, 16-24, 26-37, 45- 64, 66-83.....	1880	245	1 ¶ 24	
			9.....	1849	333	4	
			19-21, 23, 24; pt. design- ating the times and places of holding general and special terms of the supreme court and circuit courts and courts of oyer and terminer and judges who shall hold the same.....	1848	379	15	
			25.....	1886	593	1 ¶ 22	
			29-31.....	1848	379	32	
			46.....	1847	470	17	
			73.....	1848	224	1	
1847	298	All.....	All.....	1880	245	1 ¶ 24	
1847	329	All.....	All.....	1880	245	1 ¶ 24	
1847	337	All.....	All.....	1880	245	1 ¶ 24	

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L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1847	339	All.	All.	1890	245	1 § 24	
1847	377	All.	All.	1848	379	15	
			All.	1877	417	1 § 21	
1847	390	2-4	2, 3	1877	417	1 § 21	[198]
1847	391	All.	1	1848	32	1	[199]
1847	410	All.	1-6	1877	417	1 § 21	[200]
			7, 8	1890	245	2	
1847	429	All.	All.	1864	290	5	
1847	430	All.	All.	1890	245	1 § 24	
1847	450	All.	2	1849	256	1	*
			All.	1890	245	1 § 24	
1847	462	All.	All.	1890	245	1 § 24	
1847	464	All.	Part relating to the city of New York.	1881	537	1	
			All.	1890	245	1 § 24	
1847	470	1-25, 27-32, 34-36, 38-53.	1-13, 15-25, 27-31, 34, 36, 38-44, 46-52	1877	417	1 § 21	
			1-25, 27-32, 34, 36, 38- 53	1890	245	1 § 24	
			1-25, 27-32, 34-36, 38- 53	1896	548	1	
			3, last paragraph	1848	222	1	
1848	28	All.	All.	1890	245	1 § 25	
			All.	1896	548	1	
1848	32	All.		1890	245	1 § 25	[201]
1848	48	All.	All.	1890	245	1 § 25	
1848	50	All.	All.	1890	245	1 § 25	
1848	53	All.	All.	1890	245	1 § 25	
1848	185	All.	All.	1890	245	1 § 25	
1848	222	All.	All.	1877	417	1 § 22	
1848	224	All.	3	1850	245	1	*
			All.	1877	417	1 § 22	
1848	277	All.	All.	1877	417	1 § 22	
1848	312	All.	All.	1890	245	1 § 25	
1848	379	All.	13	1849	333	4	
			All.	1849	438	1	*
			All.	1877	417	1 § 22	
			All.	1890	245	1 § 4	
1848	380	All.	All.	1849	439	1	*
			All.	1877	417	1 § 22	
1849	30	All.	All.	1890	245	1 § 26	
1849	107	All.	All.	1890	245	2	
1849	133	All.	2	1854	240	10	*
			All.	1889	382	2	
1849	160	All.	All.	1863	362	8	*
1849	193	All.	1, pt. amending R. S., pt. 3, ch. 8, tit. 10, § 28, subd. 4	1874	208	1	
			1	1879	101	1	*
			2	1857	684	2	*
			4	1862	368	1	*
			All.	1890	245	2	
1849	256	1	1	1870	78	1	*
			1	1890	245	1 § 26	
1849	258	All.	4	1853	153	1	*
			All.	1890	245	1 § 26	

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L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1849	333	All.....	All.....	1877	417	1 § 23	
1849	357	All.....	All.....	1880	245	1 § 26	
1849	380	All.....	Part relating to the city of New York.....	1881	537	1	
			All.....	1880	245	1 § 26	
1849	438	All.....	11, 13, 14, 16, 24, 30, 31; 53, subds. 3, 9; 56, 57, 60-62, 64, subd. 11; 68, 74, 99-101, 111, 113, 114, 116, 122, 126, 130- 132, 134-136, 138, 139, 142, subd. 2; 149, 152, 153, 156-158, 162, 172- 174, 179, subd. 3; 188, 193, 231, 244, 246, subds 2, 3; 252, 255, 258, 259, 263-265, 268, 269, 272 273, 278, 281, subd. 2; 282 284, 287, 291, 292, 297, 298, 302, 306, 307, subd. 6; 317, 339, 348, 340, 353, 354, 366, 371, 384, 385, 397, 399, 459, 460, 470... 1851 479 1 *				
			33, subd. 2; 64, subd. 15; 140, 150, 167, 168, 253, 274, 359, 360, 367, 401, 460, 471..... 1852 392 1 *				
			49..... 1851 2 1 *				
			53, subds. 1, 2, 4-8..... 1861 158 1 *				
			64, subd. 4; 118..... 1867 781 4, 7 *				
			64, subd. 13; 365, 398... 1869 883 5, 11, 13 *				
			66, 128, 226..... 1870 741 4, 7, 9 *				
			104, 154, 335, 355, 395... 1863 392 1 *				
			121, 227, 229, 241, 300, 307, subds. 1-5, 7, 8; 308, 309, 311, 315, 381, 333, 352, 362, 369..... 1857 723 3, 6-8, 12-19, 21, 23, 24 *				
			177, 283, 343, 379, 434... 1866 824 6, 10, 12, 15, 18 *				
			179, subds. 1, 2, 4, 5..... 1875 28 1 *				
			204, 256, 328, 344..... 1858 306 6, 8, 13, 15 *				
			238..... 1875 409 1 *				
			243, 334..... 1865 615 4, 9 *				
			267..... 1860 459 6 *				
			304, subds. 3, 4; 318, 364 1862 460 16, 21, 25 *				
			391..... 1876 431 15 *				
			426..... 1869 883 15 *				
			Part relating to the city of New York..... 1881 537 1				
			All..... 1880 245 1 § 4, 26				

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L.	Ch.	Section	Section	REPEALING STAT- UTES			
				L.	Ch.	§	
1849	439	All.....	11-18.....	1877	417	1 § 23	
			Part relating to the city				
			of New York.....	1881	537	1	
			All.....	1880	245	1 § 26	
1850	1	All.....	All.....	1877	417	1 § 24	
1850	15	All.....	All.....	1877	417	1 § 24	
1850	82	All.....	1, 2, 4.....	1878	129	1, 2, 4	*
			3.....	1869	260	1	*
			All.....	1880	245	1 § 27	
1850	94	All.....	All.....	1880	245	1 § 27	
1850	128	All.....	All.....	1877	417	1 § 24	
1850	150	All.....	1.....	1879	389	1	*
			All.....	1880	245	1 § 27	
1850	162	All.....	All.....	1880	245	1 § 27	
1850	225	All.....	3.....	1877	417	1 § 24	
			All.....	1880	245	1 § 27	
1850	245	All.....	All.....	1877	417	1 § 24	
1850	260	All.....	All.....	1877	417	1 § 24	
1850	272	All.....	1.....	1866	115	1	*
			All.....	1880	245	2	
1850	295	All.....	All.....	1877	417	1 § 24	
1851	2	Part affecting Code of Pro- cedure, §§ 47, 49	Part affecting Code of Procedure, §§ 47, 49....	1877	417	1 § 25	
1851	21	All.....	All.....	1877	417	1 § 25	
1851	134	33.....	33.....	1893	101	1	*
1851	163	All.....	All.....	1896	548		
1851	202	2.....	2.....	1877	417	1 § 25	
1851	232	All.....	All.....	1896	548	1	
1851	277	All.....	Part relating to the city				
			of New York.....	1881	537	1	
			All.....	1880	245	1 § 28	
1851	444	All.....	All.....	1886	593	1 § 26	
1851	455	All.....	All.....	1880	245	1 § 28	
1851	460	All.....	1.....	1868	828	1	*
			All.....	1880	245	2	
1851	472	All.....	All.....	1880	245	2	
1851	479	All.....	1 pt. amending L. 1849, Ch. 438, §§ 11, 13, 30, subds. 12, 13; 101, 116, 149, 153, 173, 244, 252, 255, 264, 265, 268, 272, 278, 281, subd. 2; 287, 307, subd. 6; 317, 348, 349, 353, 354, 397, 460, 470.....	1852	392	1	*
			1 pt. amending L. 1849, Ch. 438, §§ 14, 99, 100, 282.....	1867	781	3, 5, 6, 10	*
			1 pt. amending L. 1849, Ch. 438, §§ 24, 31, 258	1876	431	2, 4, 10	*
			1 pt. amending L. 1849, Ch. 438, § 53, subds. 3, 9.	1861	158	1	*
			1 pt. amending L. 1849, Ch. 438, §§ 111, 130, 385	1866	824	2, 5, 16	*

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L.	Ch.	Section	Section	REPEALING STAT- UTES		
				L.	Ch.	§
						See note
			1 pt. amending L. 1849, Ch. 438, §§ 114, 132.	1857	723	2, 4
			1 pt. amending L. 1849, Ch. 438, § 135, subd. 3.	1858	306	5
			1 pt. amending L. 1849, Ch. 438, § 170, subd. 3.	1875	28	1
			1 pt. amending L. 1849, Ch. 438, §§ 273, 366, 371	1862	460	11, 26, 27
			1 pt. amending L. 1849, Ch. 438, § 399.	1857	353	1
1851	486	All.	All.	1880	245	2
			1, 2 to first semicolon, 3.	1877	417	1
			All.	1896	548	1
1852	47	All.	All.	1880	245	2
1852	65	All.	All.	1880	245	2
1852	175	All.	All.	1880	245	1
1852	277	All.	All.	1880	245	1
1852	374	1-5.	1-5.	1877	417	1
			Part relating to the city of New York.	1881	537	1
1852	392	All.	Part amending L. 1849, Ch. 438, § 11.	1857	723	1
			Part amending L. 1849, Ch. 438, § 13.	1865	615	2
			Part amending L. 1849, Ch. 438, § 30, subd. 13.	1860	459	1
			Part amending L. 1849, Ch. 438, § 116.	1865	615	3
			Part amending L. 1849, Ch. 438, § 153.	1855	44	1
			Part amending L. 1849, Ch. 438, § 167, subd. 7, "and what follows it".	1863	392	1
			Part amending L. 1849, Ch. 438, § 173.	1876	431	8
			Part amending L. 1849, Ch. 438, § 244, subd. 4.	1867	781	8
			Part amending L. 1849, Ch. 438, § 265.	1857	723	10
			Part amending L. 1849, Ch. 438, § 272.	1857	723	11
			Part amending L. 1849, Ch. 438, § 307, subd. 6.	1857	723	13
			Part amending L. 1849, Ch. 438, § 349.	1862	460	22
			Part amending L. 1849, Ch. 438, § 354.	1857	723	22
			Part amending L. 1849, Ch. 438, § 360.	1862	460	24
			Part amending L. 1849, Ch. 438, § 367.	1865	615	13
			Part amending L. 1849, Ch. 438, § 401, subds. 3-5.	1858	306	18
			Part amending L. 1849, Ch. 438, § 401, subd. 6.	1870	741	14
			All.	1880	245	2

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L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1853	153	All.	All.	1880	245	1 § 30	
1853	238	All.	1.	1879	316	1	
			All.	1880	245	1 § 30	
1853	338	All.	1-3, 5-7.	1877	417	1 § 27	
			4.	1896	548	1	
1853	421	All.					[202]
1853	511	All.	All.	1877	417	1 § 27	
1853	529	All.	Part relating to the city of New York.	1881	537	1	
			All.	1877	417	1 § 27	
1853	648	All.	All.	1880	245	1 § 30	
1854	75	All.	All.	1877	417	1 § 28	
1854	116	All.	All.	1880	245	1 § 31	
1854	135	All.					[203]
1854	206	All.	All.	1880	245	1 § 31	
1854	270	All.	1, 2.	1877	417	1 § 28	
			Part relating to the city of New York.	1881	537	1	
			All.	1880	245	1 § 31	
1855	10	All.					[204]
1855	44	All.	1.	1857	723	5	
			All.	1877	417	2	
1855	85	All.	All.	1880	245	1 § 32	
1855	202	All.	1, 2.	1880	245	1 § 32	[205]
1855	279	All.	All.	1877	417	1 § 29	
1855	471	All.	4, 5.	1870	60	1	[206]
			4.	1896	548	1	
1855	511	All.	All.	1880	245	1 § 32	
1855	530	All.	1.	1865	296	1	
			Part relating to Kings county.	1856	166	4	
			Part relating to Dutchess county.	1859	440	2	
			All.	1877	417	1 § 29	
1856	166	All.	All.	1877	417	1 § 30	
1857	60	All.	All.	1877	417	1 § 31	
1857	173	All.	All.	1861	12	1	
			All.	1880	245	1 § 33	
1857	303	All.	All.	1858	107	2	
1857	308	All.	All.	1880	245	1 § 33	
1857	353	All.	1.	1859	428	9	
			All.	1877	417	2	
1857	396	2, 3.	2, 3.	1886	593	1 § 32	
1857	512	All.	All.	1880	245	1 § 33	
1857	567	All.	All.	1877	417	1 § 31	
1857	679	All.	All.	1880	245	1 § 33	
1857	684	All.	1.	1868	828	2	
			All.	1880	245	2	
1857	723	All.	1 pt. amending L. 1849, Ch. 438, § 11, subd. 2.	1867	781	1	
			1 pt. amending L. 1849, Ch. 438, § 11, subd. 3.	1866	824	1	
			1-3, 5-11, 18-20.	1877	417	2	
			4.	1866	824	4	
			4, 12-17, 21-24.	1830	245	2	
			6.	1866	824	7	
			7.	1875	28	3	

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L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
			8.	1869	883	7	
			13 pt. amending L. 1849, Ch. 438, § 307, subds. 5-7.	1858	306	11	
			13 pt. amending L. 1849, Ch. 438, § 307, subds. 1-4.	1864	413	1	
			14.	1862	460	18	
			15.	1865	615	8	
			17.	1876	431	12	
			18.	1858	306	14	
			21.	1862	460	23	
			22.	1858	306	16	
1857	775	All.	All.	1880	245	1 § 33	
1858	37	All.	2.	1861	288	1	
			All.	1877	417	1 § 32	
1858	107	All.	All.	1877	417	1 § 32	
1858	176	All.	1.	1860	176	1	
			All.	1880	245	1 § 36	
1858	244	All.	All.	1877	417	1 § 32	
1858	306	All.	1, 8, 12	1865	615	2, 5, 8	
			1, 5-7, 9, 13-15, 17, 18, 21.	1877	417	2	
			2-4, 8, 10-12, 16, 19, 20.	1880	245	2	
			4.	1866	824	4	
			11.	1864	413	1	
			13.	1863	392	1	
			14.	1876	431	13	
			17, 18 pt. amending L. 1849, Ch. 438, § 401, subd. 3.	1859	428	9, 10	
			20.	1867	781	8	
1859	110	All.	All.	1880	245	2	
1859	134	All.	All.	1877	417	1 § 33	
1859	174	All.	All.	1880	245	1 § 35	
1859	198	All.	All.	1877	417	1 § 33	
1859	252	All.	All.	1880	245	1 § 35	
1859	261	All.	1.	1880	245	2	
			All.	1893	686	1	
1859	262	All.	1.	1877	417	1 § 33	
			All.	1880	245	1 § 35	
1859	428	All.	1-3, 5, 9-14.	1877	417	2	
			4, 8, 14.	1865	615	5, 8, 2	
			4, 6-8.	1880	245	2	
			7.	1864	413	1	
			9.	1860	459	12	
			11.	1863	392	1	
1859	440	2, 3.	2, 3.	1877	417	1 § 33	
1860	6	All.	All.	1877	417	1 § 34	
1860	80	All.	Part relating to the city of New York.	1881	537	1	
			All.	1880	245	1 § 36	
1860	131	All.	1.	1876	431	5	
			10.	1865	616	1	
			All.	1880	245	1 § 36	
1860	136	All.	1.	1864	545	1	
			All.	1880	245	1 § 36	
1860	152	All.	All.	1880	245	2	

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L.	Ch.	Section	Section	REPEALING STAT- UTES		
				L.	Ch.	§
1860 167	All.	All.	1865 218	1	
			All.	1877 417	1	34
1860 173	All.	All.	1880 245	1	36
1860 202	All.	Part requiring graduates to be admitted to practice upon production of their diplomas.	1877 417	1	34 [207]
1860 459	All.	1.	1873 431	3	
			1-3, 8.	1880 245	2	
			4-7, 9-12.	1877 417	2	
			6, 8.	1835 615	6, 5	*
			7.	1875 28	3	*
			12.	1832 460	31	*
1860 493	1, 2.	1, 2.	1880 245	1	36
1861 11	All.	All.	1880 245	1	37
1861 12	All.	All.	1880 245	1	37
1861 158	All.	1. pt. amending L. 1849, Ch. 438, § 53, subd. 2.	1862 460	3	*
			All.	1880 245	2	
1861 221	All.	All.	1862 485	2	
1861 288	All.	All.	1877 417	1	35
1862 43	All.	All.	1866 175	2	
1862 86	All.	All.	1877 417	1	36
1862 229	All.	5.	1876 278	1	*
			All.	1880 245	1	38
1862 246	All.	All.	1880 245	2	
1862 251	All.	All.	1877 417	1	36
1862 368	All.	All.	1880 245	2	
1862 375	All.	All.	1877 417	1	36
1862 451	All.	All.	1865 336	1	
1862 460	All.	1. pt. amending L. 1849, Ch. 438, § 24.	1876 431	2	[208]
			1. pt. amending L. 1849, Ch. 438, § 11, subd. 2.	1867 781	1	*
			1, 2, 4, 5, 7-9, 11-14, 22, 31, 32, 35-37.	1877 417	2	
			2, 4, 19, 23, 24, 26 pt. amending L. 1849, Ch. 438, § 366, subd. 5; § 31	1863 615	2, 3, 8, 10-12, 14	*
			3, 6, 10, 15-21, 23-30, 33, 34.	1880 245	2	
			6, 27.	1866 824	4, 14	*
			9.	1869 853	7	*
			10.	1867 781	8	*
			11, 36.	1863 392	1	*
			17.	1864 413	1	*
1862 471	All.	All.	1877 417	1	36
1862 485	All.	1.	1880 245	2	[209]
1863 206	All.	1.	1869 589	1	
			All.	1877 417	1	37
1863 212	All.	All.	1877 417	1	37
1863 362	1-9.	1, 2, 5, 6, 9.	1880 245	1	39 [210]
			3.	1867 782	6	*
			4, 7, 8.	1893 686	1	*
			7.	1864 420	1	*

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED			PREVIOUS REPEALS			
L.	Ch.	Section	Section	REPEALING STAT- UTES		
				L.	Ch.	§
1863	392	All.....	1 pt. amending L. 1849, Ch. 438, §§ 13, 116, 256, 273, 352, 390.....	1865	615	2, 3, 5, 7, 10, 14 [211]*
			1 pt. amending L. 1849, Ch. 438, § 179, subd. 4...	1875	28	1
			1 pt. amending L. 1849, Ch. 438, § 307.....	1864	413	1 *
			1 pt. amending L. 1849, Ch. 438, § 335.....	1876	431	14 *
			1 pt. amending L. 1849, Ch. 438, § 371.....	1866	824	14 *
			1 pt. amending L. 1849, Ch. 438, §§ 104, 113, 116, 154, 167, first two sentences, 179, 273; § 4.	1877	417	2
			1, 3, 4.....	1880	245	2
1863	400	All.....	All.....	1880	245	2
1863	403	All.....	All.....	1880	245	1 ¶ 39
1863	456	All.....	All.....	1896	548	1
1863	466	All.....	All.....	1880	245	2
1864	53	2-5.....	2-5.....	1880	245	1 ¶ 40
1864	71	All.....	1-11.....	1880	245	1 ¶ 40 [212]
			8, 10.....	1867	782	7
1864	95	All.....	All.....	1877	417	1 ¶ 38
1864	219	All.....	All.....	1880	245	1 ¶ 40
1864	280	5..... [213]
1864	311	All.....	1.....	1872	680	1 *
			All.....	1880	245	1 ¶ 40
1864	411	All.....	All.....	1880	245	1 ¶ 40
1864	413	All.....	1.....	1866	824	11 *
			All.....	1880	245	2
1864	414	All.....	1.....	1865	615	10 *
			2.....	1866	824	14 *
			All.....	1880	245	2
1864	417	All.....	All.....	1880	245	1 ¶ 40
1864	420	All.....	1.....	1866	784	1 *
1864	421	All.....	All.....	1880	245	2
1864	422	All.....	1.....	1875	508	1 *
			All.....	1880	245	2
1864	543	All.....	All.....	1877	417	1 ¶ 38
1864	545	All.....	1.....	1866	307	1 *
			All.....	1880	245	1 ¶ 40
1864	578	All.....	All.....	1877	417	1 ¶ 38
1865	218	All.....	1.....	1870	49	1 *
			All.....	1877	417	1 ¶ 39
1865	296	All.....	1.....	1866	588	1 *
			1.....	1877	417	1 ¶ 39
			All.....	1896	548	1
1835	836	All..... [214]
1865	357	All.....	All.....	1880	245	1 ¶ 41
1865	512	All.....	All.....	1877	417	1 ¶ 39
1865	555	All.....	All.....	1877	417	1 ¶ 39

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED			PREVIOUS REPEALS				
L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1865	615	All.....	1-3, 6, 7, 9, 14.....	1877	417	2	
			2, 5, 8.....	1876	431	1, 9, 11	*
			4, 5, 8, 10-13.....	1880	245	2	*
			6.....	1870	741	10	*
			7, 11, 14.....	1866	824	8, 13, 17	*
			13.....	1869	883	12	*
1865	616	All.....	All.....	1880	245	1 ¶ 41	
1865	724	All.....	All.....	1880	245	2	
1865	733	All.....	All.....	1880	245	1 ¶ 41	
1866	115	All.....	All.....	1880	245	2	
1866	174	All.....	All.....	1877	417	1 ¶ 40	
1866	175	All.....	All.....	1877	417	1 ¶ 40	
1866	307	All.....	All.....	1880	245	1 ¶ 42	
1866	588	All.....	All.....	1877	417	1 ¶ 40	
1866	692	1, 2, 6, 7, 9-11..	1, 2, 6, 7, 9, 10.....	1880	245	1 ¶ 42 [215]	*
			6, 7.....	1869	820	1	*
1866	782	All.....	All.....	1877	417	1 ¶ 40	
1866	784	All.....	All.....	1893	686	1	
1866	824	All.....	1, 6-8, 10, 12, 16, 17.....	1877	417	2	[216]
			3-5, 11, 13-15, 18.....	1880	245	2	
			7.....	1875	28	2	*
			11 pt. amending L. 1849, Ch. 438, § 307, subds. 1, 5; §§ 17, 18.....	1867	781	12, 13 16	*
1867	68	All.....	All.....	1880	245	2	
1867	116	All.....	All.....	1877	417	1 ¶ 41	
1867	516	All.....	1, 2.....	1878	33	1, 2	*
			Part relating to the city of New York.....	1881	537	1	
			All.....	1880	245	1 ¶ 43	*
1867	658	All.....	2.....	1870	170	1	
			All.....	1880	245	1 ¶ 43	*
1867	781	All.....	1-3, 5, 6, 9, 10, 14, 15.....	1877	417	2	*
			2, 14.....	1869	883	3, 14	*
			4-8, 11-13, 16.....	1880	245	2	*
1867	782	1, 2, 5-16....	1.....	1871	482	1	*
			1, 7-10, 16.....	1880	245	1 ¶ 43	*
			1, 2, 5-16.....	1893	686	1	*
			13.....	1887	630	1	*
			15.....	1886	593	2	*
			16.....	1869	246	1	*
1867	887	All.....	All except part relating to criminal proceedings...	1877	417	1 ¶ 41	
			All.....	1886	593	1 ¶ 42	
1868	594	All.....	All.....	1880	245	1 ¶ 44	
1868	596	All.....	All.....	1877	417	1 ¶ 42	
1868	764	All.....	All.....	1880	245	2	
1868	804	All.....	2.....	1870	706	1	*
			All.....	1880	245	1 ¶ 44	
1868	828	All.....	All.....	1880	245	1 ¶ 44	[217]
1868	869	All.....	All.....	1877	417	1 ¶ 43	
1869	99	All.....	All.....	1877	417	1 ¶ 43	
1869	133	All.....	1.....	1877	417	1 ¶ 43	
1869	157	All.....	All.....	1880	245	1 ¶ 45	

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED			PREVIOUS REPEALS				
L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1869	246	All.....	3.....	1870	359	14	
			All.....	1880	245	1 ¶ 45	
1869	260	All.....	1.....	1872	92	1	
			All.....	1880	245	1 ¶ 45	
1869	433	All.....	5.....	1877	417	1 ¶ 43	
			All.....	1880	245	1 ¶ 45	
1869	589	All.....	All.....	1877	417	1 ¶ 43	
1869	626	All.....	All.....	1877	417	1 ¶ 43	
1869	627	All.....	All.....	1880	245	1 ¶ 45	
1869	672	All.....	All.....	1872	139	2	
1869	748	All.....	All.....	1880	245	1 ¶ 45	
1869	807	All.....	All.....	1877	417	1 ¶ 43	
1869	820	1 pt. amending L. 1866, Ch. 692, §§ 6, 7; §§ 2, 3.	1 pt. amending L. 1866, Ch. 692, §§ 6, 7.....	1880	245	1 ¶ 45 [218]	
1869	831	All.....	All.....	1880	245	1 ¶ 45	
1869	845	All.....	1.....	1873	211	1	
			All.....	1880	245	1 ¶ 45	
1869	883	All.....	1-4, 6, 7, 9, 10, 13-15.....	1877	417	2	
			3, 5.....	1870	741	1, 3	
			4, 8.....	1876	431	1, 9	
			5, 8, 11, 12.....	1880	245	2	
1870	20	All.....	All.....	1880	245	1 ¶ 46	
1870	37	All.....	All.....	1880	245	1 ¶ 46	
1870	49	All.....	1.....	1875	32	1	*
			All.....	1877	417	1 ¶ 44	
1870	59	All.....	1.....	1875	442	1	*
			All.....	1880	245	1 ¶ 46	
1870	74	All.....	1.....	1890	155	1	*
			2.....	1874	9	1	*
			2.....	1880	245	1 ¶ 46	
			All.....	1893	686	1	
1870	78	All.....	All.....	1880	245	1 ¶ 46	
1870	151	1-3, 5, 6.....	1-3.....	1880	245	1 ¶ 46 [219]	
			5.....	1875	428	1	*
1870	170	All.....	All.....	1880	245	1 ¶ 46	
1870	341	All.....	1.....	1871	708	1	*
			All.....	1880	245	2	
1870	359	All.....	Part relating to the city of New York.....	1881	537	1	
			All.....	1880	245	1 ¶ 46	
1870	394	All.....	All.....	1880	245	1 ¶ 46	
1870	408	1-8, 10-15....	1-8, 10-14.....	1877	417	1 ¶ 44	
			1-8, 10-15: pt. relating to the city of New York...	1881	537	1	
			3.....	1875	316	1	*
			15.....	1896	548	1	
1870	467	1, 2, 4, 5.....	1.....	1880	480	1	*
			1.....	1877	417	1 ¶ 44	
			All.....	1880	245	1 ¶ 46	
1870	550	1.....	[220]
1870	706	All.....	All.....	1880	245	1 ¶ 46	
1870	717	All.....	2.....	1874	258	1	*
			7.....	1880	487	1	*
			All.....	1880	245	1 ¶ 46	

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STATUTES HEREBY REPEALED			PREVIOUS REPEALS				See note
L.	Ch.	Section	Section	REPEALING STAT- UTES			
				L.	Ch.	§	
1870	741	All.....	1, 2, 5-11, 13-15.....	1877	417	2	*
			3, 4, 12.....	1880	245	2	
			12.....	1876	431	11	
1871	208	All.....	All.....	1877	417	1	45
1871	219	All.....	All.....	1880	245	1	47
1871	335	All.....	4.....	1877	154	1	*
			All.....	1893	686	1	
1871	361	All.....	All.....	1880	245	1	47
1871	415	All.....	1, subd. 1.....	1872	26	1	*
			Part relating to the city of New York.....	1881	537	1	
			All.....	1880	245	1	47
1871	482	All.....	All.....	1880	245	1	47
1871	486	All.....	All.....	1877	417	1	45
1871	603	All.....	2.....	1877	417	1	45
			All.....	1880	245	1	47
1871	610	All.....	All.....	1896	548	1	*
1871	708	All.....	All.....	1880	245	2	
1871	733	All.....	All.....	1877	417	1	45
1871	766	All.....	1, 3.....	1872	778	1, 2	*
			All.....	1877	417	1	
1871	834	All.....	All.....	1880	245	1	47
1871	874	All.....	All.....	1880	245	1	47
1871	936	All.....	Part relating to the city of New York...	1881	537	1	*
			All.....	1880	245	1	
1872	26	All.....	All.....	1880	245	1	48
1872	92	All.....	1.....	1878	129	3	*
			All.....	1880	245	1	
1872	260	All.....	All.....	1877	417	1	46
1872	680	All.....	1.....	1878	324	1	*
			All.....	1880	245	1	
1872	693	All.....	All.....	1880	245	1	48
1872	778	All.....	All.....	1877	417	1	46
1873	9	All.....	2.....	1878	589	1	[221]*
1873	70	All.....	1, 2; pt. prescribing pref- erence of causes on cal- endars.....	1877	417	1	47
			All.....	1880	245	1	49
1873	79	All.....	All.....	1893	686	1	*
1873	146	All.....	All.....	1880	245	2	
1873	211	All.....	All.....	1880	245	1	49
1873	225	All.....	All.....	1893	686	1	*
1873	299	All.....	All.....	1877	417	1	
1873	427	1.....	1 pt. relating to civil causes.....	1877	417	1	47
			1.....	1886	593	1	48
1873	552	All.....	2.....	1874	127	1	*
			All.....	1880	245	1	
							[222]
1873	589	All.....		1880	245	2	*
1873	657	All.....	All.....	1880	245	2	
1873	663	All.....	All.....	1880	245	1	50
1874	9	All.....	All.....	1880	245	1	50
1874	127	All.....	All.....	1880	245	1	50
1874	156	All.....	All.....	1880	245	1	*
1874	208	All.....	1.....	1879	101	1	
			All.....	1880	245	2	
1874	258	All.....	All.....	1880	245	1	50

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED			PREVIOUS REPEALS				
L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1874	267	All.	All.	1880	245	1	50
1874	322	All.	All.	1877	417	1	48
1874	437	All.	All.	1880	245	1	50
1874	456	All.	All.	1880	245	1	50
1874	469	All.	All.	1880	245	2	
1874	470	All.	All.	1893	686	1	
1874	471	All.	1.	1879	101	1	
			All.	1880	245	2	
1874	524	All.	All.	1880	245	1	50
1875	16	All.	All.	1880	245	2	
1875	28	All.	All.	1880	245	2	
1875	32	All.	All.	1877	417	2	
1875	49	All.	5.	1877	417	1	49
			All.	1877	417	1	49
1875	131	All.	All.	1880	245	1	51
1875	167	All.	All.	1877	417	1	49
1875	305	All.	All.	1877	417	1	49
1875	334	All.	All.	1880	245	2	
1875	335	All.	All.	1880	245	2	
1875	409	All.	All.	1880	245	1	51
1875	420	All.	All.	1877	417	2	
1875	428	All.	All.	1880	245	2	
1875	442	All.	All.	1880	245	1	51
1875	508	All.	All.	1880	245	2	
1875	519	All.	All.	1880	245	1	51
1875	542	All.	All.	1893	686	1	
1875	616	All.	All.	1877	417	1	49
1875	630	All.	All.	1880	245	1	51
1876	267	2.	2.	1880	245	1	52
1876	277	All.	All.	1880	245	2	
1876	278	All.	All.	1880	245	1	52
1876	299	All.	All.	1880	245	1	52
1876	431	All.	All.	1880	245	1	52
1876	442	All.	All.	1880	245	1	52
1876	444	All.	2, 3, 4.	1881	211	1-3	[224]*
1877	11	All.	1.				[224]b
1877	154	All.	All.	1882	124	1	[225]
1877	168	All.	All.	1880	245	2	
1877	187	All.	All.	1881	537	1	[226]
			All.	1880	245	1	53
1877	206	All.	Part relating to the city of New York.	1881	537	1	
			All.	1880	245	1	53
1877	257	All.	Part relating to the city of New York.				[227]
1877	274	All.	All.	1881	537	1	
			All.	1880	245	1	53
1877	285	All.	All.	1879	311	1	
			All.	1880	245	1	53
1877	319	All.	All.	1896	548	1	
1877	417	All.	1, subd. 42.	1878	408	1	[228]*
			1, subd. 46, pt. repealing L. 1872, Ch. 438, so far as it relates to clerks and assistant clerks of district courts of New York city.	1878	345	1	
			3, subd. 17.	1878	126	1	

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED			PREVIOUS REPEALS				
L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1877	456	All.....	All.....	1893	686	1	
1878	30	All.....	All.....	1880	245	2	
1878	33	All.....	2.....	1878	175	1	*
			Part relating to the city of New York.....	1881	537	1	
			All.....	1880	245	1	54
1878	126	All.....	1.....	1879	35	1	*
1878	129	All.....	All.....	1880	245	1	54
1878	166	All.....					[239]
1878	175	All.....	All.....	1880	245	1	54
1878	219	All.....	All.....	1881	537	1	
			1.....	1879	211	1	
			2.....	1884	327	1	*
1878	292	All.....	All.....	1880	245	2	
1878	298	2.....	2.....	1880	245	1	54
1878	324	All.....	All.....	1880	245	1	54
1878	408	All.....					[230]
1879	35	All.....	1.....	1879	257	1	*
1879	101	All.....	All.....	1880	245	2	
1879	151	All.....					[231]
1879	211	All.....					[232]
1879	257	All.....	1.....	1879	349	1	*
1879	305	All.....					[233]
1879	311	All.....					[234]
1879	316	All.....					[235]
1879	349	All.....	1.....	1880	58	1	*
1879	389	All.....					[236]
1879	406	All.....	All.....	1893	686	1	
1880	36	All.....	1.....	1888	555	1	*
1880	58	All.....	1.....	1881	25	1	*
1880	231	All.....	All.....	1880	245	2	
1880	393	All.....					[237]
1880	423	All.....					[238]
1880	480	All.....	All.....	1896	548	1	
1880	487	All.....	All.....	1896	548	1	
1880	561	5.....					[239]
1881	25	All.....					[240]
1881	40	All.....	All.....	1893	686	1	
1881	211	All.....					[241]
1881	414	All.....	3, 4.....	1889	472	1, 2	*
			All.....	1906	291	2	
1881	654	All.....					[242]
1882	124	All.....	All.....	1893	686	1	
1882	340	All.....					[243]
1883	195	All.....					[244]
1883	205	All.....	2, 4, 6, 7, 9-11, 13.....	1884	60	1-8	*
			2, pt. directing that sten- ographer appointed by board of claims shall act as deputy clerk.....	1884	334	2	
			3, 5, 16.....	1888	365	2-4	*
			12.....	1893	425	1	*
			All.....	1897	36	4	
1883	426	All.....					[245]

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STATUTES HEREBY REPEALED			PREVIOUS REPEALS				
L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1884	60	All.....	1, pt. directing that the stenographer appointed by said commissioners of board of claims shall act as deputy clerk....	1884	334	2	
			1.....	1888	365	1	*
			6.....	1887	507	1	*
			7.....	1896	451	2	*
			8.....	1889	68	2	*
			All.....	1897	36	4	
1884	85	All.....	All.....	1897	36	4	
1884	133	All.....	All.....	1896	548	1	
1884	197	All.....	All.....	1885	112	1	
1884	309	1.....					[246]
1884	334	All.....	1.....	1891	379	1	*
1884	336	2-5.....					[247]
1884	376	All.....					[248]
1884	490	All.....	All.....	1893	686	1	
1884	530	11.....					[249]
1885	112	All.....					[250]
1885	135	2, 3.....					[251]
1885	267	2.....					[252]
1885	367	All.....	All.....	1893	686	1	
1886	577	6, pt. adding § 24 to L. 1885, Ch. 183.....					[253]
1887	36	All.....					[254]
1887	507	All.....	1.....	1896	451	1	*
			All.....	1897	36	4	
1887	630	All.....	All.....	1893	686	1	
1888	118	1, pt. beginning with words "and the record" to end of section; 2.....					
1888	302	All.....	All.....	1893	686	1	[255]
1888	365	All.....	1.....	1889	68	1	*
			All.....	1897	36	4	
1888	555	All.....					[256]
1888	571	All.....	1.....	1893	100	1	
			All.....	1893	686	1	
1889	68	All.....	1.....	1890	403	1	*
			All.....	1897	36	4	
1889	330	2, 3.....	2, 3.....	1895	544	2, 3	*
1889	406	2, 3.....	2.....	1890	173	2	[257]*
1889	472	All.....	All.....	1906	291	2	
1889	522	All.....	All.....	1897	36	4	
1890	155	All.....	All.....	1893	686	1	
1890	158	All.....					[258]
1890	173	2, 3.....	2, 3.....	1893	686	1	
1890	403	All.....	All.....	1897	36	4	
1890	456	All.....	All.....	1893	686	1	
1891	125	5.....	5.....	1897	403	1	*
1891	379	All.....					[260]
1892	677	19, last sentence.....					[261]

SCHEDULE OF LAWS REPEALED.

STATUTES HEREBY REPEALED			PREVIOUS REPEALS				
L.	Ch.	Section	Section	REPEALING STAT- UTES			See note
				L.	Ch.	§	
1893	100	All.					[262]
1893	101	All.					[263]
1893	425	All.	All.	1897	36	4	
1894	731	All.					[264]
1895	544	2-4.	3.	1908	185	2	[265]
1896	451	All.	All.	1897	36	4	
1896	548	All.					[266]
1897	403	1 pt. amend- ing L. 1891, Ch. 125, § 5.					[267]
1897	622	All.					[268]
1898	124	All.	All.	1899	150	4	
1899	150	All.					[269]
1900	223	All.					[270]
1900	510	All.					[271]
1908	185	2, 3.					[272]
Code Civil Procedure. 27, 95, 360; part relating to surrogate.							[273]
Code Civil Procedure. 83, fourth sen- tence.							[274]
Code Civil Procedure. Arti- cle headings of Ch. 1, tit. 2.							[275]

NOTES TO SCHEDULE

NOTES TO SCHEDULE.

[Prepared by Board of Statutory Consolidation.]

When a statute has been specifically repealed, that statute and the repealing statute are given without an explanatory note.

Statutes indicated by an asterisk * in the column "See note," have been amended so as to read as follows and superseded and repealed by the amending statutes noted. In case the entire statute has been repealed by being amended "to read as follows," except the section which states when the act shall take effect, this section is included in the word "All" under the heading "statutes hereby repealed" without further explanation.

100. R. S., Pt. 3, Ch. 1, Tit. 4, §§ 1-22, 24-28, 35, 36, 40, 45. Sections 1-22, 24-28, 45 have been heretofore repealed, as appears in the schedule. Sections 35, 36 are covered by Code Civ. Pro. § 234, and Code Crim. Pro. § 22. Section 40 is superseded by Code Civ. Pro. § 27.

101. R. S., Pt. 3, Ch. 1, Tit. 5, § 20, subd. 30. Repealing statute, L. 1833, Ch. 205, § 3, in terms repeals subd. 20 of said § 20. In fact subdivision 30 was intended, as shown by context of balance of repealing statute.

102. R. S., Pt. 3, Ch. 1, Tit. 5, § 20, subd. 38. Repealing statute, L. 1829, Ch. 80, § 2, in terms repeals § 21, subd. 38. In fact § 20, subd. 38, was intended, as shown by context of balance of repealing statute.

104. R. S., Pt. 3, Ch. 8, Tit. 17, §§ 1-26, 31-34, 36-46. All repealed, as appears in schedule, except § 32 which provides for warrant of attachment against sheriffs for failure to return warrant for collection of canal tolls. Canal tolls abolished. Obsolete.

105. R. S., Pt. 4, Ch. 2, Tit. 8, § 1. Relates to fees of justices of peace. All except last paragraph superseded by L. 1866, Ch. 692. The last paragraph prohibiting boards of supervisors from allowing accounts in favor of justices of the peace for any warrant or any complaint for an assault and battery is obsolete.

106. L. 1778, Ch. 12, §§ 3, 4 6, 7, 1 Sess. Section 3 obsolete. Court of probates abolished. Section 4, Code Civ. Pro. § 27, covers the provisions of this section. Section 7, abrogated by Code Civ. Pro. §§ 232, 355. Section 6 temporary.

107. L. 1778, Ch. 14, 1 Sess. Abrogated by Code Civ. Pro. § 3307.

108. L. 1779, Ch. 10, 2 Sess. Abrogated by provisions of Code Civ. Pro. §§ 3307, 3323.

109. L. 1779, Ch. 17, 3 Sess. Abrogated by provisions of Code Civ. Pro. §§ 3307, 3323.

110. L. 1780, Ch. 56, § 3. Superseded by Code Civ. Pro. § 1072.

111. L. 1782, Ch. 24, 5 Sess. Directs the secretary of state to deliver certain documents to the court of probates. Temporary and obsolete.

112. L. 1782, Ch. 1, 6 Sess. Revolutionary war act. Obsolete.

NOTES TO SCHEDULE.

113. L. 1783, Ch. 14, 6 Sess. Revolutionary war act. Obsolete.
114. L. 1783, Ch. 31, 6 Sess. Relates to actions for trespass brought against persons occupying or injuring property during the Revolutionary war. A part of statute was repealed by L. 1787, Ch. 71, § 1, 10 Sess. Obsolete.
115. L. 1783, Ch. 41, 6 Sess. Expired by limitation.
117. L. 1784, Ch. 7. Repealing act. Obsolete.
118. L. 1784, Ch. 48. Temporary and obsolete.
119. L. 1784, Ch. 59. Revolutionary war act. Obsolete.
120. L. 1784, Ch. 12, 8 Sess. Revolutionary war act. Obsolete.
121. L. 1786, Ch. 16. Temporary and obsolete.
122. L. 1786, Ch. 29, § 1. Revolutionary war act. Obsolete.
123. L. 1787, Ch. 5, 10 Sess. Relates to essoins and wager by law. Code Civ. Pro. § 3339, provides that there shall be but one form of civil action. Abrogated.
124. L. 1787, Ch. 26, § 7, 10 Sess. Provides a penalty for malicious arrest. Code Civ. Pro. § 3343, subd. 9, makes false arrest a personal injury and an action for a personal injury lies at common law. Abrogated.
125. L. 1787, Ch. 71. Repealing act. Obsolete.
126. L. 1787, Ch. 94. Revolutionary war act. Obsolete.
127. L. 1788, Ch. 41. Revolutionary war act. Obsolete.
128. L. 1788, Ch. 73, 2 pt. Repealing act. Obsolete.
129. L. 1791, Ch. 8. Section 1 is a repealing statute. Section 2 is superseded by Code Civ. Pro. § 3307.
130. L. 1792, Ch. 28. Superseded by Code Civ. Pro. § 847.
131. L. 1795, Ch. 1. Temporary and obsolete.
132. L. 1796, Ch. 2. Covered by provisions of Code Civ. Pro. § 44.
133. L. 1797, Ch. 20, § 20. Repealing statutes. Obsolete.
135. L. 1798, Ch. 52. Covered by provisions of Code Civ. Pro. § 847.
136. L. 1798, Ch. 68, § 18. Temporary and obsolete.
137. L. 1798, Ch. 100. Temporary and obsolete.
138. L. 1800, Ch. 22. Relates to circuit court and sittings in city and county of New York. Repealed so far as relates to the city of New York as appears in schedule. Balance obsolete.
139. L. 1801, Ch. 176. All repealed except § 10 as appears in schedule. This section confirms certain partitions of land made prior to April 7, 1801. Obsolete.
140. L. 1803, Ch. 2. Relates to terms of the supreme court of judicature. Obsolete.
141. L. 1803, Ch. 55, § 2. Repealing statute. Obsolete.
142. L. 1805, Ch. 135, §§ 4, 29. Section 4 is a repealing statute. Section 29 is repealed as appears in schedule.
143. L. 1808, ch. 3. Temporary and obsolete.
144. L. 1810, Ch. 193, §§ 14, 35. Section 14 is a repealing statute. Obsolete. Section 35 is repealed, as appears in schedule.
145. L. 1813, Ch. 203, §§ 25, 34, 50. Sections 25 and 34 are repealed as appears in schedule. Section 50 is covered by provisions of Code Civ. Pro. § 1211.
146. L. 1814, Ch. 141. Covered by provisions of Code Civ. Pro. §§ 1390, 1391.
147. L. 1814, Ch. 162, § 1. Relates to the court of chancery which was abolished by the Constitution of 1848. Obsolete.

NOTES TO SCHEDULE.

148. L. 1814, Ch. 193. Covered by provisions of Code Civ. Pro. § 250.

150. L. 1817, Ch. 90. Courts of common pleas and general sessions abolished. Obsolete.

151. L. 1818, Ch. 60, §§ 1, 3, 4. Obsolete.

152. L. 1819, Ch. 178. Expired by limitation.

154. L. 1821, Ch. 38. Repeals L. 1818, Ch. 259, § 8.

155. L. 1821, Ch. 203, § 1. Provides for enforcement of the penalties provided for in certain acts which have been repealed or superseded by subsequent legislation, making statute cited obsolete and inoperative.

156. L. 1822, Ch. 114. Relates to terms of courts which no longer exist, as constituted in 1822. Obsolete.

157. L. 1822, Ch. 247. Relates to court for trial of impeachment and correction of errors, which no longer exists. Obsolete.

158. L. 1823, Ch. 54, § 1. Relates to court for trial of impeachments and correction of errors, which has been abolished. Obsolete.

159. L. 1824, Ch. 81. Statute cited relates to supplying clerk of court of common pleas with reports of the supreme court of judicature. Obsolete.

160. L. 1825, Ch. 4. Relates to court for trial of impeachments and correction of errors, which court is abolished. Obsolete.

161. L. 1828, Ch. 134. Abrogated and superseded by Code Civ. Pro. § 2498.

162. L. 1828, Ch. 20 (2d meeting), § 15, ¶¶ 8, 37-44, 48-50, 52-55. All repealed except paragraphs 37, 42, which added certain sections to the Revised Statutes, which added sections have been since repealed.

163. L. 1828, Ch. 21 (2d meeting), § 1. The paragraphs of this statute recommended for repeal are paragraphs which themselves repeal other statutes included in this schedule. Obsolete.

164. L. 1829, Ch. 108. Refers to court for the trial of impeachments, and correction of errors, which is abolished. Obsolete.

165. L. 1829, Ch. 225. Refers to section of the Revised Statutes which has been repealed. Obsolete.

166. L. 1829, Ch. 252. Covered by Code Civ. Pro. § 449 and by Executive Law, § 52.

168. L. 1830, Ch. 5, § 3. Repealing statute. Obsolete.

169. L. 1830, Ch. 12. Relates to the court of chancery which was abolished by the Constitution of 1846.

170. L. 1830, Ch. 28. Covered by Code Civ. Pro. § 1247. Section 2 temporary and obsolete.

171. L. 1830, Ch. 105, § 2. Repealing statute. Obsolete.

172. L. 1830, Ch. 238. Revolutionary war act. Obsolete.

173. L. 1830, Ch. 320, §§ 14-23, 30-38, 40-50, 52-57, 63, 64, 68. Repealed as appears in schedule, except so much of § 16 as added a § 69 to R. S., Pt. 2, Ch. 6, Tit. 1, and § 68. Former superseded by Code Civ. Pro. § 2611, latter states when act shall take effect.

174. L. 1831, Ch. 16. Establishes office of vice-chancellor. Court of chancery abolished in 1846. Obsolete.

175. L. 1832, Ch. 210. Obsolete.

176. L. 1832, Ch. 308. Terms of court for the correction of errors. Obsolete.

NOTES TO SCHEDULE.

177. L. 1834, Ch. 1. Relates to office of vice-chancellor of court of chancery. Obsolete.

178. L. 1834, Ch. 109. Relates to terms of the court for the correction of errors, which court is abolished.

179. L. 1836, Ch. 30. Relates to the court of chancery which was abolished by Constitution of 1846.

180. L. 1837, Ch. 430, §§ 2, 3. Sections 2 and 3 are superseded by Code Civ. Pro. § 828.

181. L. 1837, Ch. 465. Section 1 repealed as appears in schedule. Section 2 is a validating statute. Obsolete.

182. L. 1838, Ch. 266. Relates to rights of redemption existing under L. 1837, Ch. 410, which act was repealed by § 9 of the act examined from and after November 1, 1838. Obsolete.

183. L. 1839, Ch. 101. Repealed, as appears in schedule, so far as it relates to the city of New York. Relates to court of chancery. Obsolete.

184. L. 1839, Ch. 211. Appointment of a vice-chancellor of court of chancery. Said court abolished by Constitution of 1846, Art. 14, § 5.

185. L. 1839, Ch. 307. Relates to court of chancery which was abolished by the Constitution of 1846, Art. 14, § 5. Obsolete.

187. L. 1840, Ch. 38. Refers to court of chancery which was abolished by the Constitution of 1846, Art. 14, § 5. Obsolete.

188. L. 1840, Ch. 41, § 3 pt. Repealing statute.

189. L. 1840, Ch. 238, §§ 2, 3. Section 2 is repealed as appears in schedule. Section 3 states when act shall take effect.

190. L. 1840, Ch. 314. Relates to officers and terms of the court of chancery, which was abolished by Constitution of 1846, Art. 14, § 5.

191. L. 1840, Ch. 320. Relates to the court for the correction of errors which was abolished by the Constitution of 1846, Art. 6, § 25. Obsolete.

192. L. 1841, Ch. 237. Section 1 relates to fees for solicitors. Obsolete. Section 2 is a repealing statute. Section 3 prescribes fees of sergeant-at-arms of the late court of chancery. Obsolete.

193. L. 1842, Ch. 202. Section 1 relates to compensation of sergeant-at-arms of the court of chancery and criers of the supreme court. The office of sergeant-at-arms was abolished with said court by the Constitution of 1846, Art. 14, § 5. Salary of criers of supreme court provided for in Code Civ. Pro. § 91 and by L. 1892, Ch. 686, § 230, subd. 4, as amended by L. 1896, Ch. 439. Section 2 is a repealing statute.

194. L. 1842, Ch. 309. Relates to the register, assistant register and clerks in chancery, which were abolished with the court of chancery by the Constitution of 1846. The clerks of the supreme court referred to in this act were the clerks of the old supreme court located at New York, Albany, Utica and Geneva. The statute became obsolete and inoperative on the going into effect of the Constitution of 1846.

195. L. 1842, Ch. 324. Corrects "clerical errors" in a statute which has since been repealed. Obsolete.

196. L. 1844, Ch. 341. Register, assistant register, and clerks of court of chancery abolished with the court of chancery by the Constitution of 1846. Clerks of the supreme court mentioned in statute examined were the clerks of the old supreme court located at New York, Albany, Utica and Geneva. Statute

NOTES TO SCHEDULE.

became obsolete and inoperative on the going into effect of the Constitution of 1846.

197. L. 1845, Ch. 235. Relates to the court of common pleas which was abolished by the Constitution of 1846, Art. 14, § 15.

198. L. 1847, Ch. 390, §§ 2-4. Sections 2, 3 are repealed as appears in schedule. Section 4 states when act takes effect.

199. L. 1847, Ch. 391. Section 1 repealed by construction as appears in schedule, balance superseded and included in New York city consolidation act, L. 1882, Ch. 410, §§ 1119-1122.

200. L. 1847, Ch. 410. Sections 1-8 which are repealed as appears in schedule comprise the entire statute.

201. L. 1848, Ch. 32. Superseded by New York city consolidation act, L. 1882, Ch. 410, §§ 1119-1122.

202. L. 1853, Ch. 421. Enrolling decrees of late court of chancery. Court abolished by Constitution of 1846, Art. 14, § 5.

203. L. 1854, Ch. 135. Temporary.

204. L. 1855, Ch. 10. Covered by Code Civ. Pro. § 27.

205. L. 1855, Ch. 202. Obsolete.

206. L. 1855, Ch. 471, §§ 4, 5. Section 4 has been repealed as appears in schedule. Section 5 states when act shall take effect.

207. L. 1860, Ch. 202. Repealed in part by L. 1877, Ch. 417, § 1, ¶ 34. The entire subject of admission of attorneys to the practice of law is covered in Judiciary Law, Article 15.

208. L. 1862, Ch. 460. Amendatory of the Code of Procedure of 1848-9, which is repealed. Obsolete.

209. L. 1862, Ch. 485. Section 1 repealed as appears in schedule. Section 2 repeals and section 3 states when act takes effect.

210. L. 1863, Ch. 362, §§ 1-9. Repealed except § 3 which continues certain repealed provisions of Revised Statutes.

211. L. 1863, Ch. 392. Sections 1, 3, 4 are repealed as appears in schedule. Section 2 is a repealing statute.

212. L. 1864, Ch. 71. Sections 1-11 repealed as appears in schedule. Balance covered by Code Civ. Pro. § 2720, subd. 2.

213. L. 1864, Ch. 280, § 5. Repeals part of Revised Statutes contained in this schedule.

214. L. 1865, Ch. 336. Relates to the "tribunal of conciliation." Obsolete.

215. L. 1866, Ch. 692, §§ 1, 2, 6, 7, 9-11. All repealed except § 11 as appears in schedule. Section 11 is a repealing statute.

216. L. 1866, Ch. 824. Sections are all repealed except §§ 2 and 9 as appears in schedule. As enacted this statute contained neither of the section numbers.

217. L. 1868, Ch. 869. Statute cited authorizes attorney-general to institute actions on certain canal contracts made in December, 1866. Obsolete.

218. L. 1869, Ch. 820, § 1 pt. Repealed as appears in schedule. Balance covered by Code Civ. Pro. §§ 3329, 3324.

219. L. 1870, Ch. 151, §§ 1-3, 5, 6. Sections 1-3, 5 repealed as appears in schedule. Section 6 is when to take effect.

220. L. 1870, Ch. 550, § 1. Repealing statute.

221. L. 1873, Ch. 9. Calendar of commission of appeals which expired by limitation. Section 2 amended by L. 1873, Ch. 589, "so as to read as follows."

222. L. 1873, Ch. 589. Relates to the old commission of appeals. Obsolete.

NOTES TO SCHEDULE.

224. L. 1876, Ch. 444. Sections 2-4 amended "to read as follows" and thus repealed by implication as appears in the schedule. Section 1 establishes a state board of audit which was abolished by L. 1883, Ch. 205, § 12. Section 5 is when to take effect. Entire act superseded by L. 1883, Ch. 205.

224a. L. 1877, Ch. 11. Consolidated in Code Civ. Pro. § 356. See note 1.

225. L. 1877, Ch. 154. Section 1 amended "to read as follows" by L. 1882, Ch. 124, § 1. Section 2 states when act takes effect.

226. L. 1877, Ch. 187. In terms L. 1881, Ch. 537, repeals L. 1877, Ch. 157, but gives the title of Ch. 187 and date of passage of same. Chapter 157 relates to town of Little Falls.

227. L. 1877, Ch. 257. Provides that the minutes of the common council of the city of Buffalo shall be received as prima facie evidence of such proceedings. Superseded by Code Civ. Pro. § 941.

228. L. 1877, Ch. 417. General repealing act.

229. L. 1878, Ch. 106. Repealing statute and the repeal has been noted in schedule.

230. L. 1878, Ch. 408. Amends L. 1877, Ch. 417, § 1, paragraph 42, in effect adding another repeal to said paragraph. Obsolete.

231. L. 1879, Ch. 151. Covered by Code Civ. Pro. § 2484.

232. L. 1879, Ch. 211. Superseded by Code Civ. Pro. § 941 as amended by L. 1894, Ch. 203.

233. L. 1879, Ch. 305. Affects L. 1846, Ch. 276, § 1, which was repealed by L. 1880, Ch. 245, § 1. Covered by Code Civ. Pro. § 3027.

234. L. 1879, Ch. 311. L. 1877, Ch. 285, affected by this act repealed by L. 1880, Ch. 245, § 1, ¶ 53. Covered by Code Civ. Pro. § 2485.

235. L. 1879, Ch. 316. Amends L. 1853, Ch. 238, which was repealed by L. 1880, Ch. 245, § 1, ¶ 30. Covered by Code Civ. Pro. §§ 1866, 1867, and repealed by implication. See *Horton v. Cantwell*, 108 N. Y. 255, and *Anderson v. Anderson*, 112 N. Y. 104.

236. L. 1879, Ch. 380. Superseded by Code Civ. Pro. §§ 744, 747, 748, 2530, 2537, 2758, 2761, 2798.

237. L. 1880, Ch. 393. Consolidated in Code Civ. Pro. § 1404a.

238. L. 1880, Ch. 423. Consolidated in Code Civ. Pro. § 236.

239. L. 1880, Ch. 561, § 5. Consolidated in Code Civ. Pro. § 801a.

240. L. 1881, Ch. 25. Became obsolete March 2, 1882, by its terms.

241. L. 1881, Ch. 211. Relates to the state board of audit. Superseded by L. 1883, Ch. 205, which established the board of claims and abolished the board of audit.

242. L. 1881, Ch. 654. Covered by Code Civ. Pro. §§ 812, 813.

243. L. 1882, Ch. 340. Consolidated in Code Civ. Pro. § 961a.

244. L. 1883, Ch. 195. Consolidated in Code Civ. Pro. § 961b.

245. L. 1883, Ch. 426. Superseded by L. 1901, Ch. 602, section 10 of which repeals acts inconsistent with the balance thereof.

NOTES TO SCHEDULE.

246. L. 1884, Ch. 309, § 1. Consolidated in Code Civ. Pro. § 2481, subd. 12.

247. L. 1884, Ch. 336, §§ 2-5. This statute is a general statute relating to appraisal of canal claims. Section 1 has been recommended for repeal in the Canal Law as having been superseded by § 80 of the Canal Law which treats of appropriations generally by the state for canal purposes. The second section is recommended for repeal as having been superseded by § 264 of the Code of Civil Procedure relating to the jurisdiction of the Court of Claims. This jurisdiction extends to private claims, Section 264 of the Code prior to 1908 expressly contained the words "appropriations of land." This expression was omitted when the section was amended in 1908, but the language contained in the 1908 amendment is broad enough to cover private claims for appropriations. Section 3 is consolidated in § 274 of the Code of Civil Procedure. See note § 37a. Section 4 repeals inconsistent legislation. Section 5 is when to take effect.

248. L. 1884, Ch. 376. Consolidated in Code Civ. Pro. § 961c.

249. L. 1884, Ch. 530, § 11. Repealing statute and the repeal has been noted.

250. L. 1885, Ch. 112. Repealing statute.

251. L. 1885, Ch. 135, §§ 2, 3. Section 2 is covered by Code Civ. Pro. § 933. Section 3 is when to take effect.

252. L. 1885, Ch. 267, § 2. Obsolete.

253. L. 1886, Ch. 577, § 6 pt. The part of § 6 which adds § 24 to L. 1885, Ch. 183, is covered by Code Civ. Pro. § 791, subd. 1, as amended by L. 1898, Ch. 136, and L. 1906, Ch. 51.

254. L. 1887, Ch. 36. Obsolete, except § 4, which is covered by Code Civ. Pro. § 933.

255. L. 1888, Ch. 118, §§ 1 pt. 2. Covered by Code Civ. Pro. § 933.

256. L. 1888, Ch. 555. Consolidated in Code Civ. Pro. § 961d.

257. L. 1889, Ch. 406, §§ 2, 3. Section 2 was "amended to read as follows" by L. 1890, Ch. 173, § 2, and as so amended superseded by Code Civ. Pro. § 2713. Section 3 is when act takes effect.

258. L. 1890, Ch. 158. Consolidated in Code Civ. Pro. § 961e.

260. L. 1891, Ch. 379. Superseded by Code Civ. Pro. §§ 266, 280.

261. L. 1892, Ch. 677, § 19 pt. Last sentence consolidated in Code Civ. Pro. § 931b.

262. L. 1893, Ch. 100. Amends L. 1847, Ch. 80, § 1, "so as to read as follows." L. 1847, Ch. 80 was repealed by L. 1893, Ch. 686. The amendatory act was not expressly repealed but is superseded by Code Civ. Pro. § 2719, as amended by L. 1893, Ch. 686.

263. L. 1893, Ch. 101. Consolidated in Code Civ. Pro. § 841a.

264. L. 1894, Ch. 731. Consolidated in Code Civ. Pro. § 2705.

265. L. 1895, Ch. 544, §§ 2-4. Section 2 consolidated in Code Civ. Pro. § 3306a. Section 3 was amended "so as to read as follows." Section 4 is when act takes effect.

266. L. 1896, Ch. 548. General repealing statute.

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267. L. 1897, Ch. 403, § 1 pt. Consolidated in Code Civ. Pro. § 941a.

268. L. 1897, Ch. 622. Consolidated in Code Civ. Pro. § 961f.

269. L. 1899, Ch. 150. Sections 1-3 consolidated in Code Civ. Pro. § 3331a. Section 4 is a repealing section.

270. L. 1900, Ch. 223. Consolidated in Code Civ. Pro. § 2408a.

271. L. 1900, Ch. 510. Consolidated in Code Civ. Pro. § 2481, subd. 12.

272. L. 1908, Ch. 185, §§ 2, 3. Consolidated in Code Civ. Pro. § 2509, subd. 7.

273. Code Civil Procedure §§ 27 pt., 95 pt., 360 pt. Section 27, part relating to surrogate has been inserted in § 2507. Section 95, part relating to surrogate has been inserted in § 2512. Section 360, part relating to surrogate has been made § 1323a.

274. Code Civil Procedure § 83 pt. The fourth sentence of Code Civ. Pro. is made § 1323a. The remainder of § 83 is in Judiciary Law, §§ 14, 24, 295-297, 301.

275. Code Civil Procedure, article headings of Ch. 1, Tit. 2. This title formerly embraced three articles, including §§ 46-99. Of these sections the ones remaining in the Code are §§ 52, 53, 55, 60 pt., 65, 83 pt., and 95 pt. It has been thought best to remove the article headings and let the title stand without a division into articles.

NOTES TO AMENDMENTS TO CODE OF CIVIL PROCEDURE.

Made by L. 1906, Ch. 65.

[Prepared by Board of Statutory Consolidation.]

1. § 356. This section is inserted in the Code of Civil Procedure because it relates to the powers of county judges and provisions of a similar nature are now in this title of the Code. Former § 356 of the Code is recommended for repeal in the Judiciary Law and County Law.

3. § 801a. This section is consolidated in the Code of Civil Procedure, since it deals entirely with practice and has no place in the Partnership Law. L. 1880, Ch. 561, §§ 1-4, were incorporated in and repealed by the Partnership Law enacted in 1897. When L. 1880, Ch. 561, was incorporated in the Partnership Law the section consolidated in the text was left unrepealed in the session laws probably because it contained practice matter. It is now placed in the Code of Civil Procedure with a proper reference to §§ 20 and 21 of the Partnership Law where the remainder of the statute is to be found.

4. § 841a. The provision inserted in the text is matter relating to practice which is now found in the session laws. The provision relates to evidence and has been placed under that head in the Code of Civil Procedure under the article relating to the competency of witnesses. It is made a new section at the end of Art. 1, Tit. 1, Ch. 9.

5. § 931a. This section consists of the last sentence of Code Civil Procedure, § 432, subd. 2. The portion of § 432, subd. 2, which relates to the method of designating, by a foreign corporation, a person upon whom to serve a summons has been transferred to the General Corporation Law, and the portion of said subdivision here consolidated is an evidence provision and should be with similar provisions in the Code of Civil Procedure. There were provisions relating to the designation by a foreign corporation of a person upon whom to make service, both in the Code of Civil Procedure (§ 432) and in the General Corporation Law (§ 16). These provisions were not entirely harmonious and in the text by the insertion of the new section in the Code of Civil Procedure, to wit: Section 931a, and by amending § 432 of the Code of Civil Procedure these provisions have been harmonized. The substantive matter in both §§ 432 and 16 relating to the actual designation of a person upon whom to make service has been consolidated in the General Corporation Law (§ 16), while the practice provisions relating to the service of papers upon a foreign corporation have been brought together in the Code of Civil Procedure. The General Corporation Law (§ 16) provides that the person designated must have an office or place of business at the place where such corporation had its principal place of business within the state, while the Code of Civil Procedure (§ 432, subd. 2) provides that the designation "must specify a

NOTES TO AMENDMENTS.

place within the state as the office or residence of the person designated," and does not require that the place should be the same as the location of the principal place of business of the corporation. The Code of Civil Procedure (§ 432, subd. 2) provides that a person designated may from time to time "change the place specified as his office or residence to some other place within the state by a writing executed by him and filed in like manner," while the General Corporation Law (§ 16) provides that if the person designated "removes from the place where the corporation has its principal place of business within the state" and the corporation does not within thirty days after such removal designate another person upon whom process may be served within the state the secretary of state may revoke the authority of the corporation to do business within the state and process may be served upon the secretary of state. The General Corporation Law (§ 16) provides for a case where a person designated dies or removes from the place where the corporation has its principal place of business within the state, while the Code (§ 432, subd. 3) provides for a case where the designation "is not in force." While § 432 of the Code was amended as late as 1903 by Ch. 311, and § 16 of the General Corporation Law was amended only as late as 1895 by Ch. 672, the provisions of the General Corporation Law have been followed in the consolidation rather than those of the Code as the later expression of the Legislature, since the amendment of the Code in 1903 related to other matters in the section and did not affect the original provisions relating to the designation of the person upon whom service might be made for a foreign corporation. All of the substantive provisions relating to the manner of designating a person upon whom service may be made on behalf of a foreign corporation have been consolidated in § 16 of the General Corporation Law and the whole subject made consistent. While § 16 of the General Corporation Law provides for service in case the designated person dies or removes from the place where the corporation has its principal place of business, the language of subd. 3 of § 432 of the Code of Civil Procedure has been preserved as broader in its application, covering any case where the designation "is not in force." The General Corporation Law provides for service in a case where the person designated dies or removes from the place where the corporation had its principal place of business within the state and this provision has been incorporated as subd. 4 of § 432 of the Code of Civil Procedure so that the section may provide for a complete scheme for service upon a foreign corporation.

6. § 931b. It seems incongruous to retain this provision as a part of a section in the General Construction Law relating to what shall constitute a quorum or majority of a public board or body and the provision in the text has been placed therefore with these provisions of the Code of Civil Procedure relating to documentary evidence and presumptive evidence of written instruments.

7. § 941a. This section consists of a part of L. 1891, Ch. 125, § 5. The remainder of L. 1891, Ch. 125 providing for the publication of the Colonial Statutes by the former commissioners of statutory revision has been treated as special and not repealed. It seems that the provision consolidated in § 941a is sufficiently important to be included in the Code with other similar matter.

8. § 961a. This statute is provided for in Penal Code, § 19,

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as to criminal proceedings and is inserted here to take care of its application to civil matters.

9. § 961b. This statute consists of two sections, one of which appears in the text and the other of which provides when the act shall take effect. The word "criminal" is not necessary, as the rules of evidence in civil cases are applicable to criminal cases except as otherwise provided in the Code of Criminal Procedure (Code of Criminal Procedure, § 392).

10. § 961c. This section is a consolidation of L. 1884, Ch. 376, §§ 1, 2. It is the whole of the statute and the only change made is the change of the word "act" to "section." The statute relates to the subject of evidence which is treated in the Code and has been consolidated therefore in the Code. The second section of the act is the last sentence of the section as incorporated in the text.

11. § 961d. This statute has not been inserted in the Code of Criminal Procedure because the rules of evidence in civil cases apply to criminal cases (Code of Criminal Procedure, § 392). The last sentence has been omitted as having no practical use, the statute having been enacted in 1888.

12. § 961e. This section is the whole of L. 1890, Ch. 158, section 2 of the statute being the clause relating to when the statute shall take effect. It is a provision relating to evidence, and as these provisions are now contained in the Code of Civil Procedure the statute has been incorporated under its appropriate head in the Code of Civil Procedure.

13. § 961f. The statute incorporated in the text consists of two sections. The second section provides for the taking effect of the statute and has been omitted as unnecessary. The whole of the first section has been consolidated as a part of the Code of Civil Procedure relating to evidence.

14. § 1323a. This section is the fourth section of Code of Civil Procedure, § 83. The remainder of the section is consolidated in Judiciary Law, §§ 14, 24, 295-297, 301. The word "such" in the section as contained in the Code of Civil Procedure relates to "the presiding" judge, and by reason of the removal of the balance of the section it becomes necessary to insert the words "the presiding" in place of the word "such." This provision has been retained in the Code of Civil Procedure as practice matter, while the remainder of the section relating to court stenographers has been placed under appropriate heads in the Judiciary Law.

15. § 1404a. The provision incorporated in the text is L. 1880, Ch. 393. Section 2 of the statute is the provision relating to the time when the statute shall take effect, and has been omitted as unnecessary. The statute relates to the exemption of exhibits at exhibitions and as similar provisions are in the Code of Civil Procedure the statute has been placed in its appropriate surroundings.

16a. § 244a. This section, relating to the power of the supreme court to compel the performance of certain contracts made by incompetent persons while capable of contracting, has been inserted in the Code of Civil Procedure, since it deals with the power of the court and has no other proper classification. The matter embraced in the section is that contained in L. 1880, Ch. 423, as amended by L. 1885, Ch. 267, § 2. The statute of 1880 amended R. S., Pt. 2, Ch. 5, Tit. 2, § 22, by changing the reference to the court of chancery to the supreme court and adding certain new

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matter. This statute seems to be alive, since the amendment was passed subsequent to but at the same session as the Code of 1880, and was subsequently recognized and amended by the Legislature by L. 1885, Ch. 267, § 2.

Throop in his note to § 2345 says with reference to the amendment made by Ch. 423: "It is supposed that this amendment fell with the repeal of this section of the revised statutes which took effect September 1, 1880," and in a later edition says that Ch. 423 is substantially embodied in the amendment of Code § 2346, made by L. 1882, Ch. 890, which is the last sentence of § 2346 of the present Code. There is some variation and it has been deemed best to preserve the provision of the Revised Statutes as consolidated in the text.

In connection with this section see Code of Civil Procedure, chapter 17, title 7, relating to the disposition of the real property of an infant, lunatic, idiot or habitual drunkard.

Section 22 of the Revised Statutes incorporated provides that the court of chancery (changed by the amendment of 1880 to supreme court) "shall have authority to decree and compel the specific performance of any bargain, contract or agreement which may have been made by any lunatic or other person specified in the first section of this title." The first section referred to provides that the chancellor shall have the care and custody of "all idiots, lunatics and persons of unsound mind and persons who shall be incapable of conducting their own affairs in consequence of habitual drunkenness." Idiots, lunatics and habitual drunkards are expressly mentioned in the section as incorporated in the text which is sufficient to cover other persons of unsound mind, since the General Construction Law, § 28 (Statutory Construction Law, § 7) defines lunatic as follows: "The terms lunatic and lunacy include every kind of unsoundness of mind except idiocy."

16. § 2408a. This section contains the whole of L. 1902, Ch. 225. The second section relates to the time when the statute shall take effect. The statute has reference to foreclosure of mortgages by advertisement and properly belongs in the Code of Civil Procedure where that proceeding is now contained.

17. § 2481, subd. 12. The provisions of L. 1884, Ch. 309, as amended by L. 1900, Ch. 309, seem not to be included among the powers of a surrogate as defined in the Code of Civil Procedure. Hence the insertion of § 1. Section 2 is a validating provision applicable to acts done prior to 1884 and has been treated as special and left unrepealed.

18. § 2500, subd. 7. This subdivision is part of L. 1889, Ch. 890, as amended by L. 1895, Ch. 544. Section 1 of the statute is in the County Law (§ 168) and § 2 has been incorporated as a part of the Code of Civil Procedure as § 3300a. It is a matter that relates to the surrogate court and therefore has been placed in chapter 18 of the Code of Civil Procedure where the practice in such courts is found. The statute should not be allowed to exist as an independent statute but should be consolidated as a part of the surrogate court provisions in the Code of Civil Procedure.

19. § 2513a. This section is the portion of Code of Civil Procedure, § 360, not embraced in Judiciary Law, §§ 198, 382-385. The section would be out of place under title 5 of chapter 3 of the Code, entitled "County Courts," and hence it has been transferred to chapter 18, which relates to surrogate courts. The

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surrogate court practice, while mainly found in chapter 18 of the Code of Civil Procedure, is by no means all contained in that chapter. Other sections of the Code are incorporated by reference and other sections are by their terms made applicable. In cases where a part of a section was removed to the Judiciary or other consolidated law and the remainder of the section related to surrogate courts alone, the part remaining has been placed in its appropriate chapter in the Code of Civil Procedure relating to surrogate courts instead of being allowed to remain isolated in another part of the Code of Civil Procedure. This statement applies to § 2513a found in the text and generally to other similar cases.

20. § 3306a. The matter inserted in this section is necessitated by the omission of the word "such" and the incorporation of L. 1889, Ch. 330, § 2, as an independent section of the Code of Civil Procedure. The provision incorporated in the text is a part of the statute, a portion of which has been consolidated in the surrogate court practice as subd. 7 of § 2509.

21. § 3331a. The new words inserted in this statute are made necessary upon the consolidation of the statute into the Code of Civil Procedure because it applies to "all jurors," and § 3332 of chapter 15, title 5, excludes from the application of the title services rendered in a criminal action or special proceeding in a court or before an officer "except as otherwise expressly prescribed therein." The inserted words leave the statute to apply as broadly as its language imports and prevents the limitation of the consolidation of civil actions and proceedings.

25. Article 8, § 2703. This statute (L. 1894, Ch. 731) exists as an independent statute apart from the Code of Civil Procedure. It relates to the probate in this country of foreign wills and should find a place in the Code of Civil Procedure. It has been made a separate article rather than a section of chapter 18, title 3, art. 7 of the Code relating to "Foreign Wills; ancillary letters," because it provides a proceeding of its own which differs from that provided in that article for probating a foreign will. Whether or not the provisions of that article apply in any respect to probate and letters testamentary under this statute is a matter for judicial construction which will not be anticipated if the statute is made a separate article. The courts can then say to what extent the provisions of article 7 apply to the provisions of the new article and their relation will be the same as if the new article had remained an independent statute. If the statute was made a section in article 7 the present relationship would be disturbed and judicial judgment would be anticipated, for throughout article 7 reference is had to conditions and proceedings prescribed therein. Section 2702 of article 7 provides that the provisions of chapter 18 relating to the rights, powers, duties and liabilities of an executor or administrator apply to a person to whom ancillary letters are granted "as prescribed in this article." etc.

26. § 1. The reference in this section to "the next two" sections has been changed to sections "two and three of the judiciary law" because Code Civil Procedure, §§ 1, 2, are now contained in Judiciary Law, §§ 2, 3.

27. § 34. Some alterations in phraseology were made necessary in the portion of the section retained in the Code of Civil Procedure. Such changes are not intended to change the present law in any way. The provisions removed from this section relate

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to the adjournment of a term of court which is something apart from the actual trial of a cause and to the drawing and notifying of jurors for an adjourned term which precedes the actual drawing of the jury for the trial of a cause.

28. § 41. A portion of this section has been removed to the Judiciary Law (§ 10). The provision thus removed from the Code of Civil Procedure relates to the adjournment of a term of a court of record because of certain conditions, such adjournment resting in the discretion of the court. The provision that has been allowed to remain in the Code of Civil Procedure has been retained because it is a matter of practice. The words "of record" have been inserted in the portion of the section retained in the Code of Civil Procedure because the preceding portion of the section which has been removed to the Judiciary Law (§ 10) made the section applicable to a court of record.

29. § 60. Part of this section has been removed to the Judiciary Law (§ 470), because it relates to the right of an attorney and counselor to practice in the courts of record of the state although a resident of an adjoining state. The balance of the section which has been retained relates to the service of a paper upon him which is a practice provision and therefore has been retained in the Code of Civil Procedure. The words inserted in the portion retained in the Code of Civil Procedure are made necessary by reason of the removal of the first portion of the section and are merely a repetition of the necessary part of the portion of the section removed.

30. § 110. Section 110 of the Code of Civil Procedure refers to the "next two sections." Of these two sections, § 111 remains in the Code of Civil Procedure and § 112 has become § 240, subd. 19, of the County Law. Hence the change made in this section.

31. § 127. Section 127 of the Code of Civil Procedure contains in its first sentence substantive matter and in its second sentence practice matter. The first portion of the section which relates to the removal of a sick prisoner from a jail to a hospital has no connection with an action. It has, therefore, been placed in the Prison Law (§ 385). The last sentence relates to the issuance of an execution where a prisoner escapes while going to, remaining at, or returning from a hospital to which he has been ordered removed. It is, therefore, a practice provision and has for that reason been retained as a part of the Code of Civil Procedure.

32. §§ 138, 140, 141. Sections 138-142 of article 3, title 2, chapter 2 of the Code of Civil Procedure, have been retained in the Code because containing matter in the nature of procedure. Sections 138, 140, 141 are amended in the text merely to correct references made necessary by the removal of certain substantive provisions from the Code of Civil Procedure to consolidated laws.

33. § 220. The first portion of this section down to and including the sentence "whenever the appellate division," etc., has been placed in the Judiciary Law as well as the last two sentences beginning "It shall have power to appoint," etc. The two sentences in the middle of the section beginning "No justices of the appellate division," etc., have been retained in the Code of Civil Procedure. The first part of the section which has been consolidated in the Judiciary Law relates to the makeup of the appellate division, the number that shall constitute a quorum, how many justices shall sit in any case, the designation of justices of the appellate division by the governor, the terms of

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office of the justices, the filling of vacancies, residence of the justices and matters which do not relate to the conduct of an action or an appeal therein. They are provisions in which the justices of the appellate division are chiefly interested and as such have been consolidated in the Judiciary Law. The last portion of the section relates to the appointment of a reporter and the location of the appellate division in each department which are matters that may be appropriately placed in the Judiciary Law. The portion retained in the Code of Civil Procedure applies to the powers of the justices of the appellate division and the jurisdiction of the appellate division, which provisions have been retained in the Code of Civil Procedure as bearing so closely upon practice as to be more appropriately placed in the Code of Civil Procedure than in the Judiciary Law.

34. § 229. This section of the Code of Civil Procedure (§ 229) is amended because of the removal to the Judiciary Law of the first sentence, which provides that "A special term or a trial term of the supreme court must be held by one judge." This is not a practice provision and therefore has been placed in the Judiciary Law.

35. § 235. The last sentence of this section provides that the justices of the supreme court in the eighth judicial district may adopt and amend rules and regulations for making calendars of cases and has been removed to the Judiciary Law where similar matters applicable in other cases have been consolidated. The first two sentences of the section relate to the power of a justice of the supreme court to hold a special term, to act upon any business except where he is disqualified and to the transaction of judicial business out of court. These are all matters relating to the general subject of the powers and jurisdiction of the courts and like such matters elsewhere found in the Code of Civil Procedure have been retained in the Code, as closely related to the actual conduct of an action in court.

36. § 239. The last sentence has been removed as substantive matter to the Judiciary Law. It relates to the attendance upon the court of certain officers, such as clerks, sheriffs, criers and constables. The remainder of the section relating to the adjournment of a special term and the trial of a case upon the calendar of a term which has been adjourned, has been retained in the Code of Civil Procedure because associated with the practice in a cause.

37. § 269. Section 66 of the Code of Civil Procedure referred to in this section relates to the compensation of attorneys and counselors and their liens in actions and special proceedings and has been consolidated in the Judiciary Law under article 15, relating to attorneys and counselors. These provisions are purely substantive. The change, therefore, made in this section in the text is merely one of reference.

37a. § 274. The new matter inserted in this section is L. 1884, Ch. 336, § 3. Section 3 is an express provision relating to allowances for expense of abstracts of title in certain awards by the Court of Claims and is therefore preserved. Section 274 of the Code which prohibits the allowance of disbursements in an action in the Court of Claims might be construed to refer only to disbursements in the course of action. Section 3 is preserved to meet cases where abstracts are required as a necessary expense incident to the appraisal of the damages. The section consolidated was passed in 1884. The Code section was originally

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enacted in 1883 and subsequently re-enacted verbatim in the Code so that the 1884 act cannot be said to have been superseded by the Code section but on the contrary is still in existence.

38. § 323. Section 17 of the Code of Civil Procedure referred to in this section relates to the convention of justices of the appellate division and to the adoption of general rules of practice by such convention. These matters are entirely apart from the conduct of a cause through the courts and have, therefore, been consolidated in the Judiciary Law in §§ 93 and 94. The distribution of § 17 of the Code of Civil Procedure to the Judiciary Law has made necessary the change in reference.

38a. § 340, subd. 1. Section 1737 of the Code of Civil Procedure has been consolidated in § 206 of the Lien Law. Section 1737 as well as other sections in the article of which it forms a part, relate to an action to foreclose a lien upon a chattel and have been consolidated in the Lien Law. Hence the change of reference.

39. § 355. The first sentence is the only portion of § 355 of the Code retained in the Code of Civil Procedure. It provides that the court shall be open for the transaction of business "for which notice is not required to be given to an adverse party except where it is specially prescribed by law that the business must be done at a stated term." This language embraces a matter of practice and for that reason has been retained in the Code of Civil Procedure. The remainder of the section relates to such matters as the appointment of times and places for holding terms of court, continuance of terms appointed, changing the day appointed, appointing one or more additional terms, dispensing with the holding of terms and adjournment of terms to other places within the county. These are provisions that are outside of the practice in an action and relate to the organization of the machinery for hearing causes rather than to the conduct of causes themselves, and have been consolidated, therefore, in the Judiciary Law (§§ 190, 191).

40. § 432. See Note 5.

41. § 450. The substantive provision contained in this section providing that recoveries in actions or special proceedings for damages to the person, estate or character of a married woman shall be her separate estate, has been removed to the Domestic Relations Law, where similar substantive matter relating to married women is found.

42. § 484, subd. 10. The reference in this section to the "fisheries, game and forest law" has been changed to the "forest, fish and game law" which is the name by which that law is now known.

43. § 716. This section of the Code of Civil Procedure is found in article 1, title 4, chapter 7, under the head "Receivers" and applies not only to a receiver appointed for the voluntary dissolution of a corporation but to a "receiver appointed by or pursuant to an order or a judgment in an action in the supreme court or in a county court or in a special proceeding." As the proceedings for the voluntary dissolution of a corporation has been transferred to the General Corporation Law (Art. 9) as well as other provisions in the Code of Civil Procedure relating to the dissolution and annulment of a corporation this section has been consolidated in article 11 of the General Corporation Law, relating to the powers, duties and liabilities of receivers of corporations in such a form as to give it the application in-

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tended by the section. Receivers may be appointed, however, in other actions and proceedings than those taken to dissolve or annul a corporation, and therefore it becomes necessary to retain the section in the Code of Civil Procedure. It has, therefore, been amended and allowed to remain in the Code of Civil Procedure applicable to receivers appointed "in an action in the supreme court or a county court or a special proceeding."

44. § 746. The portion of this section relating to the rate of interest that shall be paid by depositaries of funds or money paid into court and the requirement that they shall give a bond being substantive in character has been consolidated in the Banking Law (§ 43). The remainder of the section providing where funds or moneys paid into court shall be deposited has been allowed to remain in the Code as practice matter.

45. § 752. This section relates to the accounts that shall be kept by the depositary of funds or money paid into court. The last sentence of the section making the section applicable to banks and trust companies has been consolidated in the Banking Law (§ 44). The distribution of the remainder of the section has not been attempted on account of its wide application and it has been allowed to remain in the Code as the most convenient and practical assignment.

46. § 802. The words "except the last section" have been inserted in this section so that the limitation of § 802 will not apply to a new section (§ 801a) inserted by this act.

47. § 861. The "last" section referred to in § 861 of the Code of Civil Procedure has been consolidated in the Civil Rights Law as § 26. It relates to the privilege from arrest of a witness and being substantive in character has been assigned to the Civil Rights Law (§ 26). This assignment has made necessary the change of reference found in the text.

48. § 862. The change made in this section has been made for the same reason stated in the preceding note.

49. §§ 870, 871, 885. The words "Other than a court specified in subdivisions sixteenth, seventeenth, eighteenth or nineteenth of section two of this act" have been omitted from §§ 870, 871 and 885 because all of the courts mentioned in the exception have been abolished and new courts created in their stead. In the first place subds. 16, 17, 18 and 19 are erroneous references, since those subdivisions were changed to subds. 10, 11, 12 and 13 by L. 1895, Ch. 948, amending § 2 of the Code of Civil Procedure. In the second place the mayor's court of the city of Hudson was expressly abolished by L. 1895, Ch. 751, and there was created in its stead the city court of Hudson. The recorder's court of the city of Oswego was abolished by L. 1895, Ch. 394. The recorder's court of the city of Utica was abolished by L. 1882, Ch. 103, and the name of the justice's court of the city of Albany was changed to the city court of Albany by L. 1884, Ch. 122. In no instance were existing laws made applicable to the new courts except in the case of the city of Albany, where the existing statutes were made applicable to the new court. In no case, however, was the new court denominated a court of record, so that none of them would come within the courts referred to in §§ 870, 871 and 885 of the Code of Civil Procedure. It would be erroneous, therefore, to continue a reference in these sections of the Code to these courts formerly existing in Hudson, Utica, Oswego and Albany since they no longer exist and a change in the reference to the new courts would be unjustified, as the

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new courts are not courts of record and existing laws are not made applicable except in one instance.

50. § 961. This section relates to the searching of files by certain public officers and the making of transcripts therefrom. It is all substantive and has been distributed as indicated in the footnote. The portion retained in the Code of Civil Procedure relates to the surrogate and has been allowed to remain because the Code by chapter 18 attempts to provide for the powers and duties of the surrogate and the practice in his court, the provisions of which chapter have been preserved substantially intact.

51. § 977. There has been removed from this section the provision with reference to the making of calendars. Similar matter in other parts of the Code of Civil Procedure has been distributed to the Judiciary Law, and in order that the provisions relating to the making of calendars may be together, this provision has been inserted in the Judiciary Law. The balance of the section relates to the service of notices of trial and notes of issue and being practice matter has been allowed to remain in the Code of Civil Procedure.

52. § 1007. The part of this section which has been removed relates to the apportionment of the salaries of stenographers and is, therefore, substantive and has no place in a practice act. The remainder of the section provides that the notes of the official stenographer may be treated as the minutes of the judge upon the trial and has been allowed to remain as procedure matter.

53. § 1055. The portion of this section removed relates to the notification of persons for jury service and has nothing to do with the conduct of a case in court, and has been removed as not strictly practice. The amendments made to the portion of the section remaining in the Code of Civil Procedure have been made necessary by reason of the elimination of matter from the Code of Civil Procedure and do not embrace any new law.

54. § 1171. Changes made in this section of the Code were made necessary by reason of the elimination of certain provisions from the Code of Civil Procedure and their insertion in the Judiciary Law. The changes are merely changes of reference.

55. § 1174. The change in the reference in this section from § 1048 of the Code of Civil Procedure to § 536 of the Judiciary Law was made necessary by reason of the incorporation of § 1048 in the Judiciary Law. Section 1048 relates to the notification of jurors by the sheriff and his return. This section forms a part of the article in the Code of Civil Procedure relating to the mode of selecting, drawing and procuring the attendance of trial jurors in ordinary cases (Ch. 10, Tit. 3, Art. 2), all of which provisions, with a single exception, have been removed to the Judiciary Law as matters which precede the conduct of a cause through the courts. They are substantive provisions, providing generally the machinery which must be set in motion before a cause can be disposed of in the courts. Hence the change in reference.

56. § 1190. The substantive matter "An alien is not entitled to a jury composed in part of aliens in an action or special proceeding civil or criminal," has been placed in the Civil Rights Law (§ 12), and the section of the Code in which the provision is found has been amended accordingly.

57. § 1273. The first sentence in this section is clearly practice while the last sentence that "a married woman may confess

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such a judgment." is substantive in character and has been placed in the Domestic Relations Law (§ 51).

58. § 1773. The change in reference in this section was made necessary by reason of the removal of title 3, chapter 17 of the Code of Civil Procedure to the Judiciary Law (Art. 19). Article 3 of chapter 17 of the Code of Civil Procedure relates to proceedings to punish a contempt of court other than a criminal contempt, and has been removed from the Code of Civil Procedure and placed in the Judiciary Law, because substantive in character and something apart from the conduct of a cause through the courts.

59. § 1809. This section relates to corporations and joint-stock associations. The whole section is practice, but as the actions and proceedings relating to corporations have been consolidated in the General Corporation Law it has been deemed best to incorporate in the General Corporation Law the provisions of this section relating to corporations. The section, therefore, so far as it applies to a corporation will be found in that law (§ 306) under an article relating to "Provisions applicable to two or more of the foregoing proceedings or actions." The remainder of the section has not been distributed to the Joint-Stock Association Law because no attempt has been made to consolidate any practice relating to actions or proceedings affecting joint-stock associations in that law.

60. § 1812. The treatment given § 1809 of the Code of Civil Procedure has been given §§ 1810, 1811, 1812 and 1813, and for the same reason stated in the note to § 1809. The changes in this section noted in the text are made necessary by reason of the removal to the General Corporation Law of the provisions of the section relating to corporations.

61. § 1813. The removal of the words "corporations or" has been made necessary by reason of the consolidation of the provisions of this section relating to corporations in the General Corporation Law (§ 309).

62. § 1844. The "last section" referred to in § 1844 of the Code of Civil Procedure has been consolidated in § 101 of the Decedent Estate Law. Hence the change in reference. The "last section" referred to is a substantive provision relating to the liability of heirs and devisees, and as such has been assigned appropriately to the Decedent Estate Law, where similar substantive provisions are found.

63. § 1846. Changes in this section were made necessary by the removal of certain provisions to the Decedent Estate Law. Section 101 referred to in this section relates to the liability of heirs and devisees for the debts of a decedent.

64. § 1855. The changes in this section are changes of reference, made necessary by the removal of § 1843 from the Code of Civil Procedure to the Decedent Estate Law (§ 101). The provision of the Code of Civil Procedure thus removed relates to the liability of heirs and devisees for the debts of a decedent.

65. § 1948. Section 1797 and the remaining sections in the article of which it forms a part relate to an action by the people to annul a corporation, all of which provisions have been consolidated in the General Corporation Law. Section 1798 of the Code of Civil Procedure has become § 131 of the General Corporation Law. Hence the change in reference.

66. § 1966. This section of the Code of Civil Procedure, so far as it relates to the duty of the district attorney to bring an action

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to recover the penalty of a forfeited recognizance, has been consolidated in the County Law (§ 201). The amendment of the Code of Civil Procedure noted in the text was made necessary by this consolidation.

67. § 2032, subd. 3. Section 8 of the Code of Civil Procedure provides for a case in which a court of record has power to punish for a criminal contempt and has been removed to the Judiciary Law (§ 750). The change in the text accordingly has been made.

68. §§ 2412-2415. Title 10 of chapter 17 of the Code of Civil Procedure relates to proceedings to change the name of an individual or corporation. The part of this title that relates to the change of name of a corporation has been consolidated in the General Corporation Law. It became necessary, therefore, to amend the sections in this title so as to leave intact in the Code of Civil Procedure the proceedings relating to the change of the name of an individual. Hence the amendment to these sections.

69. § 2507. The new matter inserted in this section is taken from Code of Civil Procedure, § 27. The remainder of § 27 has been placed in Judiciary Law, §§ 28, 158, 194. The matter inserted in § 2507 would be out of place in the first chapter of the Code but falls appropriately in § 2507.

70. § 2512. The first sentence of this section is Code of Civil Procedure, § 2512. The remainder is from Code of Civil Procedure, §§ 95-97. Portions of §§ 95-97 are incorporated in Judiciary Law as follows: Section 95, in §§ 168, 200; section 96, in §§ 231, 349, 351, 354; section 97, in §§ 160, 170, 201, 232-234, 279, 403, 405. It was deemed best to remove the portion of §§ 95-97 of the Code of Civil Procedure which is not included in the Judiciary Law from the first chapter of the Code to chapter 18 with similar matter.

72. § 2537. The changes in this section are merely changes of reference. Section 774 of the Code of Civil Procedure relates to the supervision of court funds by the comptroller of the state and is substantive in character.

73. § 2634. The first sentence of this section relating to the indexing of wills by county clerks and registrars has been consolidated in the Decedent Estate Law as substantive matter. The last sentence has been retained because it provides for the fees of an executor or administrator with the will annexed, who causes the record mentioned to be made. The changes made in this section are to correct references.

74. § 2660. Part of this section has been placed in the Decedent Estate Law (§ 103). The removed portion is substantive matter relating to the liability of a husband for the debts of his deceased wife, his liability as administrator for the debts of his wife and the disposition of unadministered assets of his wife at the time of his death.

75. § 2695. It was necessary to amend this section because the section in the article of the Code referred to prescribing the manner of authenticating papers was consolidated in the Decedent Estate Law (§ 45).

76. § 2696. A change in the reference was made necessary because § 2704, prescribing the manner of authenticating papers of another state or country to be used in this state was consolidated in § 45 of the Decedent Estate Law.

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77. § 2733. The first part of this section, relating to advancements, has been consolidated in the Decedent Estate Law as § 99. The latter part being practice has been retained in the Code of Civil Procedure.

78. § 2746. Section 744 of the Code of Civil Procedure has been incorporated in the State Finance Law as subdivision 4 of § 8, except the last clause, relating to the fees of county clerks, which is consolidated in County Law as § 240, subd. 22, and thus the change in reference becomes necessary. Section 744 of the Code of Civil Procedure related to the supervision of court funds by the state comptroller. A portion at the end of this section has been taken care of in appropriate schedules of repeals.

79. § 2838, subd. 1. The provision in the article mentioned in this subdivision of the Code of Civil Procedure has been consolidated in the Decedent Estate Law. It relates to the authentication of papers from another state or foreign country for use in this state. The changes in reference, therefore, became necessary.

80. § 2833. Subdivision 3 of this section contains a reference to certain sections of the Code of Civil Procedure. Two of these sections, to wit: §§ 1843 and 1868, have been placed in the Decedent Estate Law. Section 1868 relates to the liability of legatees or devisees to a child born after the making of a will who is entitled to succeed to a part of the real or personal property of the testator, and their liability to the subscribing witness to a will who is entitled to succeed to a share of such property. This is substantive in character and for that reason has been placed in the Decedent Estate Law (§ 28) and taken from the Code of Civil Procedure. Section 1843 of the Code of Civil Procedure relates to the liability of heirs and devisees for the debts of the decedent and is substantive in character, and has been placed in the Decedent Estate Law as § 101. The reference, therefore, in subdivision 3 of § 2833 has been changed to correspond to this treatment of §§ 1843 and 1868 of the Code of Civil Procedure.

81. § 2889. Sections 63 and 64 of the Code of Civil Procedure, relating to attorneys practicing in the city of New York, have been placed in the Penal Law and a corresponding change in reference has been made in this section.

82. § 2990. Section 1037 of the Code of Civil Procedure relates to the making and filing of duplicate jury lists and has been placed with its appropriate provisions in the Judiciary Law under the head of jurors. This necessitated a change in the reference, which has been made.

83. § 2991. Section 1033 of the Code of Civil Procedure, relating to excusing of jurors from service during the whole or a portion of a term, has been placed in the Judiciary Law and the necessary change in reference in this section, therefore, has been made.

84. § 3075, subd. 2. The reference in this subdivision has been changed because Code of Civil Procedure, § 46, has been made § 15 of the Judiciary Law.

85. § 3158. Sections 104 and 105 of the Code of Civil Procedure have been incorporated as §§ 400 and 401 of the Judiciary Law. They relate to the authority of the sheriff to command the power of the county to overcome resistance and the certification of the names of those who resist his authority.

86. § 3253. The change made in this section merely substitutes the title of the general law for the statute mentioned in the section.

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87. § 3320. The change in this section is one of reference merely.

88. § 3343, subd. 14. The reference in this subdivision has been changed from "sixteenth" to "fifteenth" to correct an obvious error in the present Code. Chapter 16 of the Code of Civil Procedure contains but two titles. Article 1 of title 4 of chapter 15 is entitled "Judgment Creditor's Action" and the definition contained in § 3343, subd. 14, is of a "judgment creditor's action."

89. § 3347, subd. 1. Section 122 of the Code of Civil Procedure has been consolidated as § 347 of the Prison Law and has been made to apply to civil and criminal prisoners in accordance with the language of this subdivision. It is, therefore, unnecessary to include it as a part of this subdivision.

90. § 3347, subd. 5. Section 548 of the Code of Civil Procedure, referred to in this subdivision, has been consolidated in § 23 of the Civil Rights Law. It relates to the exemption of a person from arrest in a civil action or special proceeding except as prescribed by statute.

91. § 3347, subd. 7. The reference to "title third" contained in the second sentence has been changed to "article third of title third" because article third is the only portion of title third remaining in the Code. The remainder of title third is in the Judiciary Law. The reference to "title fourth" in the same sentence has been omitted because the whole title has been transferred to the Judiciary Law. The reference in the fifth sentence to "title third" has been changed to "article third of title third" of the Code and "article sixteen of the judiciary law" because article third is the only portion of title third remaining in the Code and the remainder of the title is now in Judiciary Law, article thirteen. The reference to "title fourth" in the last sentence has been changed to "articles seventeen and eighteen of the judiciary law" because the provisions of title fourth are now consolidated in those articles of the Judiciary Law.

92. § 3347, subd. 11. The references to §§ 2181-2187, 2197-2199, 2213-2218 have been removed because these sections are now in Debtor and Creditor Law. The reference to §§ 2228-2230 has been removed because these sections are now in Prison Law. The references are no longer necessary.

GENERAL CONSTRUCTION LAW.

(Laws of 1909, ch. 27. Takes the place of former Statutory Construction Law.)

- Article**
1. Short title (§ 1).
 2. Meaning of terms (§§ 10-58).
 3. Ancient statutes and resolutions (§§ 70-72).
 4. References, titles and head notes (§§ 80, 81).
 5. Effect of repeals (§§ 90-96).
 6. Effect of consolidated laws (§§ 100, 101).
 7. Application of chapter (§ 110).
 8. Laws repealed; when to take effect (§§ 120, 121).

ARTICLE 1.

Short Title.

Section 1. Short title.

§ 1. **Short title.** This chapter shall be known as the "General Construction Law."

ARTICLE 2.

Meaning of Terms.

- Sec.**
10. Acknowledge and acknowledgment.
 11. Acknowledgment or proof of instrument.
 12. Affidavit.
 13. Adjournment of meeting.
 14. Bond and undertaking.
 15. Chattels.
 16. Choose.
 17. Civil code and criminal code.
 18. Consolidated laws.
 19. Day, calendar.
 20. Day, computation.
 21. Follo.
 22. Gender.
 23. Heretofore and hereafter.
 24. Holiday and half holiday.
 25. Holiday in contractual obligations.
 26. Judge.
 27. Last, preceding, next and following.
 28. Lunatic and lunacy.
 29. Men.
 30. Month, computation.
 31. Month in statute, contract and public or private instrument.
 32. Municipal officers.
 33. Notice.
 34. Now.
 35. Number, singular and plural.
 36. Oath, affidavit and swear.
 37. Person.
 38. Property.
 39. Property, personal.
 40. Property, real.
 41. Quorum and majority.

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to the adjournment of a term of court which is something apart from the actual trial of a cause and to the drawing and notifying of jurors for an adjourned term which precedes the actual drawing of the jury for the trial of a cause.

28. § 41. A portion of this section has been removed to the Judiciary Law (§ 10). The provision thus removed from the Code of Civil Procedure relates to the adjournment of a term of a court of record because of certain conditions, such adjournment resting in the discretion of the court. The provision that has been allowed to remain in the Code of Civil Procedure has been retained because it is a matter of practice. The words "of record" have been inserted in the portion of the section retained in the Code of Civil Procedure because the preceding portion of the section which has been removed to the Judiciary Law (§ 10) made the section applicable to a court of record.

29. § 60. Part of this section has been removed to the Judiciary Law (§ 470), because it relates to the right of an attorney and counselor to practice in the courts of record of the state although a resident of an adjoining state. The balance of the section which has been retained relates to the service of a paper upon him which is a practice provision and therefore has been retained in the Code of Civil Procedure. The words inserted in the portion retained in the Code of Civil Procedure are made necessary by reason of the removal of the first portion of the section and are merely a repetition of the necessary part of the portion of the section removed.

30. § 110. Section 110 of the Code of Civil Procedure refers to the "next two sections." Of these two sections, § 111 remains in the Code of Civil Procedure and § 112 has become § 240, subd. 19, of the County Law. Hence the change made in this section.

31. § 127. Section 127 of the Code of Civil Procedure contains in its first sentence substantive matter and in its second sentence practice matter. The first portion of the section which relates to the removal of a sick prisoner from a jail to a hospital has no connection with an action. It has, therefore, been placed in the Prison Law (§ 395). The last sentence relates to the issuance of an execution where a prisoner escapes while going to, remaining at, or returning from a hospital to which he has been ordered removed. It is, therefore, a practice provision and has for that reason been retained as a part of the Code of Civil Procedure.

32. §§ 138, 140, 141. Sections 138-142 of article 3, title 2, chapter 2 of the Code of Civil Procedure, have been retained in the Code because containing matter in the nature of procedure. Sections 138, 140, 141 are amended in the text merely to correct references made necessary by the removal of certain substantive provisions from the Code of Civil Procedure to consolidated laws.

33. § 220. The first portion of this section down to and including the sentence "whenever the appellate division," etc., has been placed in the Judiciary Law as well as the last two sentences beginning "It shall have power to appoint," etc. The two sentences in the middle of the section beginning "No justices of the appellate division," etc., have been retained in the Code of Civil Procedure. The first part of the section which has been consolidated in the Judiciary Law relates to the makeup of the appellate division, the number that shall constitute a quorum, how many justices shall sit in any case, the designation of justices of the appellate division by the governor, the terms of

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office of the justices, the filling of vacancies, residence of the justices and matters which do not relate to the conduct of an action or an appeal therein. They are provisions in which the justices of the appellate division are chiefly interested and as such have been consolidated in the Judiciary Law. The last portion of the section relates to the appointment of a reporter and the location of the appellate division in each department which are matters that may be appropriately placed in the Judiciary Law. The portion retained in the Code of Civil Procedure applies to the powers of the justices of the appellate division and the jurisdiction of the appellate division, which provisions have been retained in the Code of Civil Procedure as bearing so closely upon practice as to be more appropriately placed in the Code of Civil Procedure than in the Judiciary Law.

34. § 229. This section of the Code of Civil Procedure (§ 229) is amended because of the removal to the Judiciary Law of the first sentence, which provides that "A special term or a trial term of the supreme court must be held by one judge." This is not a practice provision and therefore has been placed in the Judiciary Law.

35. § 235. The last sentence of this section provides that the justices of the supreme court in the eighth judicial district may adopt and amend rules and regulations for making calendars of cases and has been removed to the Judiciary Law where similar matters applicable in other cases have been consolidated. The first two sentences of the section relate to the power of a justice of the supreme court to hold a special term, to act upon any business except where he is disqualified and to the transaction of judicial business out of court. These are all matters relating to the general subject of the powers and jurisdiction of the courts and like such matters elsewhere found in the Code of Civil Procedure have been retained in the Code, as closely related to the actual conduct of an action in court.

36. § 239. The last sentence has been removed as substantive matter to the Judiciary Law. It relates to the attendance upon the court of certain officers, such as clerks, sheriffs, criers and constables. The remainder of the section relating to the adjournment of a special term and the trial of a case upon the calendar of a term which has been adjourned, has been retained in the Code of Civil Procedure because associated with the practice in a cause.

37. § 269. Section 66 of the Code of Civil Procedure referred to in this section relates to the compensation of attorneys and counselors and their liens in actions and special proceedings and has been consolidated in the Judiciary Law under article 15, relating to attorneys and counselors. These provisions are purely substantive. The change, therefore, made in this section in the text is merely one of reference.

37a. § 274. The new matter inserted in this section is L. 1884, Ch. 336, § 3. Section 3 is an express provision relating to allowances for expense of abstracts of title in certain awards by the Court of Claims and is therefore preserved. Section 274 of the Code which prohibits the allowance of disbursements in an action in the Court of Claims might be construed to refer only to disbursements in the course of action. Section 3 is preserved to meet cases where abstracts are required as a necessary expense incident to the appraisalment of the damages. The section consolidated was passed in 1884. The Code section was originally

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enacted in 1883 and subsequently re-enacted verbatim in the Code, so that the 1884 act cannot be said to have been superseded by the Code section but on the contrary is still in existence.

38. § 823. Section 17 of the Code of Civil Procedure referred to in this section relates to the convention of justices of the appellate division and to the adoption of general rules of practice by such convention. These matters are entirely apart from the conduct of a cause through the courts and have, therefore, been consolidated in the Judiciary Law in §§ 93 and 94. The distribution of § 17 of the Code of Civil Procedure to the Judiciary Law has made necessary the change in reference.

38a. § 340, subd. 1. Section 1737 of the Code of Civil Procedure has been consolidated in § 206 of the Lien Law. Section 1737 as well as other sections in the article of which it forms a part, relate to an action to foreclose a lien upon a chattel and have been consolidated in the Lien Law. Hence the change of reference.

39. § 355. The first sentence is the only portion of § 355 of the Code retained in the Code of Civil Procedure. It provides that the court shall be open for the transaction of business "for which notice is not required to be given to an adverse party except where it is specially prescribed by law that the business must be done at a stated term." This language embraces a matter of practice and for that reason has been retained in the Code of Civil Procedure. The remainder of the section relates to such matters as the appointment of times and places for holding terms of court, continuance of terms appointed, changing the day appointed, appointing one or more additional terms, dispensing with the holding of terms and adjournment of terms to other places within the county. These are provisions that are outside of the practice in an action and relate to the organization of the machinery for hearing causes rather than to the conduct of causes themselves, and have been consolidated, therefore, in the Judiciary Law (§§ 190, 191).

40. § 432. See Note 5.

41. § 450. The substantive provision contained in this section providing that recoveries in actions or special proceedings for damages to the person, estate or character of a married woman shall be her separate estate, has been removed to the Domestic Relations Law, where similar substantive matter relating to married women is found.

42. § 484, subd. 10. The reference in this section to the "fisheries, game and forest law" has been changed to the "forest, fish and game law" which is the name by which that law is now known.

43. § 716. This section of the Code of Civil Procedure is found in article 1, title 4, chapter 7, under the head "Receivers" and applies not only to a receiver appointed for the voluntary dissolution of a corporation but to a "receiver appointed by or pursuant to an order or a judgment in an action in the supreme court or in a county court or in a special proceeding." As the proceedings for the voluntary dissolution of a corporation has been transferred to the General Corporation Law (Art. 9) as well as other provisions in the Code of Civil Procedure relating to the dissolution and annulment of a corporation this section has been consolidated in article 11 of the General Corporation Law, relating to the powers, duties and liabilities of receivers of corporations in such a form as to give it the application in-

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tended by the section. Receivers may be appointed, however, in other actions and proceedings than those taken to dissolve or annul a corporation, and therefore it becomes necessary to retain the section in the Code of Civil Procedure. It has, therefore, been amended and allowed to remain in the Code of Civil Procedure applicable to receivers appointed "in an action in the supreme court or a county court or a special proceeding."

44. § 746. The portion of this section relating to the rate of interest that shall be paid by depositaries of funds or money paid into court and the requirement that they shall give a bond being substantive in character has been consolidated in the Banking Law (§ 43). The remainder of the section providing where funds or moneys paid into court shall be deposited has been allowed to remain in the Code as practice matter.

45. § 752. This section relates to the accounts that shall be kept by the depositary of funds or money paid into court. The last sentence of the section making the section applicable to banks and trust companies has been consolidated in the Banking Law (§ 44). The distribution of the remainder of the section has not been attempted on account of its wide application and it has been allowed to remain in the Code as the most convenient and practical assignment.

46. § 802. The words "except the last section" have been inserted in this section so that the limitation of § 802 will not apply to a new section (§ 801a) inserted by this act.

47. § 861. The "last" section referred to in § 861 of the Code of Civil Procedure has been consolidated in the Civil Rights Law as § 26. It relates to the privilege from arrest of a witness and being substantive in character has been assigned to the Civil Rights Law (§ 26). This assignment has made necessary the change of reference found in the text.

48. § 862. The change made in this section has been made for the same reason stated in the preceding note.

49. §§ 870, 871, 885. The words "Other than a court specified in subdivisions sixteenth, seventeenth, eighteenth or nineteenth of section two of this act" have been omitted from §§ 870, 871 and 885 because all of the courts mentioned in the exception have been abolished and new courts created in their stead. In the first place subds. 16, 17, 18 and 19 are erroneous references, since those subdivisions were changed to subds. 10, 11, 12 and 13 by L. 1895, Ch. 946, amending § 2 of the Code of Civil Procedure. In the second place the mayor's court of the city of Hudson was expressly abolished by L. 1895, Ch. 751, and there was created in its stead the city court of Hudson. The recorder's court of the city of Oswego was abolished by L. 1895, Ch. 394. The recorder's court of the city of Utica was abolished by L. 1882, Ch. 103, and the name of the justice's court of the city of Albany was changed to the city court of Albany by L. 1884, Ch. 122. In no instance were existing laws made applicable to the new courts except in the case of the city of Albany, where the existing statutes were made applicable to the new court. In no case, however, was the new court denominated a court of record, so that none of them would come within the courts referred to in §§ 870, 871 and 885 of the Code of Civil Procedure. It would be erroneous, therefore, to continue a reference in these sections of the Code to these courts formerly existing in Hudson, Utica, Oswego and Albany since they no longer exist and a change in the reference to the new courts would be unjustified, as the

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- Sec. 42. Register of county.
43. Seal of court, public officer or corporation.
44. Seal, private.
45. Seal, private as corporate seal.
46. Signature.
47. State.
48. Tense, present.
49. Territory.
50. Time, computation.
51. Time, night.
52. Time, standard.
53. Time, use of standard.
54. Village.
55. Women.
56. Writing and written.
57. Year, common and leap.
58. Year in statute, contract and public or private instrument.

§ 10. Acknowledge and acknowledgment.

The terms acknowledge and acknowledgment, when used with reference to the execution of an instrument or writing other than a deed of real property, include a compliance with the provisions of the next section by either such proof or acknowledgment.

§ 11. Acknowledgment or proof of instrument.

When the execution of any instrument or writing is authorized or required by law to be acknowledged, or to be proven so as to entitle it to be filed or recorded in a public office, the acknowledgment may be taken or the proof made before any officer then and there authorized to take the acknowledgment or proof of the execution of a deed of real property to entitle it to be recorded in a county clerk's office, and shall be made and certified in the same manner as such acknowledgment or proof of such deed.

§ 12. Affidavit.

When an affidavit is authorized or required it may be sworn to before any officer authorized by law to take the acknowledgment of deeds in this state, unless a particular officer is specified before whom it is to be taken.

§ 13. Adjournment of meeting.

Any meeting referred to in section forty-one of this chapter may be adjourned by a less number than a quorum.

§ 14. Bond and undertaking.

A provision of law authorizing or requiring a bond to be given shall be deemed to have been complied with by the execution of an undertaking to the same effect.

§ 15. Chattels.

The term chattels includes goods and chattels.

§ 16. Choose.

The term choose includes elect and appoint.

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§ 17. Civil code and criminal code.

The term civil code means the code of civil procedure. The term criminal code means the code of criminal procedure.

§ 18. Consolidated laws.

The term Consolidated Laws shall mean the compilation of the statutes prepared by the board of statutory consolidation and the amendments thereof.

§ 19. Day, calendar.

A calendar day includes the time from midnight to midnight. Sunday or any day of the week specifically mentioned means a calendar day.

§ 20. [Am'd, 1910.] Day, computation.

A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. Sunday or a public holiday, other than a half holiday, must be excluded from the reckoning if it is the last day of any such period, or if it is an intervening day of any such period of two days. In computing any specified period of time from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned shall be excluded in making the reckoning.

Amended by L. 1910, ch. 347, in effect May 21, 1910.

§ 21. Folio.

A folio is one hundred words, counting as a word each figure necessarily used.

§ 22. Gender.

Words of the masculine gender include the feminine and the neuter, and may refer to a corporation, or to a board or other body or assemblage of persons; and, when the sense so indicates, words of the neuter gender may refer to any gender.

§ 23. Heretofore and hereafter.

Each of the terms, heretofore, and hereafter, in any provision of a statute, relates to the time such provision takes effect.

§ 24. Holiday and half holiday.

The term holiday includes the following days in each year: The first day of January, known as New Year's day; the twelfth day of February, known as Lincoln's birthday; the twenty-second day of February, known as Washington's birthday; the thirtieth day of May, known as Memorial day; the fourth day of

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July, known as Independence day; the first Monday of September, known as Labor day; the twelfth day of October, known as Columbus day; and the twenty-fifth day of December, known as Christmas day, and if either of such days is Sunday, the next day thereafter; each general election day and each day appointed by the president of the United States or by the governor of this state as a day of general thanksgiving, general fasting and prayer, or other general religious observances. The term half holiday includes the period from noon to midnight of each Saturday which is not a holiday.

Am'd by L. 1909, ch. 112. In effect March 23, 1909.

§ 25. Holiday in contractual obligations.

Where a contract by its terms requires the payment of money or the performance of a condition on a public holiday, such payment may be made or condition performed on the next business day succeeding such holiday, with the same force and effect as if made or performed in accordance with the terms of the contract.

§ 26. Judge.

The term judge includes every judicial officer authorized, alone or with others, to hold or preside over a court of record.

§ 27. Last, preceding, next and following.

A reference to the last or preceding section, or other provision of a statute, means the section or other division immediately preceding, and a reference to the next or following section or other division of a statute means the section or other division immediately following.

§ 28. Lunatic and lunacy.

The terms lunatic and lunacy include every kind of unsoundness of mind except idiocy.

§ 29. Men.

The term men includes boys.

§ 30. Month, computation.

A number of months after or before a certain day shall be computed by counting such number of calendar months from such day, exclusive of the calendar month in which such day occurs, and shall include the day of the month in the last month so counted having the same numerical order in days of the month as the day from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of the month so counted.

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§ 31. Month in statute, contract and public or private instrument.

In a statute, contract or public or private instrument, unless otherwise provided in such contract or instrument or by law, the term month means a calendar month and not a lunar month.

§ 32. Municipal officers.

A reference to several officers of a municipal corporation holding the same office, or to a board of such officers, shall be deemed to refer to the single officer holding such office, when but one person is chosen to fill such office in pursuance of law.

§ 33. Notice.

When a notice is required to be given to a board or body, service of such notice upon the clerk or chairman thereof shall be sufficient.

§ 34. Now.

The term now in any provision of a statute referring to other laws in force, or to persons in office, or to any facts or circumstances as existing, relates to the laws in force, or to the person in office, or to the facts or circumstances existing, respectively, immediately before the taking effect of such provision.

§ 35. Number, singular and plural.

Words in the singular number include the plural, and in the plural number include the singular.

§ 36. Oath, affidavit and swear.

The terms oath and affidavit include every mode authorized by law of attesting the truth of that which is stated. The term swear includes every mode authorized by law for administering an oath.

§ 37. Person.

The term person includes a corporation and a joint-stock association. When used to designate a party whose property may be the subject of any offense, the term person also includes the state, or any other state, government or country which may lawfully own property in the state.

§ 38. Property.

The term property includes real and personal property.

§ 39. Property, personal.

The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evi-

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denced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership.

Oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation.

§ 40. Property, real.

The term real property includes real estate, lands, tenements and hereditaments, corporeal and incorporeal.

§ 41. Quorum and majority.

Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of all such persons or officers at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, may perform and exercise such power, authority or duty, and if one or more of such persons or officers shall have died or have become mentally incapable of acting, or shall refuse or neglect to attend any such meeting, a majority of the whole number of such persons or officers shall be a quorum of such board or body, and a majority of a quorum, if not less than a majority of the whole number of such persons or officers may perform and exercise any such power, authority or duty.

§ 42. Register of county.

Any act done in pursuance of law by the register of a county shall be deemed to be a compliance with any provision of law authorizing or requiring such act to be done by the county clerk of such county, and any instrument or writing filed, entered or recorded in pursuance of law in the office of a register of a county, shall be deemed to be a compliance with any provision of law authorizing or requiring such paper to be filed, entered or recorded, as the case may be, in the office of the clerk of such county. The term county clerk when used in relation to conveyances of real property or the filing or recording of instruments which are or may be filed in the office of the register of a county, shall include the register of each county in which there is a register.

§ 43. Seal of court, public officer or corporation.

A seal of a court, public officer or corporation may be impressed directly upon the instrument or writing to be sealed, or upon wafer, wax or other adhesive substance affixed thereto, or upon paper, or other similar substance affixed thereto by mucilage or other adhesive substance.

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§ 44. Seal, private.

The private seal of a person, other than a corporation, to any instrument or writing shall consist of a wafer, wax or other similar adhesive substance affixed thereto, or of paper or other similar substance affixed thereto, by mucilage or other adhesive substance, or of the word "seal," or the letters "L. S.," opposite the signature.

§ 45. Seal, private as corporate seal.

An instrument or writing duly executed, in the corporate name of a corporation, which shall not have adopted a corporate seal, by the proper officers of the corporation under their private seals, shall be deemed to have been executed under the corporate seal.

§ 46. Signature.

The term signature includes any memorandum, mark or sign, written or placed upon any instrument or writing with intent to execute or authenticate such instrument or writing.

§ 47. State.

The term state, when used generally to include every state of the United States, includes also every territory of the United States and the District of Columbia.

§ 48. Tense, present.

Words in the present tense include the future.

§ 49. Territory.

The term territory when used generally to include every territory of the United States, includes also the District of Columbia.

§ 50. Time, computation.

Time shall continue to be computed in this state according to the Gregorian or new style. The first day of each year after the year seventeen hundred and fifty-two is the first day of January, according to such style.

§ 51. Time, night.

Night time includes the time from sunset to sunrise.

§ 52. Time, standard.

The standard time throughout this state is that of the seventy-fifth meridian of longitude west from Greenwich, and all courts and public officers, and legal and official proceedings, shall be regulated thereby.

§ 53. Time, use of standard.

Any act required by or in pursuance of law to be performed at or within a prescribed time, shall be performed according to the standard time.

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§ 54. Village.

The term village means an incorporated village.

§ 55. Women.

The term women includes girls.

§ 56. Writing and written.

The terms writing and written include every legible representation of letters upon a material substance, except when applied to the signature of an instrument.

§ 57. Year, common and leap.

For the purpose of computing and reckoning the days of the year in the same regular course in the future, every year, the number of which in the Christian era is a multiple of four, is a bissextile or leap year consisting of three hundred and sixty-six days, unless such number of the year is a multiple of one hundred and the first two figures thereof treated as a separate number is not a multiple of four, and every year which is not a leap year is a common year consisting of three hundred and sixty-five days.

§ 58. Year in statute, contract and public or private instrument.

The term year in a statute, contract, or any public or private instrument, means three hundred and sixty-five days, but the added day of a leap year and the day immediately preceding shall for the purpose of such computation be counted as one day. In a statute, contract or public or private instrument, the term year means twelve months, the term half year, six months, and the term a quarter of a year, three months.

ARTICLE 3.

Ancient Statutes and Resolutions.

Sec. 70. Statutes of England and Great Britain inoperative in this state.

71. Acts of the legislature of the colony of New York inoperative.

72. Resolutions of the congress of the colony and the convention of New York inoperative.

§ 70. Statutes of England and Great Britain inoperative in this state.

A statute of England or Great Britain shall not be deemed to have had any force or effect in this state since May first, seventeen hundred and eighty-eight.

§ 71. Acts of the legislature of the colony of New York inoperative.

Acts of the legislature of the colony of New York shall not be deemed to have had any force or effect in this state since December twenty-ninth, eighteen hundred and twenty-eight.

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§ 72. Resolutions of the congress of the colony and the convention of New York inoperative.

The resolutions of the congress of the colony of New York and of the convention of the state of New York, shall not be deemed to be the laws of this state hereafter.

ARTICLE 4.

References, Titles and Head Notes.

Sec. 80. References to repealed provisions.

81. Titles and head notes.

§ 80. References to repealed provisions.

If any provision of a law be repealed and, in substance, re-enacted, a reference in any law to such repealed provision shall be deemed a reference to such re-enacted provision.

§ 81. Titles and head notes.

If the title of any article or other division of a statute, or the head note of a section shall be amended or repealed in the body of the statute, or if a new article or other division having a title, or a new section having a new head note be added to a statute, the corresponding title or head note, if any, in an abstract of contents at the beginning of the article or other division of the statute shall be deemed to be correspondingly amended or repealed, although there be no express reference thereto.

ARTICLE 5.

Effect of Repeals.

Sec. 90. Effect of the repeal of a repealing statute.

91. Effect of the repeal of a statute upon amendments thereof.

92. Effect of the repeal of an amending statute.

93. Effect of repealing statute upon existing rights.

94. Effect of repealing statute upon pending actions and proceedings.

95. Effect of the repeal of a statute by another statute substantially re-enacting the former.

96. Effect of hyphen in schedule of repeals.

§ 90. Effect of the repeal of a repealing statute.

The repeal hereafter or by this chapter of any provision of a statute, which repeals any provision of a prior statute, does not revive such prior provision.

§ 91. Effect of the repeal of a statute upon amendments thereof.

The repeal by the Consolidated Laws of a statute includes a statute amendatory of the statute repealed.

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§ 92. Effect of the repeal of an amending statute.

The repeal hereafter or by this chapter of any provision of a statute, which amends a provision of a prior statute, leaves such prior provision in force unless the amendatory statute be a substantial re-enactment of the statute amended.

§ 93. Effect of repealing statute upon existing rights.

The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected.

§ 94. Effect of repealing statute upon pending actions and proceedings.

Unless otherwise specially provided by law, all actions and proceedings, civil or criminal, commenced under or by virtue of any provision of a statute so repealed, and pending immediately prior to the taking effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed.

§ 95. Effect of the repeal of a statute by another statute substantially re-enacting the former.

The provisions of a law repealing a prior law, which are substantial re-enactments of provisions of the prior law, shall be construed as a continuation of such provisions of such prior law, modified or amended according to the language employed, and not as new enactments.

§ 96. Effect of hyphen in schedule of repeals.

When two numbers in a schedule of repeals of the consolidated laws are connected by a hyphen both such numbers are included as well as all intermediate numbers.

ARTICLE SIXTH.

Effect of Consolidated Laws.

Sec. 100. Effect of consolidation upon laws passed at same session or before consolidation takes effect.

101. Effect of consolidated laws on penal law and civil and criminal codes.

§ 100. Effect of consolidation upon laws passed at same session or before consolidation takes effect.

No provision of any chapter of the consolidation of the general laws, of which this chapter is a part, shall supersede or repeal by implication any law passed at the same session of the legislature at which any such chapter was enacted, or passed

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after the enactment of any such chapter and before it shall have taken effect; and an amendatory law passed at such session or at any subsequent session begun before any such chapter takes effect, shall not be deemed repealed, unless specifically designated in the repealing schedule of such chapter.

§ 101. Effect of consolidated laws on penal law and civil and criminal codes.

The Consolidated Laws shall not be construed to amend, repeal or otherwise affect any provision of the penal law, code of civil procedure or code of criminal procedure unless expressly so stated.

ARTICLE 7.

Application of Chapter.

Sec. 110. Application of chapter.

§ 110. Application of chapter.

This chapter is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by this chapter.

ARTICLE 8.

Laws Repealed; When to Take Effect.

Sec. 120. Laws repealed.

121. When to take effect.

§ 120. Laws repealed.

Of the laws enumerated in the schedule hereto annexed portion specified in the last column is hereby repealed.

§ 121. When to take effect.

This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED.

Revised Statutes..	Part 1, chapter 8, title 8, section 16.
Revised Statutes..	Part 1, chapter 19, title 1, sections 1-5.
Revised Statutes..	Part 2, chapter 4, title 2, section 3.
Revised Statutes..	Part 2, chapter 4, title 3, section 9.
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1828.....	20.....	9-11 (2d Meet.)

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1876.....	448.....	29, 788, 960
1877.....	416.....	1, §§ 176, 214.
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1880.....	178.....	1, pt. adding § 3343, subds. 6-8, 15, 17, 21-24 to L. 1876, Ch. 448
1881.....	30.....	All
1881.....	442.....	955-957
1881.....	676.....	261, 500, 718, subds. 9-15
1882.....	384.....	1, pt. amending L. 1881, Ch. 676, § 718, subds. 9-15
1883.....	372.....	All
1884.....	14.....	All
1886.....	21.....	20
1887.....	289.....	All
1892.....	677.....	All, except last sentence of § 24
1894.....	447.....	All
1894.....	448.....	All
1895.....	603.....	All
1897.....	614.....	1, except part providing that public offices shall be kept open on all week days; 2. 3
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1907.....	800.....	All

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Misc. 19-134.
N. Y. Supp. 124-876.
Abb. N. C. 30-59, n.</p> <p>22. N. Y. 98-511.
Misc. 19-503; 42-621.</p> <p>23. N. Y. 88-611.
Civ. Proc. 19-446; 22-105.
N. Y. Super. 47-271.
How. 62-76.</p> <p>24. N. Y. 88-611; 188-55.
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App. Div. 115-309.
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[L. 1902, Chap. 580, as amended.]

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MUNICIPAL COURT ACT.

§ 1. [Am'd, 1905, 1908, 1910.] Jurisdiction.

Except as provided in the next section the municipal court of the city of New York has jurisdiction in the following civil actions and proceedings:

1. An action to recover damages upon or for breach of contract, express or implied, other than a promise to marry, where the sum claimed does not exceed five hundred dollars, exclusive of interest and costs.

2. An action upon a bond conditioned for the payment of money where the sum claimed to be due does not exceed five hundred dollars, exclusive of interest and costs, the judgment to be rendered for the sum actually due. Where the sum secured by the bond is to be paid in installments, an action may be brought for each installment as it becomes due.

3. An action upon a surety bond or undertaking taken in any court where the amount claimed in the summons does not exceed the sum of five hundred dollars, exclusive of interest and costs.

4. An action in behalf of the people of the state or of the city of New York, brought by the direction of a commissioner of public charities or an overseer of the poor upon a bastardy or abandonment bond in a case where it is prescribed by law that such an action can be maintained.

5. An action upon the bond of a marshal of the city of New York, as prescribed in this act.

6. An action upon a judgment rendered in any court not being a court of record.

7. An action for a fine or penalty not exceeding five hundred dollars, including an action to recover a penalty given by the charter of the city of New York or any by-law or ordinance thereof or by any statute of the state.

8. An action to recover damages for an escape from the jail liberties of any county within the city of New York, where the sum claimed does not exceed five hundred dollars and costs.

9. An action to recover one or more chattels with or without damages for the taking, withholding or detention thereof, where the value of the chattel or of all the chattels as stated in the affidavit made on the part of the plaintiff does not exceed five hundred dollars.

10. An action to foreclose a lien upon a chattel for a sum of money, in any case where such a lien exists at the commencement of the action and where the amount of the lien does not exceed five hundred dollars, exclusive of interest and costs.

11. An action to enforce a mechanic's lien on real property in which the court shall have power to render judgment for the sum due, with interest thereon from the date of the filing of the lien, costs of the action and all prospective fees, and to declare the amount a valid lien against the interest of the defendant in the property described in the complaint, at the time of the filing of the lien, where the amount does not exceed five hundred dollars, exclusive of interest and costs, but said court cannot render judgment for the foreclosure and sale of the property.

12. A summary proceeding under title two of chapter seventeen of the code of civil procedure to recover possession of real property which, or a portion of which, is situated within the district wherein the application for such recovery is made. Such proceeding may be tried with or without a jury, which may be demanded by any party thereto. The court in either case has power upon application, to allow the petition or answer to be amended, at any time, if substantial justice will be promoted thereby and the rights of the parties have not been impaired by

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§ 4. Contempt of court; criminal.

The said court has power to punish for a criminal contempt: person guilty of either of the following acts and no others:

1. Disorderly, contemptuous or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise or other disturbance directly tending to interrupt its proceedings.

3. Wilful disobedience to its lawful mandates.

4. Resistance wilfully offered to its lawful mandates.

5. Contumacious and unlawful refusal to be sworn as a witness, or after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full and fair report of a trial, argument, decision or other proceeding thereon.

O. C. P., § 8; L. 1882, ch. 410, § 1288; L. 1901, ch. 466, § 1368.

§ 5. Punishment.

Punishment for a contempt, specified in the last section, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment not exceeding thirty days, in the jail of the court where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail, for the non-payment of such a fine, he must be discharged at the expiration of thirty days; but where he is also committed for a definite time, the thirty days must be computed from the expiration of the definite time.

O. C. P., § 9; L. 1882, ch. 410, § 1288; L. 1901, ch. 466, § 1368.

§ 6. In view of court; how punished.

Such a contempt, committed in the immediate view and presence of the court, may be punished summarily. When not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defence, and the court may issue a warrant directed generally to any marshal requiring him to bring the offender before the court. Where a person is committed for such a contempt, the particular circumstance of his offence must be set forth in the mandate of commitment.

O. C. P., §§ 10, 11; L. 1882, ch. 410, § 1288; L. 1901, ch. 466, § 1368.

§ 7. Preceding three sections limited.

Punishment for a contempt, as herein prescribed, does not lie by indictment for the same offence; but where a person who has been so punished is convicted on such an indictment, the court in sentencing him, must take into consideration the previous punishment.

O. C. P., § 12.

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MUNICIPAL COURT ACT.

Where a person is committed to jail for the nonpayment of a fine he must be discharged at the expiration of thirty days but where he is also committed for a definite time, the thirty days must be computed from the expiration of the definite time. The particular circumstances of the offense must be set forth in the mandate of commitment.

Added, L. 1910, ch. 539. In effect June 20, 1910.

§ 8-b. [Added, 1910.] In other cases; order to show cause

In any other case specified in section eight, the court must, upon being satisfied by affidavit of the commission of the offense and that the right or remedy of a party to an action or special proceeding pending in the court or before the judge may be defeated, impaired, impeded or prejudiced thereby, make an order requiring the accused to show cause before it or him, at a time and place specified, why the accused should not be punished for the alleged offense. The order to show cause may be made by any judge authorized to grant an order without notice in an action pending in the court, and it must be made returnable at a term or part of the court at which a contested motion may be heard.

Added, L. 1910, ch. 539. In effect June 20, 1910.

§ 8-c. [Added, 1910.] Return of order to show cause; fine or imprisonment; warrant of commitment.

Upon the return of an order to show cause the question which arises must be determined as upon any other motion, and the determination is to the effect that the accused has committed the offense charged, and that it was calculated to, or actually to, defeat, impair, impede or prejudice the rights or remedies of a party to an action or special proceeding brought in the court or before the judge, the court or judge must make a final order accordingly, and directing that the accused be punished by a fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly.

Added, L. 1910, ch. 539. In effect June 20, 1910.

§ 8-d. [Added, 1910.] Actual loss or injury, payment of fine.

If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected and paid over to the aggrieved party, under the direction of the court, not to exceed five hundred dollars. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and a sum not exceeding two hundred and fifty dollars in addition thereto, and

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TITLE I.

Jurisdiction and general powers.

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§ 1. [Am'd, 1905, 1908, 1910.] Jurisdiction.

Except as provided in the next section the municipal court of the city of New York has jurisdiction in the following civil actions and proceedings:

1. An action to recover damages upon or for breach of contract, express or implied, other than a promise to marry, where the sum claimed does not exceed five hundred dollars, exclusive of interest and costs.

2. An action upon a bond conditioned for the payment of money where the sum claimed to be due does not exceed five hundred dollars, exclusive of interest and costs, the judgment to be rendered for the sum actually due. Where the sum secured by the bond is to be paid in installments, an action may be brought for each installment as it becomes due.

3. An action upon a surety bond or undertaking taken in any court where the amount claimed in the summons does not exceed the sum of five hundred dollars, exclusive of interest and costs.

4. An action in behalf of the people of the state or of the city of New York, brought by the direction of a commissioner of public charities or an overseer of the poor upon a bastardy or abandonment bond in a case where it is prescribed by law that such an action can be maintained.

5. An action upon the bond of a marshal of the city of New York, as prescribed in this act.

6. An action upon a judgment rendered in any court not being a court of record.

7. An action for a fine or penalty not exceeding five hundred dollars, including an action to recover a penalty given by the charter of the city of New York or any by-law or ordinance thereof or by any statute of the state.

8. An action to recover damages for an escape from the liberties of any county within the city of New York, where the sum claimed does not exceed five hundred dollars and costs.

9. An action to recover one or more chattels with or without damages for the taking, withholding or detention thereof, where the value of the chattel or of all the chattels as stated in the affidavit made on the part of the plaintiff does not exceed five hundred dollars.

10. An action to foreclose a lien upon a chattel for a sum of money, in any case where such a lien exists at the commencement of the action and where the amount of the lien does not exceed five hundred dollars, exclusive of interest and costs.

11. An action to enforce a mechanic's lien on real property in which the court shall have power to render judgment for the sum due, with interest thereon from the date of the filing of the lien, costs of the action and all prospective fees, and to declare upon amount a valid lien against the interest of the defendant in the property described in the complaint, at the time of the filing of the lien, where the amount does not exceed five hundred dollars, exclusive of interest and costs, but said court cannot render judgment for the foreclosure and sale of the property.

12. A summary proceeding under title two of chapter seventeen of the code of civil procedure to recover possession of real property which, or a portion of which, is situated within the district wherein the application for such recovery is made. Such proceeding may be tried with or without a jury, which may be demanded by any party thereto. The court in either case has power upon application, to allow the petition or answer to be amended, at any time, if substantial justice will be promoted thereby and the rights of the parties have not been impaired of

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must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

Added, L. 1910, ch. 539. In effect June 20, 1910.

§ 8-e. [Added, 1910.] Omission to perform duty in power of offender; fine or imprisonment for; warrant of commitment.

Where the misconduct proved consists of an omission to perform an act or duty, which it is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed. In such a case, the order, and the warrant of commitment, if one is issued, must specify the act or duty to be performed, and the sum to be paid. In every other case, where special provision is not otherwise made by law, the offender may be imprisoned for a reasonable time, not exceeding six months, and until the fine, if any, is paid; and the order, and the warrant of commitment, if any, must specify the amount of the fine, and the duration of the imprisonment.

Added, L. 1910, ch. 539. In effect June 20, 1910.

§ 8-f. [Added, 1910.] When offender discharged from imprisonment.

Where an offender, imprisoned as prescribed in this title is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the court or judge may, in its or his discretion, and upon such terms as justice requires, make an order, directing him to be discharged from the imprisonment.

Added, L. 1910, ch. 539. In effect June 20, 1910.

§ 8-g. [Added, 1910.] Misconduct; when punishable.

Where a misconduct which is punishable by fine or imprisonment as prescribed in this title occurs during a month or with respect to a mandate returnable during a month, and was not punished during the month in which it occurred, the court or judge thereof may inquire into and punish the misconduct as if it had occurred during the month in which the order to show cause is made returnable and as if it had occurred during the month in which such motion is heard.

Added, L. 1910, ch. 539. In effect June 20, 1910.

§ 9. Process; where service may be made.

The court shall have power to send its process and other mandates in an action or special proceeding of which it has jurisdiction to any part of the city of New York for service or execution, and to enforce obedience thereto, and the power and authority of said court extends to the whole of said city of New York, without limitation, except as expressly prescribed in this act.

L. 1901, ch. 466, § 1368.

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§ 10. Justice to administer oaths, et cetera.

The justices of said court may, in the city of New York, in the virtue of their office, administer oaths, take depositions and acknowledgments, and certify the same in the manner and with like effect as justices of courts of record.

L. 1901, ch. 466, § 1370.

§ 11. [Am'd, 1904, 1907.] Board of justices.

The justices of said court shall constitute the board of justice of the municipal court and discharge the functions thereof. They may elect a president from their own number and at pleasure remove him and elect a successor. All meetings of said board shall be public and all proceedings shall be recorded in its books of minutes, by its secretary and shall be preserved. Such board may designate a clerk or deputy clerk of said court for each of said districts to act as secretary of said board, and from time to time substitute another and fix a compensation to be paid for such service, not exceeding the sum of five hundred dollars per annum. Such board may also designate an attendant of said court to act as attendant of said board, and from time to time substitute another, and fix a reasonable compensation to be paid for such service. Such board shall establish public rules relating to its meetings, which as far as possible shall be held at regular times, to the keeping and preservation of its minutes and to the public inspection of the same under the care of the secretary at reasonable times.

L. 1901, ch. 466, § 1474; L. 1904, ch. 735; L. 1907, ch. 603.

§ 12. [Am'd, 1903, 1907, 1908.] Board to make rules.

Said board of justices shall adopt, and may from time to time amend or add to rules relating to the following subjects:

1. As to the hours at which court shall be opened on each day and what officers shall be in attendance.
2. As to the order of business and manner of its discharge.
3. As to the manner in which the clerks, deputy clerks, assistant clerks, stenographers, interpreters, attendants and employees shall perform their duties, the manner of keeping records and papers, the collection and disposition of moneys and keeping accounts of the same.
4. As to the maintenance of order in and about the courts and offices thereof.
5. As to the forms and practices in said court.
6. As to a calendar in each district of actions reserved generally, to which actions may be transferred notwithstanding the provisions of section one hundred and ninety-three and one hundred and ninety-four of this act.
7. As to trial calendars and the transfer for trial from one part to another in the same district of special proceedings and of actions not necessarily triable in a part designated for jury trials under the next section of this act. The said board may also provide for the transfer from any part to a jury trial in the same district of any special proceeding or any action triable by jury.
8. As to the reports to the comptroller by the clerks of the disbursement by them of the moneys paid to them upon demand for jury trials and as to the payment to the comptroller of the city of New York of any surplus of said moneys after the payment therefrom of the fees for serving jurors and of juror

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rules shall be submitted to the presiding justices of the late divisions of the first and second departments of the me court, and when approved by them shall go into effect have the force of law.

901, ch. 466, § 1375; L. 1903, ch. 282; L. 1904, ch. 598; L. 1907, ch. 481, ch. 481. In effect Sept. 1, 1908.

13. [Am'd, 1907, 1908.] Parts of court; how held.

The board of justices shall from time to time establish parts and court and shall assign justices to hold the several parts established, but no justice shall be assigned to sit outside of the borough for which he was elected or appointed, excepting one of the cases specified in section thirteen hundred and five of the Greater New York charter, as amended by chapter six hundred and three of the laws of nineteen hundred seven. No justice shall sit in any one district for two successive months, nor, in the borough of Manhattan, for more than six months in any one year, nor in the boroughs other than Manhattan for more than the minimum number of months under the system of complete rotation by the justices within such boroughs respectively. Of the parts so established in the boroughs of Manhattan and the Bronx one or more parts in each district shall be designated for the trial by jury of all actions triable in that district in which a defendant is not under arrest. Said board shall provide for the transfer of every such action to one of the parts in which it is triable and shall prescribe on what such jury trials shall be had in each part so designated and such parts shall have a preference on such day.

Am'd by L. 1907, ch. 603; L. 1908, ch. 481. In effect Sept. 1, 1908.

14. Concurrence of majority.

The concurrence of a majority of all the members of said board shall be necessary to adopt any resolution thereof.

1901, ch. 466, § 1376.

15. Actions may be continued before another justice.

The trial of an action or special proceeding may be continued from day to day, or from one day to any other day or days until the same is finished. A special proceeding commenced before one justice may be continued before any other justice having jurisdiction of the subject-matter, the same as though it had been originally commenced before him. A transcript of any proceedings had before either of said justices, or of any paper filed with the clerk, or of the minutes of any testimony taken by or before said justice, certified by the clerk or said justice to be correct, shall be presumptive evidence of the facts therein contained.

§ 16. Death or removal of justice not to impair proceedings, et cetera.

No process, action, judgment, execution or proceeding shall abate or be discontinued by reason of the death, removal from office, or vacancy in office of any justice, but the respective successor in office of the said justice shall proceed to hear, try, determine and give judgment in and upon the same, and upon all matters and things pending before and undecided or not acted on or indorsed by their predecessors in office, with the same powers, jurisdiction, and authority, as their predecessors had.

L. 1867, ch. 344; L. 1882, ch. 410, § 1390.

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§ 17. [Am'd, 1907.] Court; where held.

The said court shall be held in each of the districts in one or more parts as fixed by the board of justices, by the justices or justices assigned to hold such parts, at the places provided by the commissioners of the sinking fund, and in accordance with law, at such hours in every judicial day or so often as the board of justices of the municipal court shall direct, and must continue in session so long as the public interest requires; and it shall be the duty of the commissioners of the sinking fund to provide a suitable place for the holding of said court in each of said districts, provided that more than one place for holding such court may be provided at any time after this act takes effect in any district, if the said board of justices shall certify that the public convenience requires such additional number of places.

In each of the districts in the borough of Manhattan the court shall on every day of the year except only Saturdays, Sundays and legal holidays, during each month of the year excepting July and August, be open from at least nine o'clock in the forenoon to four o'clock in the afternoon at least one part of said court with one of the justices of said court in attendance therein who shall hear and dispose of ex parte applications and summary actions for wages, summary proceedings and such other actions or proceedings as may be given a preference by the rules of the board of justices, and attend to such other business as may be directed by such rules. During the months of July and August such part shall be in session as aforesaid in each district for at least two days in each week. Similar parts may be established by the board of justices to sit in the boroughs of the Bronx, Brooklyn, Queens and Richmond, as the business of said court may require.

L. 1882, ch. 410, § 1291; L. 1901, ch. 466, § 1371. Am'd L. 1907, ch. 67 in effect Jan. 1, 1908.

§ 18. Seals.

The said court in each district shall have official seals furnished at the expense of the city, on which shall be engraved the arms of the state of New York, "Borough of Manhattan" (or whatever the borough may be), "First District" (or whatever the district may be), but nothing herein contained shall authorize such court to issue certificates of naturalization.

L. 1882, ch. 410, § 1293; L. 1901, ch. 466, § 1372.

§ 19. Access to court-houses.

The justices of said court shall have access and possession of the court-houses; and it shall be the duty of the board of aldermen of the city of New York and its several officers charged with duties in that behalf to supply and pay for whatever may be necessary for the transaction of the business of said court and the justices thereof, and to supply all proper accommodations, books, stationery and furniture, and to pay all salaries, compensations and expenses and disbursements herein authorized, and the board of estimate and apportionment shall annually include in its final estimate such sums as may be necessary to pay the same.

L. 1901, ch. 466, § 1380.

§ 20. Code, rules of supreme court applicable; when.

The provisions of the code of civil procedure and rules and regulations of the supreme court as they may be from time to time, shall apply to the municipal court as far as the same can be made applicable, and are not in conflict with the provisions of this act; in case of such conflict this act shall govern.

L. 1901, ch. 466, § 1377.

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TITLE II.

Actions; summons; parties.

- Sec. 25. In what district brought.
26. Actions; how commenced.
27. Summons; requisites.
28. Form of summons.
29. Summons; corporation counsel may issue, et cetera.
30. Service; alias.
31. Method of service.
32. Order for service of summons, when defendant not found.
33. How such service must be made.
34. Papers to be filed; proof of service.
35. Defendant when allowed to defend.
36. Who may serve summons, et cetera.
37. Return day.
38. Indorsement upon summons.
39. Indorsement upon summons where execution against the person may issue.
40. Parties; appearance of.
41. Guardian ad litem.
42. Parties; who may be joined.
43. Application of this article to defendants jointly liable.
44. Where employee is party.
45. Who may petition for leave to prosecute as a poor person.
46. Contents of petition.
47. Order and petition to be filed; when counsel assigned.
48. When leave may be annulled.
49. When defendant may defend as a poor person, et cetera.
50. Defendant's order.
51. Leave may be annulled as in cases of plaintiff.
52. Appeal where plaintiff or defendant poor person.
53. Costs in favor of petitioner.

§ 25. [Am'd, 1904, 1907.] In what district brought.

An action or proceeding of which the municipal court has jurisdiction must be brought:

1. In a district in which either the plaintiff or defendant or one of the plaintiffs or one of the defendants resides, unless all the plaintiffs or all the defendants reside out of the city of New York, in which case the action or proceeding may be brought in said court in any district; provided, however, that whenever any action shall be brought by the assignee of the cause of action, such action shall upon the demand of a defendant made as provided in subdivision four of this section, be transferred to the district in which the defendant resides and the court must make an order for such transfer, as provided in subdivision four of this section.

2. If the defendant be a corporation created by law, in a district in which the plaintiff or either of the plaintiffs resides, or in which (if it be a corporation) it transacts its general business or keeps an office or has an agency established for the transaction of business or is established by law, except the corporation of the city of New York, which may sue, or be sued in any district, except as provided for in subdivision five of this section.

3. By plaintiffs not residing in the city of New York, in the district in which the defendant, or one of the defendants resides, and against a defendant or defendants, not residing in said city, in the district in which the plaintiff or one of the plaintiffs re-

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sides; but where all the parties reside out of said city, the action may be brought in any district. No person who shall have a place in said city for the regular transaction of business shall be deemed a non-resident under the provisions of this act.

4. If the district in which the action or proceeding is brought is not the proper district, the action may, notwithstanding, be tried therein, unless the action is transferred to the proper district before trial upon demand of the defendant made upon or before the joinder of issue in writing or in open court, followed by the consent of the plaintiff given in like manner, or the order of the court. The demand must specify the district to which defendant requires the action to be transferred. The court must make such order when the district in which the action or proceeding is brought is not the proper district, as specified in this section or the next one, if such demand be made.

5. All actions by or on behalf of the city of New York to recover a penalty or fine for a violation of any corporation ordinance, when the amount of such penalty or fine shall not exceed five hundred dollars, must be brought in the district in which the violation of such ordinance happened or occurred. And all actions to recover a penalty or fine for a violation of any provision of the sanitary code or of any regulation of the fire commission or of any laws or ordinances which either the health or fire department is authorized, empowered and especially charged to enforce, where the amount of such penalty or fine shall not exceed five hundred dollars, must be brought in the district in which such violation happened or occurred.

6. An action pending in said court may upon consent be transferred by an order by any justice of said court to a district other than that in which it is pending.

L. 1901, ch. 466, § 1370, am'd by ch. 93, L. 1904, and by L. 1904, ch. 65; L. 1907, ch. 603. In effect Jan. 1, 1908.

§ 26. Action; how commenced.

An action brought in the municipal court of the city of New York, must be commenced by the service of a summons, or the voluntary appearance of and joinder of issues by the parties.

L. 1882, ch. 410, § 1296.

§ 27. Summons; requisites.

The summons must be addressed to the defendant by name, or if his name be unknown, by a fictitious name, and must summon him to appear before the court, at the court-room thereof, and at the time specified therein, to answer the complaint of the plaintiff, and must state the amount for which the plaintiff will take judgment if the defendant fail to appear and answer; it must be issued and subscribed by the clerk of the court in the district out of which the same is issued, or by his assistant in the name of such clerk, except as provided in section twenty-five of this act.

L. 1882, ch. 410, § 1297.

§ 28. Form of summons.

The summons must be substantially in the following form, the blanks being properly filled out.

MUNICIPAL COURT ACT.

MUNICIPAL COURT OF THE CITY OF NEW YORK.

Borough of _____, district _____

..... plaintiff,
against } Summons.
..... defendant. }

the above named defendant:

You are hereby summoned and required to appear in this action in the municipal court of the city of New York, borough _____, district _____, in the court room thereof, _____, in the city of New York, on the _____ day of _____ 19.., at _____ o'clock in the forenoon, to answer a complaint of the plaintiff in this action, who, if you then fail to appear and answer will take judgment against you for a sum of _____ dollars, with interest from the _____ day of _____ 19.., together with the costs of this action.
Dated, New York, 19..

New.]

..... Clerk.

§ 29. [Am'd, 1905.] Summons; attorney-general and corporation counsel may issue, et cetera.

In any and all actions brought in the name of the people of the state of New York by the attorney-general or in the name of the city of New York, or of any department, board, or officer thereof, or by the corporation counsel of the city of New York, as attorney for said city, or said department, board or officer thereof, to recover a penalty or penalties for the violation of any laws or ordinance, the summons may be issued out of said court by the attorney-general or by the corporation counsel in his own name without the same being subscribed by the clerk of the court where such action or actions are brought, and in such actions the attorney-general or the corporation counsel shall not be required to pay to the clerk of the court the fees in the action, but shall account therefor to the city treasurer and shall collect the same from the defendant, when judgment is recovered; and no fees or costs shall be demanded of the people of the state of New York or the attorney-general or of the said the city of New York, or any board or officer thereof in any such suit or proceeding.

L. 1901, ch. 468, § 1384; L. 1905, ch. 73. In effect March 17, 1905.

§ 30. Service; alias.

An action shall be deemed commenced, at the time the summons is actually delivered for service. If the marshal, or other person having the summons to serve, cannot find the defendant so as to serve him therewith as required by this act, he must so return, and the clerk shall, at the request of the plaintiff, if made between the last day when service could be had and the return day mentioned in said summons or alias, including such return day, continue from time to time to issue another summons, to be known as and stamped "alias," until the defendant is served.

L. 1882, ch. 410, § 1303.

§ 31. Method of service.

The summons must be served as follows:

1. If an action be against a corporation, by delivery of a copy to the president or other head of the corporation, or to the secretary, cashier, or managing agent thereof, but when no such officer resides in the city, to a director resident therein.

2. If against a minor under the age of fourteen years, by de-

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livery of a copy to such minor, and also to his father, mother or guardian, or if they be not within the city, then to any person having the care or control of said minor, or with whom he resides, or to whose service he is.

3. If against a person judicially declared to be of unsound mind or incapable of conducting his own affairs in consequence of habitual drunkenness, or for any other cause, and for whom a committee has been appointed, by delivery of a copy to such committee and of the defendant personally.

4. In all other cases to the defendant personally, except as in this act otherwise specially provided.

L. 1882, ch. 410, § 1300.

§ 32. Order for service of summons; when defendant not found.

An order for the service of a summons upon a defendant residing within the city, may be made by the court in the district in which an action is brought after an alias summons has been duly issued, upon satisfactory proof by the affidavit of a person not a party to the action, and the return of a marshal, that proper and diligent effort has been made to serve the summons upon the defendant, and that the place of his sojourn cannot be found, or if he is within the city that he avoids service so that personal service could not be made.

C. C. P., § 435.

§ 33. How such service must be made.

The order must direct that the service of the summons be made, by leaving a copy thereof, and of the order, at the residence of the defendant, with a person of proper age, if upon reasonable application, admittance can be obtained, and such person found who will receive it; or, if admittance cannot be obtained, nor such a person found, by affixing the same to the outer or other door of the defendant's residence, and by depositing another copy thereof, properly enclosed in a post-paid wrapper, addressed to him, at his place of residence, in a post-office in the borough in which he resides; or upon proof being made by affidavit that no such residence can be found, service of the summons may be made in such manner as the court may direct.

C. C. P., § 436.

§ 34. [Am'd 1909] Papers to be filed; proof of service.

The order, and the papers upon which it was granted, must be filed, and the service must be made, not less than six days before the return day of the summons; otherwise the order becomes inoperative. On filing an affidavit showing service according to the order, the summons is deemed served and the same proceedings may be taken thereupon, as if the personal service thereof had been made except that no execution against the person shall issue upon a judgment obtained after such service. The summons, when returned to the clerk's office, shall be indorsed with the residence or post-office address of the plaintiff, and also the name and post-office address of the attorney, if any. The indorsement upon the summons of the address of the plaintiff shall be deemed his post-office address for the purpose of the service of papers, in all cases where papers may be served upon the plaintiff.

C. C. P., § 437, am'd L. 1909, ch. 468. In effect May 25, 1909.

§ 35. Defendant when allowed to defend.

Where the summons is served, pursuant to an order made as herein prescribed, and the defendant so served does not appear, he or his representative must upon good cause shown and upon just terms be allowed to defend the action at any time within six months after personal service of written notice thereof; or if such notice has not been served, within two years after the entry of the judgment. If the defense is successful, and the judgment, or any part thereof has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs, but the title to property sold, to a purchaser in good faith by

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virtue of an execution issued upon the judgment, shall not be affected thereby.

C. C. P., § 445.

§ 36. Who may serve summons, et cetera.

The summons, and in a proper case a copy of the complaint, or a precept in summary proceedings, may be served by a marshal or by any person not a party to the action, who is over the age of eighteen years. Proof of service by such person other than a marshal must be made by his affidavit which must state the particular place, time, and manner of service, and that the affiant knew the person so served to be the person mentioned and described in the summons as defendant therein.

L. 1882, ch. 410, § 1301.

§ 37. Return day.

The return day mentioned in the summons must not be more than twelve days from its date and except in the case where an order of arrest had been issued, must be served at least six days before the time of appearance.

L. 1882, ch. 410, § 1298.

§ 38. Indorsement upon summons.

In an action to recover a penalty or forfeiture given by a statute or ordinance if a copy of the complaint is not delivered to the defendant with a copy of the summons, a general reference to the statute or ordinance must be indorsed upon the copy of the summons so delivered in the following form: "According to the provisions of," et cetera; adding such a description of the statute or ordinance as will identify it with convenient certainty, and also specifying the section if penalties or forfeitures are given, in different sections thereof, for different acts or omissions, and the proof of service of such summons must show that the copy served on the defendant likewise had such indorsement thereon.

C. C. P., § 1897.

§ 39. Indorsement upon summons; where execution against the person may be issued.

In an action where an execution may issue against the person upon a judgment rendered in favor of the plaintiff, unless a verified complaint is served with the summons, a general reference to that fact must be indorsed by the clerk upon the summons and upon the copy to be served on defendant in the following form: "Plaintiff claims defendant is liable to arrest and imprisonment in this case." In the event of there being no such indorsement, no execution against the person shall issue, and the proof of service of such summons must show that the copy served on the defendant likewise had such indorsement upon it.

[New.]

§ 40. Parties; appearance of.

A party to an action in the municipal court of the city of New York, who is of full age, may appear and prosecute or defend the

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same, in person or by an attorney, at his election, unless he has been judicially declared to be incompetent to manage his affairs.

C. C. P., § 2886; see, also, L. 1882, ch. 410, § 1294.

§ 41. Guardian ad litem.

When a guardian is necessary he must be appointed by the court as follows:

1. If the infant be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years or upwards; if under that age, upon the application of some relative or friend. The consent in writing of the guardian to be appointed and to be responsible for costs, if he fail in the action, must be filed with the clerk of the court, in the district in which the action is brought, except in cases where a free summons is provided for by this act.

2. After the service and return of a summons against an infant defendant no other proceedings shall be taken in the action, until a person has been appointed to appear as his guardian for the purpose of the action. Upon the nomination of the defendant, the court must appoint a proper person for that purpose. If the defendant does not appear upon the return of the summons, or if he neglects or refuses to nominate, the court may, on the application of the plaintiff, appoint any proper person as his guardian. The written consent of the person so appointed, must be filed with the clerk of the court before his appointment. The guardian so appointed is not responsible for any costs.

C. C. P., § 2888; L. 1882, ch. 410, § 1295.

§ 42. Parties; who may be joined.

Parties plaintiff or defendant may be joined as follows:

1. All persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly prescribed in this act.

2. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party defendant, for the complete determination or settlement of a question involved therein, except as otherwise expressly prescribed in this act.

3. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without, joining with him the person for whose benefit the action is prosecuted. A person, with whom or in whose name, a contract is made for the benefit of another, or a trustee of an express trust, within the meaning of this section.

4. In an action or special proceeding a married woman appears, prosecutes or defends alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person or estate of his wife, and all sums that may be recovered in such actions, or special proceedings shall be the separate property of the wife. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, or estate, of another on account of the wrongful acts of his wife committed without his instigation.

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5. Two or more persons, severally liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon the instrument, or by a party thereto to recover against other parties liable over to him; may, all or any of them, be included as defendants in the same action, at the option of the plaintiff, and the joinder of a person as defendant in an action, with another person as prescribed in this section, does not affect his right, to any order or other relief, to which he would have been entitled, if he had been separately sued in the action.

C. C. P., §§ 446-457, 5347.

§ 43. Application of this article to defendants jointly liable.

The last section does not affect a defense or other objection of a defendant, growing out of the failure to join in the action two or more persons jointly liable; and as regards the other parties to the action, persons jointly liable are regarded as one party, for every purpose contemplated by that section.

C. C. P., § 457.

§ 44. Where employee is party.

When an action is brought by an employee against an employer for services performed by such employee, male or female, the clerk of the said municipal court in the district in which the action is brought, shall issue, a free summons when the plaintiff's demand is less than fifty dollars and the plaintiff is a resident of the city of New York, and proof by the plaintiff's own affidavit that he has a good and meritorious cause of action and of the nature of such action and of said plaintiff's residence, and whether previous application therefor has been made, shall be duly presented to and filed with the clerk of the municipal court where such action shall be brought and he shall not demand or receive any fee whatsoever from the plaintiff or his agents or attorneys in such action, unless the plaintiff shall demand a trial jury, in which case the plaintiff must pay to the clerk of the municipal court where such action shall be pending the sum of four dollars and fifty cents.

L. 1882, ch. 410, § 1416; L. 1887, ch. 387.

§ 45. Who may petition for leave to prosecute as a poor person.

A person whether an adult or infant, who alleges that he has a cause of action against another person, may apply by petition to the court for leave to prosecute as a poor person, and to have an attorney and counsellor assigned to conduct his action.

C. C. P., § 458.

§ 46. Contents of petition.

The petition must state:

1. The nature of the action brought or intended to be brought
2. That the applicant is not worth one hundred dollars, besides the wearing apparel and furniture necessary for himself and his family, and the subject matter of the action and whether he has made any previous application for leave to sue as a poor person. It must be verified by the applicant's affidavit, unless

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the applicant is an infant under the age of fourteen years, and in that case by the affidavit of his guardian appointed in said action, and supported by a certificate of a counsellor at law to the effect that he has examined the case and is of the opinion that the applicant has a good cause of action. The petition may, however, be verified before the clerk or assistant clerk of said municipal court in the district in which the action is brought, and the certificate of said clerk or assistant clerk, that he has inquired into the facts of the case and that in his opinion the plaintiff has a prima facie cause of action, shall have the same force and effect as the certificate of an attorney.

C. C. P., § 459.

§ 47. Order and petition to be filed; when counsel assigned.

The court to which the petition is presented, if satisfied of the truth of the facts alleged, and that the applicant has a good cause of action, may, by order, which may be endorsed on petition, admit him to prosecute as a poor person, and where there is a certificate of a counsellor at law, as prescribed in the last section, may assign to him an attorney and counsel to prosecute his action, who must act therein without compensation. Such petition and order must be filed with the clerk of the court in the district in which the action is brought.

C. C. P., § 460.

§ 48. When leave may be annulled.

If the person so admitted is guilty of deception in the petition or of improper conduct in the prosecution of the action, or of wilful or unnecessary delay, the court, may in its discretion annul the order, admitting him to prosecute as a poor person; and he shall thereafter be deprived of all the privileges conferred thereby.

C. C. P., § 462.

§ 49. When defendant may defend as a poor person, et cetera.

A defendant in an action in said court may petition the court in which the action is pending for leave to defend the action as a poor person, and to have an attorney and counsellor assigned to conduct his defense; as follows:

1. By an oral application made in open court, by defendant, on the return day, and a statement under oath, of the same matters respecting his ability as are required to be contained in a petition for leave to prosecute as a poor person; or

2. By a petition verified before the clerk or assistant clerk accompanied by his certificate relating to the defense in the same manner as prescribed in section forty-two of this act; or

3. By a verified petition supported by a certificate of a counsellor at law relating to the defense, in the same manner as prescribed in section forty-two of this act.

C. C. P., §§ 463, 464.

§ 50. Defendant's order.

The court to which the application is made or petition is presented as prescribed in the last section, if satisfied of the truth

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of the facts stated as to defendant's ability, and that the applicant has a good defense if proved on the trial, may, by order, admit him to defend as a poor person and may assign counsel to conduct his defense, or may, in case of verified pleadings, direct the clerk or assistant clerk of said court, to prepare and file an answer, verified before him by defendant, or may assign a counsellor at law present in court to prepare and file an answer which may be verified before the clerk or assistant clerk of said court.

[New.]

§ 51. Leave may be annulled as in case of plaintiff.

The provisions relating to an order to be made upon an application for leave to prosecute as a poor person and the proceedings subsequent thereto apply to an order and subsequent proceedings upon an application for leave to defend as a poor person.

C. C. P., § 465.

§ 52. Appeal where plaintiff or defendant poor person.

An order made as prescribed in this article, does not authorize the petitioner to take or maintain an appeal as a poor person; but where an appeal is taken by the adverse party the order is applicable in favor of the petitioner as respondent in the appeal.

C. C. P., § 466.

§ 53. Costs in favor of petitioner.

Where costs are awarded in favor of a person who had been admitted to prosecute or defend as a poor person as prescribed in this article, they must be paid over to his attorney, when collected from the adverse party and distributed among the attorneys and counsel assigned to the poor person, as the court directs.

C. C. P., § 467.

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TITLE III.

Provisional remedies; and actions to foreclose a lien on a chattel.

- Article 1. Order of arrest.
2. Attachment.
3. Replevin.
4. Action to foreclose a lien on a chattel.

ARTICLE FIRST.

Order of arrest.

- Sec. 55. Process to be served by marshal.
56. In what cases order of arrest to be granted.
57. Affidavit and undertaking upon granting.
58. What to direct.
59. Papers to be delivered to arrested person; proceedings thereupon.
60. Proceedings in case justice is a witness.
61. Plaintiff to be notified of arrest.
62. Bail or deposit before return.
63. Bail may be examined.
64. Bail or deposit after return.
65. When and how defendant to remain in custody.
66. Duty of marshal.
67. Undertaking by arrested defendant on applying for adjournment.
68. Motion to discharge from arrest.
69. Privilege from arrest.
70. Sections applicable as to undertakings, et cetera.

§ 55. Process to be served by marshal.

An order of arrest, warrant of attachment or requisition to replevy, issued by or out of the municipal court of the city of New York, shall be served and executed by a marshal of the city of New York.

L. 1882, ch. 410, § 1802.

§ 56. [Am'd, 1903.] In what cases order of arrest to be granted.

An order to arrest the defendant must or may be granted directed to any marshal of said city, in the following cases, but no female can be arrested except for a wilful injury to person or property:

1. In an action for the recovery of damages, in a cause of action not arising on contract, when the defendant is not a resident of the city of New York, or is about to remove therefrom, or when the action is for a wilful injury to person or property.

2. In an action for a fine or penalty, or for money or property embezzled or wrongfully misapplied or converted to his own use by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent or clerk, in the course of his employment as such, or by any other person acting in a fiduciary capacity.

3. Where the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought, except that no order of arrest shall be granted in an action specified in this subdivision where the debt contracted or the obligation incurred over all payments and set-offs or the property taken, obtained or converted, amounts to, or is valued at one hundred dollars, or less.

4. When the defendant has removed, concealed, or disposed of his property, or is about to do so, with the intent to defraud his

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creditors, except that no order shall be granted in such an action unless the plaintiff's claim or demand over all payments and set-offs exceeds one hundred dollars.

L. 1882, ch. 410, § 1304; L. 1903, ch. 156. In effect April 8, 1903.

§ 57. Affidavit and undertaking upon granting.

Before an order of arrest shall issue, the party applying must prove to the satisfaction of the court, by the affidavit of himself or some other person, the facts on which the application is founded, and the amount of his debt or claim over all payments and set-offs. The plaintiff must also execute and deliver to the clerk of the court, in the district in which the action is brought, a written undertaking approved by the court, with such approval endorsed thereon, with sufficient surety or sureties, to the effect that if the defendant recover judgment the plaintiff will pay to him all costs and extra costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest not exceeding the sum specified in the undertaking, which must be double the amount claimed. But the proof and security required by this section shall not be necessary where the order of arrest is issued for the violation of a by-law or ordinance of the city of New York, or for the recovery of a penalty or a forfeiture under the statutes of this state, where the city of New York or any department of the government of said city authorized by statute to maintain an action, or of the people of the state of New York are plaintiffs.

L. 1882, ch. 410, § 1305.

§ 58. What to direct.

An order of arrest, must direct that the summons accompanying it be made returnable immediately upon the arrest of the defendant, and it must specify a sum in which the defendant may be let to bail.

L. 1882, ch. 410, § 1307.

§ 59. Papers to be delivered to arrested person; proceedings thereupon.

The marshal, upon arresting the defendant, by virtue of such an order, must at the same time, serve upon him the summons, and also a copy of the order of arrest, and of the papers upon which it was granted. He must forthwith bring the defendant before the court, in the district in which the action is brought, if the court is then in session; otherwise unless bail is given, as prescribed in section sixty-two of this act, he must take the defendant to the jail of the county in which the district where the action is brought is situate, for the confinement of prisoners in civil causes. The keeper thereof must confine the defendant therein. On the next day thereafter when said court is in session, the marshal must take the defendant from the jail and bring him before the court.

L. 1882, ch. 410, § 1308.

§ 60. Proceedings in case justice is a witness.

If it be made to appear by the affidavit of the defendant to the satisfaction of the justice sitting in the district in which the action is brought, that such justice is a material witness in the action, the marshal must immediately take the defendant before

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the court in an adjoining district named by said justice, which must take cognizance of the action, and proceed therein the same as if the order of arrest had been issued out of the court in the latter district.

L. 1882, ch. 410, § 1309.

§ 61. Plaintiff to be notified of arrest.

The marshal making the arrest must immediately give notice thereof to the plaintiff, and endorse on the order of arrest, and subscribe a certificate stating the time of serving the same, and of giving notice to the plaintiff.

L. 1882, ch. 410, § 1310.

§ 62. Bail or deposit before return.

The defendant may give bail, by delivering to the marshal a written undertaking to the plaintiff, in the sum specified in the order of arrest, executed by one or more sureties, to the effect that the defendant will attend in person at the opening of the court on the next day thereafter when it is there in session, or he may deposit with the marshal the sum specified in the order of arrest. In either case the marshal must forthwith release him from custody.

L. 1882, ch. 410, § 1311.

§ 63. Bail may be examined.

Where bail is given as prescribed in the last section, the officer taking the acknowledgment of the undertaking must, if the marshal so requires, examine under oath, to a reasonable extent, the persons offering to become bail, concerning their property and their circumstances. The defendant may give bail, or make the deposit, immediately upon his arrest, at any hour of the day or night; and he must have reasonable opportunity to seek for and procure bail, before being committed to jail. Where a deposit is made, the money deposited must, before the expiration of the next day, thereafter, not being Sunday or a public holiday, be paid by the marshal into court, by paying the same directly to the clerk in the district in which the action is brought, which said deposit shall be regarded as an undertaking, and shall have the same force and effect and no other.

L. 1882, ch. 410, § 1312.

§ 64. Bail or deposit after return.

At any time after the return of the marshal, and before final judgment, the court may admit a defendant in custody to bail, or allow him to make a deposit; and may direct his release upon his giving bail or making the deposit accordingly. The sum to be deposited or the sum specified in the undertaking of the bail, must be fixed, and the sureties in the undertaking must be approved by the court, which must be satisfied by their examination, or by other proof, respecting their sufficiency. The undertaking must be to the effect that the defendant will at all times, render himself amenable to any mandate which may be issued, to enforce a final judgment against him in the action.

L. 1882, ch. 410, § 1313.

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§ 65. When and how defendant to remain in custody.

Unless bail is given, or a deposit is made, as prescribed in the last three sections, the defendant must remain in the jail by virtue of the order of arrest, until final judgment in the action; and if the judgment is against the defendant, until the return of an execution against property issued thereupon. But the court must direct him to be brought into court, at the time of the trial; and it may in its discretion, direct him to be brought into court at any other time. In either case he must be taken from the jail, and brought into court accordingly. Nothing in this section shall be so construed as to prevent a defendant at any time after judgment from being admitted to the jail liberties in the manner provided by law, whether formal execution against the person has issued or not.

L. 1882, ch. 410, § 1314.

§ 66. Duty of marshal.

The marshal making the arrest, or another marshal, by direction of the court, must keep the defendant in custody, unless he shall give the security for his appearance, or until he is duly discharged by order of the court; but in no case can such detention exceed forty-eight hours, excluding Sundays and legal holidays, from the time of his first being brought before the court, unless within that time the trial of the action be commenced, and formally proceeded with, and resumed without any interruption other than the necessary recess of the court.

L. 1882, ch. 410, §§ 1315, 1363.

§ 67. Undertaking by arrested defendant on applying for adjournment.

If the defendant make application for an adjournment, or demand a jury trial at the time he is brought before the court, before it can be granted, he must, unless he has given bail or made a deposit, execute an undertaking, with one or more sufficient sureties, to be approved by the court, which approval must be indorsed on the undertaking, to the effect that he will appear on the adjourned day, and not depart until duly discharged according to law, or until after the trial and judgment, and that he will surrender himself into custody if any execution be issued upon the judgment when obtained against him in the action.

L. 1882, ch. 410, §§ 1315, 1363.

§ 68. Motion to discharge from arrest.

A defendant, arrested as prescribed in this article, may, without notice, upon the appearance of the plaintiff before the court, or at any time afterwards before judgment, upon two days' notice given personally to the plaintiff, or to his agent or attorney who appeared for him before the court, apply to the court for an order, discharging him from arrest. The application may be founded upon the papers upon which the order of arrest was granted, and upon the complaint, if it has been made. The court must grant the application, where it appears that the case is not within the provisions of section fifty-six of this act. The court must also, upon the defendant's application, grant an order discharging him from arrest, if the plaintiff fails to take out an execution, upon

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a judgment in his favor, before the expiration of twenty-four hours after he is entitled thereto.

C. C. P., § 2201.

§ 69. Privilege from arrest.

This article does not abridge or otherwise affect a privilege from arrest given by law, or a right of action for the breach thereof. A privileged person is entitled to be discharged from arrest, by the order of the court before which he is brought, upon proof, by affidavit, of the facts entitling him to a discharge; or he may apply for and obtain an order for his discharge, as prescribed in section five hundred and sixty-four of the code of civil procedure.

C. C. P., § 2204.

§ 70. Sections applicable as to undertakings, et cetera.

Sections one hundred and six to one hundred and ten of this revision inclusive and sections one hundred and twenty-seven and one hundred and twenty-eight, in so far as they relate to undertakings, sureties and justification, apply to proceedings under this title, and the exceptions to, and examination of, sureties, whether on undertaking, or bail, may be made and conducted, by the adverse party, as prescribed therein.

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ARTICLE SECOND.

Attachment.

- Sec. 73.** When may be granted.
74. What must be shown to procure warrant.
75. Contents of warrant.
76. Undertaking.
77. How warrant to be executed.
78. Attachment, how levied.
79. Certificate of defendant's interest to be furnished.
80. Person refusing certificate may be examined.
81. Marshal may maintain action.
82. When attachment discharged, et cetera. Property to be restored to defendant.
83. Service of summons and warrant of defendant.
84. Undertaking of defendant.
85. Claim by third person; bond and delivery thereupon.
86. Judgment upon bond.
87. Action upon undertaking where warrant is vacated.
88. Return by marshal attaching.
89. Application to vacate or modify warrant of attachment.
90. Effect of vacating warrant.
91. Judgment where property has been attached.
92. Sections applicable as to undertaking, et cetera.

§ 73. Attachment, when may be granted.

A warrant of attachment against the property of one or more defendants must be granted, upon the application of the plaintiff, as hereinafter prescribed, in an action upon one or more of the following causes of action:

1. Upon a judgment.
2. Breach of a contract, express or implied.
3. Wrongful conversion of personal property.
4. Any other injury to personal property, in consequence of negligence, fraud or misconduct.

L. 1882, ch. 410, § 1316.

§ 74. What must be shown to procure warrant.

To entitle the plaintiff to such a warrant, he must show, by affidavit, to the satisfaction of the court, as follows:

1. That a sufficient cause of action exists against the defendant to recover damages for one or more causes specified in the last section. If the action is upon a judgment, or to recover for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

2. That the defendant is either a foreign corporation, or not a resident of the state; or, if the defendant is a natural person, and a resident of the state, that he has departed, or is about to depart from the county where he last resided, to a place outside the city of New York, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed, with the like intent; or if the defendant is a natural person, or a domestic corporation, that he or it has removed, or is about to remove property from the county where the defendant, being a natural person, last resided, or being a corporation, has kept its principal office, to a place outside of the city of New York, with intent to defraud his or its creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete

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property, with the like intent; or where for the purpose of procuring credit or the extension of credit, the defendant has made a false statement in writing, under his own hand and signature, or under the hand and signature of a duly authorized agent, made with his knowledge and acquiescence, as to his financial responsibility or standing. Or that the defendant being a natural person of full age, and a resident of the state, has been continuously without the United States for the space of six months or more, immediately before the application and either that he has not made a designation of a person upon whom to serve a summons in his behalf as prescribed in section four hundred and thirty of the code of civil procedure, or that service upon the person so designated cannot be made, with due diligence, in the county where the person making the designation resides. The affidavit must be filed in the office of the clerk of the court, in the district in which the action is brought when the warrant is issued.

L. 1882, ch. 410, § 1317.

§ 75. Contents of warrant.

The warrant must be granted by the court at the time when the summons is issued, and must be issued by the clerk of the court in the district in which the action is brought, and it must be indorsed upon or annexed to the summons. It must be subscribed by the clerk, and must briefly recite the ground of the attachment. It must require the marshal, to whom the summons is delivered, to attach on or before a day specified therein, which must be at least six days before the return of the summons, and safely to keep, as much of the defendant's personal property, within the city of New York, as will satisfy the plaintiff's demand, with the costs and expenses and to make return of his proceedings thereon to the court, at the time when the summons is returnable. The amount of the plaintiff's demand must be specified in the warrant as stated in the affidavit. Nothing in this section shall be construed to prevent a valid warrant of attachment issuing in a proper case against a non-resident of the city of New York.

L. 1882, ch. 410, § 1318.

§ 76. Undertaking.

Before granting the warrant, the court must require a written undertaking to the defendant, on the part of the plaintiff, with one or more sureties, approved by the court, to the effect that, if the defendant recovers judgment, or the warrant of attachment is vacated, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least twice the amount of the plaintiff's demand, as stated in the warrant, and in no case less than two hundred dollars, and that if the plaintiff recovers judgment, he will pay to the defendant all money received by him from property taken by virtue of the warrant of attachment, or upon any bond given therefor, over and above the amount of the judgment and interest thereupon.

L. 1882, ch. 410, § 1319.

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§ 77. How warrant to be executed.

The marshal to whom the warrant of attachment is delivered must execute it at least six days before the return day of the summons, by levying upon so much of the property of the defendant hereinafter mentioned, as will satisfy the plaintiff's demand with costs and expenses and must safely keep the same to be disposed of as prescribed in this title and must immediately make an inventory thereof stating therein the estimated value of each article or item. Such levy can be made on the following property:

1. Goods and chattels of the defendant found in the city of New York not exempt from levy and sale by virtue of an execution including money and bank notes.

2. The rights or shares which the defendant has in the stock of an association or corporation having a place of business in the city of New York, together with the interest and profits thereon, and the marshal's certificate of the sale thereof entitles the purchaser to the same rights and privileges, with respect thereto, which the defendant had, when they were so attached.

3. Causes of action arising upon contract, including bonds, promissory notes, or other instruments for the payment of money in whole or in part, negotiable or otherwise, whether past due, or yet to become due, executed by a corporation, or by a private person, either within or without the state, which belong to the defendant, and are found within the city, and the levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the debt represented thereby.

L. 1882, ch. 410, § 1320; C. C. P., §§ 147, 148.

§ 78. Attachment, how levied.

A levy under a warrant of attachment upon personal property capable of manual delivery, including a bond, a promissory note, or other instrument for the payment of money, must be made by taking the same into the marshal's actual custody. He must hereupon, without delay, deliver to the person from whose possession the property is taken, if any, a copy of the warrant, and of the affidavits upon which it was granted. Upon other personal property, it must be made by leaving a certified copy of the warrant and a notice showing the property attached, with the person holding the same; or if it consists of a demand, other than as specified in this section with the person against whom it exists; or, if it consists of rights or shares in the stock of an association or corporation, or interests or profits thereon, with the president, or other head of the association or corporation, or the secretary, cashier, or managing agent thereof.

C. C. P., § 649.

§ 79. Certificate of defendant's interest to be furnished.

Upon the application of a marshal, holding a warrant of attachment, the president or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the marshal a certificate, under his hand, specifying the rights or number of shares of the defendant, in the stock of the association or corporation, with all dividends declared, or encumbrances thereon, or

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the amount, nature and description of the property, held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires.

C. C. P., § 650.

§ 80. Person refusing certificate may be examined.

If a person, to whom application is made, and prescribed in the last section, refuses to give such a certificate; or if it is made to appear by affidavit, to the satisfaction of the court, that there is reason to suspect that a certificate given by him is untrue, or that it fails fully to set forth the facts, required to be shown thereby, the court may make an order, directing him to attend at a specified time, at the court in the district in which the action is brought, and submit to an examination, under oath, concerning the same.

C. C. P., § 651.

§ 81. Marshal may maintain action.

The marshal must, subject to the direction of the court, collect and receive all debts, effects, and things in action attached to him. He may maintain any action or special proceeding in his own name or in the name of the defendant, which is necessary for that purpose, or to reduce to his actual possession an article of personal property, capable of manual delivery, but of which he has been unable to obtain possession, and he may discontinue such an action or special proceeding, at such time and on such terms, as the court directs.

C. C. P., § 655, subd. 1.

§ 82. When attachment discharged, et cetera, property to be restored to defendant.

Where a warrant of attachment or a writ of replevin is vacated or annulled, or an attachment is discharged, upon the application of the defendant, the marshal must, except in a case where it is otherwise expressly prescribed by law, upon an order made by the court to that effect, deliver over to the defendant, or to the person entitled thereto, upon reasonable demand, and upon payment of all costs, charges and expenses, legally chargeable by the marshal, all the attached personal property remaining in his hands, or that portion thereof, as to which the attachment is discharged; or the proceeds thereof, if it has been sold by him.

C. C. P., § 709.

§ 83. Service of summons and warrant on defendant.

The marshal must, immediately after making inventory, and at least six days before the return day of the summons, serve the summons, together with the warrant of attachment and inventory, upon the defendant, by delivering to him personally a copy of each, if he can, with reasonable diligence, be found within the city, or if he cannot be so found, by leaving a copy of each, certified by the marshal at the last place of residence of the defendant in the city, with a person of suitable age and discretion. If such person cannot be found there, by posting them on the outer door, and also depositing another copy of each in the post-office, inclosed in a sealed post-paid wrapper, directed to the

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defendant at his residence; or if the defendant has no place of residence in the city, by delivering them to the person in whose possession the property attached is found.

L. 1882, ch. 410, § 1321.

§ 84. Undertaking by defendant.

The defendant, or his attorney, or agent in his behalf, may, at any time before judgment is rendered in the action, execute and deliver to the marshal an undertaking to the plaintiff in a sum specified therein, at least twice the value of the property attached, as stated in the inventory, with one or more sureties, approved by the marshal or by a justice of the court, and to the effect, that if the judgment is rendered against the defendant and an execution is issued thereupon, within six months after the giving of the undertaking, the property attached shall be produced to satisfy the execution. Thereupon the marshal must deliver the property to the defendant.

L. 1882, ch. 410, § 1322.

§ 85. Claim by third person; bond and delivery thereupon.

If a person, not a party to the action, claims any property attached, which is not reclaimed by the defendant, as prescribed in the last section, he may, at any time after the seizure and before execution is issued upon a judgment rendered in the action, execute and file with the clerk a bond to the plaintiff, with one or more sureties approved by the marshal or by a justice, in a penalty at least twice the value of the property claimed, and conditioned that, in an action upon the bond to be commenced within three months thereafter, the claimant will establish that he was the general owner of the property claimed at the time of the seizure; or if he fails so to do, that he will pay to the plaintiff the value thereof, with interest. The marshal must thereupon deliver the property claimed to the claimant.

L. 1882, ch. 410, § 1323.

§ 86. Judgment upon bond.

A judgment for the plaintiff, in an action upon a bond, given as prescribed in the last section, must award to him the value of the property seized and delivered to the claimant, with interest thereupon from the time of the delivery. If the amount so recovered exceeds the amount which the plaintiff recovers in the action in which the warrant of attachment was issued, he is liable to the defendant in that action for the excess.

L. 1882, ch. 410, § 1324.

§ 87. Action upon undertaking where warrant is vacated.

If the warrant of attachment is vacated or annulled, the defendant may maintain an action, upon the bond and undertaking specified in the last two sections, in his own name, in the same manner and with the like effect as the plaintiff might have done if the warrant had remained in full force.

L. 1882, ch. 410, § 1325.

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§ 88. Return by marshal attaching.

The marshal executing the warrant of attachment must, at the time when and the place where it is returnable, make a return thereto, under his hand, stating all his proceedings thereupon. He must deliver to the clerk, with the return, each bond or undertaking delivered to him, pursuant to any of the foregoing provisions of this article, and a copy certified by him, of the inventory of the property attached. The return must state the manner in which the warrant and inventory were served, and if they were served otherwise than by delivering a copy thereof to the defendant personally, the reason therefor, and the name of the person to whom the copy was delivered, unless his name is unknown to the marshal; in which case the return must describe him so as to identify him, as nearly as may be.

L. 1882, ch. 410, § 1326.

§ 89. Application to vacate or modify warrant of attachment.

A defendant, whose property has been attached, may, upon the return of the summons, or before such return on written notice of at least twenty-four hours to the plaintiff or his attorney, apply to the court out of which the warrant of attachment issued to vacate or modify it, or to increase the plaintiff's security. Such an application may be founded upon the papers upon which the warrant was granted; or upon proof, by affidavit, on the part of the defendant, or upon both. If it is founded upon proof on the part of the defendant, it may be opposed by new proof, by affidavit, upon the part of the plaintiff, tending to sustain any ground for the attachment, recited in the warrant, but no other. The court may, upon the return of the summons, or at any other time to which the action is adjourned, vacate the warrant of attachment upon his own motion, if he deems the papers upon which it was granted insufficient to authorize it.

L. 1882, ch. 410, § 1327.

§ 90. Effect of vacating warrant.

Vacating the warrant of attachment does not affect the jurisdiction of the court to hear and determine the action, where the defendant has appeared generally in the action; or where the summons was served personally upon him, or where judgment may be taken against him, as being indebted jointly with another defendant, who has been thus summoned or has thus appeared. In every other case the justice who vacates a warrant of attachment against the property of a defendant must dismiss the action as to him.

L. 1882, ch. 410, § 1328.

§ 91. Judgment where property has been attached.

Where the defendant has not appeared, and the summons has not been personally served upon him, and property of the defendant has been duly attached by virtue of a warrant which has not been vacated, the court must proceed to hear and determine the action; but in an action subsequently brought, the judgment is only presumptive evidence of the indebtedness, and the defendant is not barred from any counterclaim against the plaintiff.

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The execution, issued upon a judgment so rendered, must require the marshal to satisfy it out of the property so attached, without containing a direction to satisfy it out of any other property.

L. 1882, ch. 410, § 1329.

§ 92. Sections applicable as to undertaking, et cetera.

Sections one hundred and six to one hundred and ten of this revision, inclusive, and sections one hundred and twenty-seven and one hundred and twenty-eight, in so far as they relate to undertaking, sureties and justification, apply to proceedings under this title, and the exceptions to, and examination of, sureties, whether on undertaking, or bail, may be made and conducted by the adverse party, as prescribed therein.

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§95. Action to recover a chattel.

An action to recover a chattel, with or without damages, for the wrongful taking, withholding, or detention thereof, may be brought in the municipal court of the city of New York, except:

1. Where the chattel was taken by virtue of a warrant, against the plaintiff, for the collection of a tax, assessment or fine, issued in pursuance of a statute of the state, or of the United States: unless the taking was, or the detention is, unlawful, as specified in section ninety-seven of this act.

2. Where it was seized by virtue of an execution, or a warrant of attachment, against the property of the plaintiff, unless it was legally exempt from such seizure, or is unlawfully detained, as specified in section ninety-seven of this act.

3. Where it was seized by virtue of an execution, or a warrant of attachment, against the property of a person other than the plaintiff, and at the time of the commencement of the action the plaintiff had not the right to reduce it into his possession.

4. Where a chattel is replevied in an action to recover the same, and a final judgment awarding the possession thereof to the defendant is rendered, a subsequent action to recover the same chattel cannot be maintained by the plaintiff, for the same cause of action. But the judgment does not affect his right to

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maintain an action to recover damages, for taking or detaining the same or any other chattel, unless it was rendered against him upon the merits.

5. If plaintiff's title be by transfer, made since wrongful taking, or during wrongful detention, no action can be maintained unless the person from or through whom the plaintiff derived title might have maintained the same, had the transfer not been made.

C. C. P., §§ 1210, 1600-1602; L. 1882, ch. 410, § 1331.

§ 96. Affidavit and undertaking by plaintiff.

The plaintiff may, at the time the summons is issued, but not afterwards, require the chattel to be replevied as prescribed in this act. For that purpose he must deliver to the court, an affidavit and a written undertaking as herein prescribed, which must be filed with the clerk of the court in the district in which the action is brought.

L. 1882, ch. 410, § 1332.

§ 97. Affidavit therefor, before commencement of action.

The affidavit prescribed in the last section, must particularly describe the chattel to be replevied and must contain the following allegations:

1. That the plaintiff is the owner of the chattel, or is entitled to the possession thereof, by virtue of a special property therein; the facts with respect to which must be set forth.

2. That it is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof, according to the best knowledge, information, and belief of the person making the affidavit.

4. That it has not been taken by virtue of a warrant, against the plaintiff, for the collection of a tax, assessment or fine, issued in pursuance of a statute of the state, or of the United States; or, if it has been taken under color of such a warrant, either that the taking was unlawful, by reason of defects, in the process, or other causes specified, or that the detention is unlawful by reason of facts specified which have subsequently occurred.

5. That it has not been seized by virtue of an execution or warrant of attachment, against the property of the plaintiff, or of any person from or through whom the plaintiff has derived title to the chattel, since the seizure thereof; or, if it has been so seized, that it was exempt from the seizure, by reason of facts specified, or that its detention is unlawful, by reason of facts specified which have subsequently occurred.

6. Its actual value.

C. C. P., § 1695; L. 1882, ch. 410, § 1332.

§ 98. Where several chattels are to be replevied.

Where the affidavit describes two or more chattels of the same kind, it must state the number thereof, and where it describes a chattel in bulk, it must state the weight, measurement, or other quantity. Where it describes two or more chattels, to be replevied, it may, at the election of the plaintiff, state the aggregate value of all, or separately the value of any chattel or of any class of chattels, and the aggregate value of the remainder, if any. Where it states separately the value of one or more chattels or

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classes of chattels, the defendant may require, as prescribed in the following provisions of this article, the return of any or all of the chattels or classes of chattels, the value of which is thus stated, or of the portion thereof which has been replevied. If he procures such a return, the remainder must be delivered to the plaintiff, except as is otherwise prescribed in this article.

C. C. P., § 1697; L. 1882, ch. 410, § 1332.

§ 99. Plaintiff's undertaking for replevin.

The undertaking must be executed by at least two sureties or by a fidelity or surety company, expressly authorized by law to execute an undertaking, which must be approved by the court. It must be to the effect that the sureties are bound in a specified sum not less than twice the value of the chattel, as stated in the affidavit, for the prosecution of the action, for the return of the chattel to the defendant, if possession thereof is adjudged to him, or if the action abates, or is discontinued, before the chattel is returned to the defendant; and for the payment to the defendant of any sum, which the judgment awards to him against the plaintiff.

L. 1882, ch. 410, § 1696.

§ 100. When agent, et cetera, may make affidavit for replevin or return.

The affidavit to be delivered to the court, in behalf of the plaintiff, with a requisition to replevy a chattel, may be made by the plaintiff's agent or attorney, if the material facts are within his personal knowledge; or if the plaintiff is not within the city of New York where the attorney resides or has his office, or is not capable of making the affidavit. The affidavit to be delivered to the court, either in behalf of the defendant, with a notice that he requires the return of the chattel, or in behalf of a person not a party, who makes a claim as prescribed in section one hundred and thirteen of this act, may be made by an agent or attorney, if the material facts are within his personal knowledge, or if the defendant or claimant as the case may be, is not within the city of New York, and capable of making the affidavit. When the affidavit is made by an attorney or agent, he must state therein what allegations, if any, are made upon his information and belief; and he must set forth therein the grounds of his belief, as to all matters not stated upon his knowledge, and the reasons why the affidavit is not made by the party or the claimant.

C. C. P., § 1712.

§ 101. Requisition of justice.

Upon receiving the affidavit and undertaking, the justice must indorse upon or attach to the affidavit a written requisition, subscribed by him, requiring the marshal to whom the summons is delivered to replevy the property described in the affidavit, on or before a day specified in the requisition, which must be at least six days before the return day of the summons. The affidavit, undertaking and requisition must be delivered to the marshal with the summons.

L. 1882, ch. 410, § 1333.

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§ 102. How executed.

If any chattel described in the affidavit is found in the possession of the defendant, or of his agent, the marshal to whom the summons, affidavit and requisition, together with a copy of the undertaking are delivered, after the undertaking and requisition have been approved by the court, as prescribed in the foregoing sections of this chapter, must forthwith replevy it by taking it into his possession. He must thereupon without delay serve upon the defendant a copy of the summons, affidavit, requisition and undertaking by delivering the same to him personally, if he can be found within the city of New York, or if he cannot be so found, to his agent, if any, from whose possession the chattel is taken; or if neither can be found within the city of New York, by leaving a copy at the usual place of abode of either, with a person of suitable age and discretion.

C. C. P., § 1701.

§ 103. How executed if property concealed, et cetera.

If any chattel, described in the affidavit, is secured or concealed in a building or inclosure, the marshal must publicly demand its delivery. If it is not delivered, pursuant to the demand, he must cause the building or inclosure to be broken open, and must take the chattel into his possession.

C. C. P., § 1701.

§ 104. Marshal to keep in possession; when and how to deliver.

A marshal who has replevied a chattel, must retain it in his possession, keeping it in a secure place, until the person who is entitled to the possession thereof, is ascertained, as prescribed in this title. He must then deliver it to that person upon request and payment of his lawful fees, and necessary expenses for taking and keeping it, as taxed by the court, out of which the proceedings issued.

C. C. P., § 1702.

§ 105. Return to requisition.

The marshal must, on or before the return day of the summons, make a return to the requisition, under his hand, stating all his proceedings thereupon; and file it, with the affidavit, undertaking, and requisition, with the clerk in the district in which the action is brought. The return must state the manner in which the summons, affidavit, requisition and undertaking were served; and, if they were served otherwise than by delivering the requisite copies to the defendant personally, the reason therefor and the name of the person to whom the copies were delivered, unless his name is unknown to the marshal, in which case the return must describe him so as to identify him, as nearly as may be.

L. 1882, ch. 410, § 1335.

§ 106. Defendant when to except to sureties; proceedings thereupon.

At any time after the chattel has been replevied, and at least two days before the return day of the summons, the defendant, unless he requires a return of the chattel, may serve upon the

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plaintiff, or upon the marshal, a written notice that he excepts to the plaintiff's sureties, otherwise he is deemed to have waived all objections to them. If such a notice is served, the sureties must justify upon the return of the summons, or the plaintiff must then give new undertaking to the same effect as the original undertaking, with other sureties, who must then appear and justify before the court.

L. 1882, ch. 410, § 1336.

§ 107. Defendant may reclaim chattel; proceedings thereupon.

At any time before the return of the summons, the defendant may, if he does not except to the plaintiff's sureties, serve upon the clerk a notice that he requires the return of the chattel replevied. With the notice he must deliver to the clerk the following papers:

1. An affidavit, containing an allegation, either that the defendant is the owner of the chattel, or that he is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts with respect to which must be set forth.

2. An undertaking, executed by at least two sureties, or a fidelity or surety company, specifically authorized by law to act instead of sureties, to the effect that they are bound, in a specified sum, not less than twice the value of the chattel, as stated in the affidavit of the plaintiff, for delivery thereof to the plaintiff, if delivery thereof is adjudged, and for the payment to him of any sum, which the judgment awards against the defendant. The sureties in the undertaking, must justify before the court upon the return of the summons.

If the plaintiff has stated separately in his affidavit the value of one or more chattels, or classes of chattels, as prescribed in section ninety-eight of this act, the defendant may require a delivery of part of the property replevied, as prescribed in that section.

C. C. P., §§ 1704, 2025; L. 1882, ch. 410, § 1337.

§ 108. Qualifications of sureties.

The qualifications of sureties, as required by this act, are as follows:

1. Each of them must be a resident of, and a householder or freeholder within the city of New York.

2. Each of them must be worth twice the sum specified for which they become obligated in the undertaking or order of arrest, exclusive of property exempt from execution.

3. A fidelity or surety company specifically authorized by law to act as surety.

C. C. P., §§ 579, 2926; L. 1882, ch. 410, § 1338.

§ 109. Justification.

For the purpose of justification, each of the sureties or bail must attend before the court, at the time and place mentioned in the notice, provided in section one hundred and six of this act, and be examined on oath, touching his sufficiency, in such manner as the court, in its discretion, thinks proper. The court may, in its discretion, adjourn the examination, from day to day, until it

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s completed, but such an adjournment must always be to the next judicial day, unless by consent of parties. If required by the attorney for the adverse party, the examination must be reduced to writing, and subscribed by the bail or surety.

C. C. P., §§ 580, 2926; L. 1882, ch. 410, § 1338.

§ 110. Allowance of undertaking.

If the court finds the surety or bail sufficient, it must annex the examination to the undertaking, indorse its allowance thereon, and cause them to be filed with the clerk.

C. C. P., §§ 581, 2926; L. 1882, ch. 410, § 1338.

§ 111. When and to whom marshal to deliver chattel.

If the defendant neither excepts to the plaintiff's sureties, nor requires the return of the chattel, within the time prescribed for that purpose, or if he fails to procure the allowance of his undertaking, or if the plaintiff, after the defendant has excepted to his sureties, duly procures the allowance of his undertaking, the marshal must, except in the case specified in section one hundred and thirteen of this act, immediately deliver the chattel to the plaintiff. If the plaintiff, after the defendant has excepted to his sureties, fails to procure the allowance of his undertaking, or if the defendant after he has required the return of the chattel, procures the allowance of his undertaking, the marshal must immediately deliver the chattel to the defendant.

L. 1882, ch. 410, § 1339.

§ 112. Penalty for wrong delivery by marshal.

The marshal who delivers to either party, without the consent of the other, a chattel replevied by him, except as prescribed in the last section, or by virtue of an execution issued upon a judgment in the action, forfeits to the party aggrieved the sum of one hundred dollars, and is also liable to him for all damages which he sustains thereby.

L. 1882, ch. 410, § 1340.

§ 113. Claim of title by third person; proceeding thereupon.

At any time before the chattel which has been replevied is actually delivered to either party, if a person not a party to the action, claims as against the defendant a right to the possession thereof, existing at the time when it was replevied, an affidavit may be made and delivered to the marshal who executed the requisition, in his behalf, stating that he makes such claim, specifying the chattel or chattels, to which it relates, if two or more chattels have been replevied, and the claim relates only to part of them, and setting forth the facts upon which his right of possession depends. In that case, the marshal may, in his discretion, before he delivers the chattel to the plaintiff, serve upon the plaintiff's attorney, a copy of the affidavit with a notice that he requires indemnity against the claim. If the indemnity is not furnished within a reasonable time, after the plaintiff becomes entitled to the delivery of the chattel, the marshal may,

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in his discretion, deliver it to the claimant without incurring any liability to the plaintiff, by reason of so doing.

C. C. P., § 1709; L. 1882, ch. 410, § 1341.

§ 114. Action against a marshal on claim.

A person, not a party to the action, who has served an affidavit as prescribed in the last section, may maintain an action, against the marshal who has delivered the chattel to the plaintiff, to recover his damages, by reason of the taking, detention, or delivery of the chattel. But the summons in such an action must be issued within three months after the delivery of the chattel to the plaintiff, and must be served within three months after it is issued. An action cannot be maintained against a marshal by a person so entitled to make a claim, except as prescribed in this section.

C. C. P., § 1710; L. 1882, ch. 410, § 1341.

§ 115. Indemnity to marshal against such action.

The indemnity to be furnished to the marshal by the plaintiff as prescribed in the last section but one, must consist of a written undertaking to him, in an amount at least double the actual value of the property claimed, executed by at least two sureties, or in a proper case by a fidelity or surety company, that they or it will indemnify him against any liability, for damages, cost, or expenses, to be incurred in an action, brought against him, by reason of the taking or detention of the chattel, or its delivery to the plaintiff. Each of the sureties besides possessing the other qualifications required by law, must be a freeholder or householder in the city of New York. The marshal before delivering the chattel, may require the persons offered as sureties, to submit to an examination, before the court, out of which the proceedings issued. The sureties are entitled to be substituted as defendants, in an action, brought as prescribed in the last section, as if the chattel had been levied upon, by virtue of an execution.

C. C. P., § 1711; L. 1882, ch. 410, § 1341.

§ 115a. Third party may interplead and defend.

At any time before a chattel or chattels which have been replevied are actually delivered to either party, and at least two days before the return day of the summons, a person, not a party to the action, who claims a right to the possession of the chattel or chattels so replevied, or any part thereof, which right is claimed to have existed at the time when the said chattel or chattels were replevied, and which he desires to assert, may make an affidavit and deliver the same to the court, stating that he makes such claim, and does so without collusion with the defendant. The party shall also specify in such affidavit, the chattel or chattels to which he makes claim, setting forth the facts upon which his right depends, and praying to be impleaded as a defendant in the action. The court may thereupon grant leave to said party to appear and defend and the provisions of this act in relation to the defendant or defendants originally proceeded against, so far as applicable, shall apply to the said party, and the court may, in its discretion, make such order, or direct such delivery of the possession of the property, as may be just, and thereupon the entire controversy may be determined in the action. Nothing in this section, however, shall be construed to

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affect the rights of the parties to maintain a separate action, or to recover damages for the wrongful taking or detention of a chattel, unless judgment is awarded against him, as herein provided, on the merits. In that case the court may grant leave to said party to appear and defend, and the provisions of this act in relation to the defendant or defendants originally proceeded against, then apply to said party.

[New.] L. 1903, ch. 431. In effect May 7, 1903.

§ 116. Answer of title in third person.

The defendant may, by answer, defend, on the ground that a third person was entitled to the chattel, without connecting himself with the latter's title.

C. C. P., § 1723.

§ 117. Defendant may demand judgment for return of chattel.

Where a chattel has been replevied, and the defendant has not required the return thereof, pending the action, as prescribed in the foregoing sections, he may, in his answer, demand judgment for the return thereof, either with or without damages for the taking, withholding, or detention.

L. 1882, ch. 410, § 1342.

§ 118. For delivery of property; how money recovered by same judgment may be collected.

An execution for the delivery of a chattel, must particularly describe the property and designate the party to whom the judgment awards possession thereof. It must require the marshal to deliver the possession of the property within the city of New York, to the party entitled thereto. If a sum of money is awarded by the same judgment, it may be collected by virtue of the same execution; or a separate execution may be issued for the collection thereof, omitting the direction to deliver possession of the property. If one execution is issued for both purposes, it must contain with respect to the money to be collected, the same directions as an execution against property, or against the person as the case requires.

C. C. P., § 1373; L. 1882, ch. 410, § 1343.

§ 119. Damages when chattel injured, et cetera, by defendant.

Where the plaintiff recovers a chattel which was injured, or otherwise depreciated in value, while it was in the possession or under the control of the defendant, under such circumstances, that the plaintiff might recover damages for the injury or depreciation, in an action brought against the defendant therefor, he may recover the same damages, in an action brought as prescribed in this article. In that case he must set forth the facts in his complaint, and demand judgment for damages accordingly.

C. C. P., § 1722; L. 1882, ch. 410, § 1343.

§ 120. Judgment or verdict; what to state.

The judgment, verdict or decision, must fix the damages, if any, of the prevailing party.

1. Where it awards to the plaintiff a chattel, which has not been replevied, or where it awards to the prevailing party a chattel, which has been replevied, and afterwards delivered by the marshal to the unsuccessful party, or to a person not a party, it must also fix the value of the chattel, at the time of the trial.

2. In a case where the unsuccessful party had a special property therein, not equal to the full valuation of the chattel to fix the value of the special property.

C. C. P., §§ 1726, 1727; L. 1882, ch. 410, § 1343.

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§ 121. Judgment or verdict, et cetera, for part of several chattels.

Where the action is brought to recover two or more chattels, the judgment, verdict or decision, may award to one party, or more distinct chattels, which can be identified, and set apart from the others, and the residue to the other party, and, if necessary, the complaint must be amended so as to conform thereto. The final judgment rendered thereupon, must award to each party the same relief, with respect to the finding in his favor, as if separate judgments were rendered, except that, where each party is entitled to an absolute award of a sum of money, against the other, the smaller sum must be deducted from the greater, and the balance only must be awarded.

C. C. P., § 1728.

§ 122. Damages; how ascertained on default.

Where the plaintiff is entitled to judgment by default, for want of an appearance or pleading, the court to which he applies for judgment may ascertain and determine the damages to which he is entitled and the value of the chattel, if necessary.

C. C. P., § 1729.

§ 123. Final judgment, et cetera.

Final judgment for the plaintiff must award to him possession of the chattel recovered by him, with his damages if any. If the chattel recovered was not replevied, or if after it was replevied it was delivered to the defendant, or to a person not a party, as prescribed in this act, the final judgment must also award to the plaintiff the sum fixed as the value thereof, to be paid by the defendant, if possession thereof is not delivered to the plaintiff. If the defendant has demanded judgment for the return of the chattel, which was replevied, and afterwards delivered to the plaintiff or to a person not a party, as prescribed in this act, final judgment in his favor therefor must award to him possession thereof, with his damages, if any, and it must also award to him the sum fixed as the value thereof; to be paid by the plaintiff, if possession is not delivered to the defendant. But if the case is one of those specified in subdivision two of section one hundred and twenty of this act, final judgment in favor of the defendant must award to him the sum fixed as therein specified and if it is not collected, the delivery of the chattel, or, if the chattel has not been replevied, or has been returned to him after replevin, that he is entitled to the possession thereof, until the sum so awarded is collected, or otherwise paid.

C. C. P., § 1730; L. 1882, ch. 410, § 1343.

§ 124. Execution; contents thereof.

An execution for the delivery of the possession of a chattel and to satisfy out of the property of the judgment debtor a sum of money contingently awarded against him, must contain, in addition to the other matters prescribed by law, the following direction:

1. Where the judgment awards a sum of money, if possession of the chattel is not delivered to the prevailing party, the execution must require the marshal if the chattel cannot be found within the city of New York, to satisfy the sum so awarded with interest and his fees, out of the property of the party against whom the judgment is rendered.

A direction to satisfy a sum of money out of property, as prescribed in this section, must be in the form required by law for a like direction, where an execution against property is issued upon a judgment for a sum of money.

C. C. P., § 1731; L. 1882, ch. 410, § 1343.

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§ 125. Marshal's power to take chattel.

For the purpose of taking possession of a chattel, by virtue of such an execution, the powers of the marshal are the same as where he is required to replevy a chattel.

C. C. P., § 1732; L. 1882, ch. 410, § 1343.

§ 126. Action on undertaking; when maintainable.

A plaintiff who has recovered a final judgment cannot maintain an action against the sureties in an undertaking given in behalf of the defendant to procure a return of the chattel or against the bail of a defendant who has been arrested, until after the return, wholly or partly unsatisfied or unexecuted, of an execution in his favor, for the delivery of the possession of the chattel, or to satisfy a sum of money out of the property of the defendant, or for both purposes, as the case requires. A defendant who has recovered a final judgment cannot maintain an action against the sureties in the plaintiff's undertaking, given to procure a replevin until after a like return of similar execution against the plaintiff.

C. C. P., § 1733; L. 1882, ch. 410, § 1343.

§ 127. Marshal's return; evidence therein.

In such an action against the sureties, the marshal's return to the execution is presumptive evidence of a failure to deliver or to return a chattel, or to pay a sum of money, according to the terms of the undertaking.

C. C. P., § 1734; L. 1882, ch. 410, § 1343.

§ 128. Injury, et cetera, no defence.

It is not a defence to such an action, that the chattel was injured or destroyed, after it was replevied, unless the injury or destruction was affected by the act, or with the consent of the plaintiff, in the action, or occurred after the chattel was taken by virtue of the execution.

C. C. P., § 1735; L. 1882, ch. 410, § 1343.

§ 129. Proceeding where summons not personally served.

Where the defendant does not appear, and the summons has not been personally served upon him, and a chattel, or a part of a chattel, to recover which the action is brought, has been replevied, and the proceedings thereupon have been duly taken, as prescribed in this act, the court must proceed to hear and determine the action with respect to that chattel, or part of a chattel, or, if the action is brought to recover two or more chattels, with respect to those which have been replevied, in like manner and with the like effect as if the summons had been personally served.

L. 1882, ch. 410, § 1344.

§ 130. When action not affected by failure to replevy.

Where the summons has been personally served upon the defendant, or where he appears, the court must proceed to hear and determine the action, although the plaintiff has not required the chattel to be replevied, or the marshal has not been able to replevy it.

L. 1882, ch. 410, § 1345.

§ 131. Joinder of action with others.

Nothing in this title is to be so construed as to prevent the plaintiff from uniting in the same complaint two or more causes of action, in any case specified in section one hundred and forty-six of this act.

C. C. P., § 1680.

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ARTICLE FOURTH.

Action to foreclose a lien on a chattel.

- Sec. 137. Action; when and in what courts maintainable.
138. Warrant in action.
139. Action on conditional sale agreement, et cetera; how brought.
140. Judgment; order of arrest; body execution.
141. Judgment, et cetera.
142. Application of this article.

§ 137. Action; when and in what courts maintainable.

An action may be maintained in the municipal court of the city of New York, to foreclose a lien upon a chattel, for a sum of money, where the amount claimed, exclusive of costs, does not exceed five hundred dollars, in any case where such a lien exists at the time of the commencement of the action.

C. C. P., § 1737.

§ 138. Warrant in action for.

In an action to foreclose a lien upon a chattel, if the plaintiff is not in possession of the chattel, a warrant, commanding the marshal to seize the chattel, and safely keep it to abide the judgment, may be issued in like manner, as a warrant of attachment may be issued, in an action founded upon a contract, and the provisions of law applicable to a warrant of attachment, issued out of the court apply to a warrant issued as prescribed in this act, and to the proceedings to procure it, and after it has been issued, except as otherwise specified in the judgment.

L. 1882, ch. 410, § 1330.

§ 139. [Am'd, 1910.] Action on conditional sale agreement, et cetera; how brought.

No action shall be maintained in this court, which arises out of a contract of conditional sale of personal property; a hiring of personal property, where title is not to vest in the person hiring until payment of a certain sum; or a chattel mortgage made to secure the purchase price of chattels; except an action to foreclose the lien, as provided in this article. For the purpose of this section an instrument in writing as above stated shall be deemed a lien upon a chattel. Provided, however, that an action may be maintained to recover a sum or sums due and payable for instalment, payment or hiring, but in such cases no order of arrest shall issue.

L. 1910, ch. 542. In effect June 20, 1910.

§ 140. [Am'd, 1903.] Judgment; order of arrest; body execution.

In an action of foreclosure, as provided in the last section where the sum or sums, over all payments and set-offs due and payable by the terms of a written contract of conditional sale, or upon the payment of which the title to hired personal property vests, or secured by a chattel mortgage, amount to more than one hundred dollars, the plaintiff may allege that the defendant wilfully or maliciously disposed of or concealed the property or a part thereof, covered by the instrument on which suit is inst-

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uted, in which case the court may grant an order of arrest in the manner provided in article one of this title, and upon such allegation being proved on the trial, execution against the person shall issue, if the provisions of this act relating to indorsement upon the summons have been complied with, unless the property awarded by the judgment is produced by the defendant to satisfy the execution and levy, when made as provided in this article. Upon judgment being rendered, as prescribed in this article under the provisions of this or the last preceding section, and execution issuing thereon, the property subject to levy must be produced or possession made readily available at the time of such levy, to satisfy the execution in the manner prescribed in the judgment, and on failure so to do, where the plaintiff has recovered judgment for a sum exceeding one hundred dollars, exclusive of costs, an execution against the person shall issue, provided the provisions of this act relating to indorsement upon the summons have been complied with, on the return of the marshal having the execution made to the clerk of the court in the district in which the judgment is docketed, to the effect that such property is not available for levy and execution.

L. 1908, ch. 156. In effect April 8, 1908.

§ 141. Judgment, et cetera.

In an action to foreclose a lien, the final judgment in favor of the plaintiff, must specify the amount of the lien, and direct a sale of the chattel to satisfy the same and the costs, if any, by a marshal, in like manner, as where a marshal sells personal property by virtue of an execution, and the application by him of the proceeds of the sale, less his fees and expenses, to the payment of the amount of the lien, and the costs of the action. It must also provide for the payment of the surplus to the owner of the chattel, and for the safe keeping of the surplus, if necessary, by the clerk of the court, until it is claimed by him. If a defendant upon whom the summons is personally served, is liable for the amount of the lien, or for any part thereof, it may also award payment accordingly.

C. C. P., §§ 1739, 1740.

§ 142. Application of this article.

This title does not affect any existing right or remedy to foreclose or satisfy a lien upon a chattel, without action, and it does not apply to a case, where another mode of enforcing a lien upon a chattel is specially prescribed by law.

C. C. P., § 1741.

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TITLE IV.

Pleadings.

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182. Old action; thereupon discontinued.
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184. Title appearing from plaintiff's own showing.
185. Same cause of action, and defense in new action.
186. Answer of title interposed as to only one or more of several defenses; proceedings thereupon.
187. Interpleader by order in certain cases.

§ 145. [Am'd, 1908, 1911.] Pleading on joinder of issue.

Pleadings in the municipal court of the city of New York, may be oral or written, verified or unverified, except as prescribed in section thirty-four hundred and four of the code of civil procedure, and include a complaint, answer or demurrer.

1. Where the action is commenced by the service of a summons only, the pleadings may be oral, and the substance thereof shall be endorsed upon the summons and entered in the docket book of the court. Issue must be joined on the return day of the summons, except as otherwise expressly prescribed in this act. The court may, however, in its discretion, order a written bill of particulars, with or without verification, to be filed by the plaintiff, or by the defendant interposing a counterclaim.

2. In all cases where a written complaint, verified or unverified, is served with the summons, a written answer, verified if the complaint be verified, or a written demurrer, must be filed

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and issue joined on return day, except as otherwise expressly prescribed in this act, unless the court further extends the time to answer or demur. In actions, however, in which the amount claimed is fifty dollars or less, and the complaint is written, verified or unverified, and the defendant appears in person, the court may, in its discretion, permit the defendant to plead orally and indorse the substance thereof upon the summons.

3. Where a demurrer is interposed and disallowed, the court must, notwithstanding the return day has passed, grant leave to plead as if no demurrer had been interposed, with or without costs, in an amount within the sum allowed as costs in the action; but the time to file said pleading shall not be extended longer than eight days from the time the decision on the demurrer is rendered, unless on the consent of the parties.

4. If the court deems the demurrer well founded, it must permit the pleading to be amended; and if the party fails so to amend, the defective pleading or part of a pleading demurred to must be disregarded; and the court may, in its discretion, extend the time for pleading, in the manner prescribed in the preceding subdivision.

5. Where, on the return day of a summons, a person appears specially for the purpose of raising a question not involving the merits of the action, the court may, in its discretion, reserve the decision on the question raised and extend the time to plead, in the manner prescribed in subdivision three of this section.

6. Nothing herein shall be construed to prevent the court ordering a bill of particulars in a proper case, whether the pleadings be written or oral.

C. C. P., §§ 2935, 3126, 3207; L. 1882, ch. 410, § 1846. Am'd by L. 1308, ch. 495; L. 1911, ch. 73, in effect Sept. 1, 1911.

§ 146. What causes of action may be joined in the same complaint.

The plaintiff may unite in the same complaint, two or more causes of action, where they are brought to recover as follows:

1. Upon contract, express or implied.
2. For personal injuries, and injuries to property, or either.
3. Chattels, with or without damages, for the taking or detention thereof.
4. Upon claims against a trustee, by virtue of a contract, or by operation of law.

5. Upon claims arising out of the same transaction or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.

6. For penalties incurred under a statute of the state, or an ordinance of the city of New York.

But it must appear upon the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; that they require the same judgment; and except as otherwise prescribed by law, that they affect all the parties. Where a cause of action for which a defendant might be arrested is united with a cause of action for which he cannot be arrested, an execution against the person of the defendant cannot be issued upon the judgment.

C. C. P., §§ 484, 2937.

§ 147. [Am'd, 1908.] Plaintiff to prove his case; exceptions.

If a defendant fails to appear and answer, the plaintiff cannot recover without proving his case, except in a case specified in

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section thirty-four hundred and six of the code of civil procedure, and excepting that where the action is on a contract, express or implied, and a copy of a verified complaint was served on defendant at the time of the service of the summons, judgment may be taken as demanded without further proof.

C. C. P., § 2801; L. 1882, ch. 410, § 1347. Am'd L. 1908, ch. 495. In effect Sept. 1, 1908.

§ 148. Defendant may offer to allow judgment or compromise.

The defendant may, upon the return of the summons, and before answering, file with the court a written offer to allow judgment to be taken against him for a sum of money, or for property therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more of the defendants, against whom a separate judgment may be taken. If the plaintiff thereupon, before taking any other proceeding in the action, files with the court a written acceptance of the offer, the court must render judgment accordingly. If an acceptance is not filed, the offer cannot be given in evidence upon the trial; but, if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, and must pay the defendant's costs from that time. But a defendant may instead of such written offer, deposit the amount of his offer, if a sum of money, with the clerk of the court, with like effect.

C. C. P., § 2892.

§ 149. Complaint.

The complaint must state in a plain and direct manner the facts, constituting the cause of action.

C. C. P., § 2936.

§ 150. Answer; what to contain.

The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief.
2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.

C. C. P., §§ 500, 2938; L. 1882, ch. 410, § 1347.

§ 151. Counterclaim defined.

The counterclaim, specified in the last section, must tend in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.
2. In an action on contract, any other cause of action on contract, existing at the commencement of the action.

C. C. P., § 501.

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§ 152. Rules respecting the allowance of counterclaim.

But the counterclaim, specified in subdivision second of the last section, is subject to the following rules:

1. If the action is founded upon a contract, which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand existing against the party thereto, or an assignee of the contract, at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of the assignment, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him.

2. If the action is upon a negotiable promissory note or bill of exchange, which has been assigned to the plaintiff after it became due, a demand existing against a person who assigned or transferred it, after it became due, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the assignor, while the note or bill belonged to him.

3. If the plaintiff is a trustee for another or if the action is in the name of the plaintiff, who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim; but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counterclaim, if it might have been so allowed in an action brought by the person beneficially interested.

C. C. P., § 502.

§ 153. Judgment when demand or counterclaim are equal or unequal.

Where a counterclaim is established, which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff; the judgment does not prejudice the defendant's right to recover, from another person, so much thereof as the judgment does not cancel.

C. C. P., § 503.

§ 154. For affirmative relief.

In a case not specified in the last section where a counterclaim is established, which entitles the defendant to an affirmative judgment, demanded in the answer, judgment must be rendered for the defendant accordingly.

C. C. P., § 504.

§ 155. Counterclaim when defendant is sued in a representative capacity.

In an action against an executor or administrator, or other person sued in a representative capacity, the defendant may set forth, as a counterclaim, a demand belonging to the decedent or other person whom he represents, where the person so represented would have been entitled to set forth the same, in an action against him.

C. C. P., § 505.

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§ 150. When plaintiff is an executor or administrator.

In an action brought by an executor or administrator, in his representative capacity, a demand against the decedent, belonging, at the time of his death to the defendant, may be set forth by the defendant as a counterclaim, as if the action had been brought by the decedent in his lifetime; and, if a balance is found to be due to the defendant, judgment must be rendered therefor against the plaintiff, in his representative capacity. Execution can be issued upon such a judgment only in a case where it could be issued upon a judgment in an action against the executor.

C. C. P., § 506.

§ 157. Counterclaim where amount is in excess of court's jurisdiction.

Where defendant has a counterclaim which is in excess of the amount of the jurisdiction of this court, the counterclaim may be interposed, and in the event of judgment being rendered in defendant's favor, sustaining said counterclaim, said judgment shall not be for any larger sum in any event than the sum to which the court has jurisdiction, exclusive of costs, but nothing in this section shall be construed to estop such a defendant from bringing an action against the plaintiff for the difference between the sum of the court's jurisdiction, and the sum by said defendant to be due unless the judgment shall state that the sum awarded by the judgment is the whole amount found to be due.

[New.]

§ 158. When defendant may demur.

The defendant may demur to the complaint, where one or more of the following objections thereto, appear upon the face thereof:

1. That the court has not jurisdiction of the person of the defendant.
2. That the court has not jurisdiction of the subject of the action.
3. That the plaintiff has not legal capacity to sue.
4. That there is another action pending between the same parties, for the same cause.
5. That there is a misjoinder of parties plaintiff.
6. That there is defect of parties, plaintiff or defendant.
7. That causes of action have been improperly united.
8. That the complaint does not state facts sufficient to constitute a cause of action.

C. C. P., §§ 488, 2039; L. 1882, ch. 410, § 1347.

§ 159. Demurrer to complaint must specify grounds of objection.

The demurrer must distinctly specify the objections to the complaint, otherwise it may be disregarded. An objection, taken under subdivision first, second, fourth or eighth of section one hundred and fifty-eight of this act, may be stated in the language of the subdivision; and an objection taken under either of the other subdivisions, must point out specifically the particular defect relied upon.

C. C. P., § 480.

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§ 160. Demurrer to all or part of the complaint, may answer to part.

The defendant may demur to the whole complaint, or to one or more separate causes of action, stated therein. In the latter case, he may answer the cause of action not demurred to.

C. C. P., § 401.

§ 161. Formal reply or demurrer to counterclaim not necessary.

A formal reply to a counterclaim is not necessary. The counterclaim shall be deemed denied by the plaintiff unless specifically admitted on the trial. It also may be objected to on motion, or demurred to as if the counterclaim were an affirmative cause of action, set up in a complaint.

[New.]

§ 162. When plaintiff may demur to answer.

The plaintiff may demur to a counterclaim or a defence consisting of new matter contained in the answer, on the ground that it is insufficient in law on the face thereof.

C. C. P., § 404.

§ 163. Requirements concerning verified pleadings.

The allegations or denials in a verified pleading must in form be stated to be made by the party pleading. Unless they are therein stated to be made on the information and belief of the party, they must be regarded, for all purposes as having been made on the knowledge of the person verifying the pleading. An allegation that the party has not sufficient knowledge or information to form a belief with respect to a matter, must, for the same purpose, be regarded as an allegation that the person verifying the pleading has not such knowledge or information.

C. C. P., § 524.

§ 164. Verification; how and by whom made.

The verification must be made by the affidavit of the party, or, if there are two or more parties united in interest, and pleading together, by at least one of them who is acquainted with the facts, except as follows:

1. Where the party is a domestic corporation, the verification must be made by an officer thereof.

2. Where the people of the state are, or a public officer, in their behalf, is the party, the verification may be made by any person acquainted with the facts.

3. Where the party is a foreign corporation; or where the party is not within the county where the attorney resides, or if the latter is not a resident of the state, the county where he has his office, and capable of making the affidavit; or, if there are two or more parties united in interest and pleading together, where neither of them, acquainted with the facts, is within that county and capable of making the affidavit; or where the action or defence is founded on a written instrument for the payment of money only, which is in the possession of the agent or the attorney; or where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney;

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In either case the verification may be made by the agent of or the attorney for the party.

C. C. P., § 525.

§ 165. Exhibition of accounts at instance of adverse party may be ordered.

The court may at the time of pleading, or at any other time before the trial, require the plaintiff or defendant to exhibit to the inspection of the adverse party, with liberty to copy the same, any writing or account declared on or set up in the way of offset or counterclaim, or if not so exhibited, may prohibit its afterward being given in evidence.

L. 1882, ch. 410, § 1361.

§ 166. Amendment of pleadings.

The court must, upon application, allow a pleading to be amended, at any time, if substantial justice will be promoted thereby. Where a party amends his pleading, after joinder of issue, or pleads over upon the decision of a demurrer, and it is made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party, in consequence of the amendment or pleading over, an adjournment must be granted. The court may also, in its discretion, require, as a condition of allowing an amendment, the payment of costs to the adverse party.

C. C. P., § 2944; L. 1882, ch. 410, § 1347.

§ 167. Private statute; how pleaded.

In pleading a private statute, or a right derived therefrom, it is necessary to designate the statute by its chapter, year of passage and title, or in some other manner with convenient certainty, without setting forth any of the contents thereof.

C. C. P., § 580.

§ 168. Judgments; how pleaded.

In pleading a judgment, or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted the party pleading must on the trial establish the facts conferring jurisdiction.

C. C. P., § 532.

§ 169. Conditions precedent; how pleaded.

In pleading the performance of a condition precedent in a contract it is not necessary to state the facts constituting performance; but the party may state generally that he or the person whom he represents duly performed all the conditions on his part. If that allegation is controverted he must on the trial establish performance.

C. C. P., § 532.

§ 170. Pleadings to be liberally construed.

The allegations of a pleading must be liberally construed, with a view of substantial justice between the parties.

C. C. P., § 519.

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§ 171. Immaterial variance in pleading to be disregarded.

A variance between an allegation in a pleading and the proof, must be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled thereby, to his prejudice.

C. C. P., § 2043; L. 1882, ch. 410, § 1347.

§ 172. Material variances; how provided for.

A variance between an allegation in a pleading and the proof is not material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense on the merits. If a party insists that he has been misled that fact and the particulars in which he has been misled must be proved to the satisfaction of the court. Thereupon the court may in its discretion order the pleading to be amended on such terms as it deems just.

C. C. P., § 539.

§ 173. What to be deemed a failure of proof.

Where, however, the allegation to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance within the last two sections, but a failure of proof.

C. C. P., § 541.

§ 174. Partial defenses.

A partial defense may be set forth, but it must be expressly stated to be a partial defense to the entire complaint, or to one or more separate causes of action therein set forth. On a demurrer thereto the question is whether it is sufficient for that purpose. Matter tending only to mitigate or reduce damages in an action to recover damages for a personal injury, or an injury to property, is a partial defense within the meaning of this section.

§ 175. Complaint in actions by or against corporations.

In an action brought by or against a corporation, the complaint must aver that the plaintiff, or the defendant, as the case may be, is a corporation; must state whether it is a domestic corporation or a foreign corporation; and, if the latter, the state, country or government, by or under whose laws it was created. But the plaintiff need not set forth, or specially refer to, any act or proceeding by or under which the corporation was created.

C. C. P., § 1775.

§ 176. When proof of corporate existence unnecessary.

In an action brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation unless the answer is verified and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation.

C. C. P., § 1776.

§ 177. Misnomer; when waived.

In an action or special proceeding brought by or against a corporation, the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer or other pleading in the defendant's behalf.

C. C. P., § 1777.

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§ 178. Pleadings in actions on bastardy bonds.

The pleadings and proceedings in actions in which the people of this state are a party, where such actions are brought by the overseers of the poor or the commissioners of public charities and correction, upon bastardy or abandonment bonds, shall be the same as in actions brought on bonds with conditions other than for the payment of money, and for any breach of the condition of such bond given in cases of bastardy which shall happen after the recovery of any damages or the commencement of any suit, the municipal court in the district in which the action was originally brought shall have power to issue a new summons, and upon the return thereof to ascertain the amount of damages arising from said breach, and to give judgment accordingly; and in suits upon bonds given in abandonment cases the court shall have the same power as to requiring further security or committing defendant in default thereof, as are conferred by law, upon the judges of courts of record in similar cases.

L. 1882, ch. 410, § 1348.

§ 179. Answer of title.

The defendant may, either with or without other matter of defense, set forth in his answer facts showing that the title to real property will come in question. Such an answer must be in writing, and it must be signed by the defendant, or his attorney or agent, and delivered to the court. The court must, thereupon, countersign the answer, and deliver it to the plaintiff.

L. 1882, ch. 410, § 1349.

§ 180. Defendant in answer of title to deliver undertaking.

In the case specified in the last section, the defendant must also deliver to the court, with the answer, a written undertaking, executed by one or more sureties, approved by the court, to the effect that, if the plaintiff, within twenty days thereafter, deposits with the court a summons and complaint in a new action, for the same cause, to be brought in the proper court, as prescribed in the next section, the defendant will, within twenty days after the deposit, give a written admission of the service thereof. Where the defendant was arrested in the action before the court, the undertaking must further provide that he will, at all times, render himself amenable to any mandate which may be issued to enforce a final judgment in the action so brought. If the defendant fails to comply with the undertaking, the sureties are liable thereupon to any amount for which judgment might have been rendered by the municipal court, if the answer and undertaking had not been delivered.

L. 1882, ch. 410, § 1350.

§ 181. New action to be brought in supreme court.

The court, in which a new action is to be brought, as prescribed in the last section, is the supreme court.

L. 1882, ch. 410, § 1351.

§ 182. Old action; thereupon discontinued.

Upon the delivery of the undertaking to the court, the action is discontinued, and each party must pay his own costs. If the

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plaintiff falls to deposit with the court a summons and complaint in the new action, before the expiration of twenty days after the delivery of the undertaking, the defendant may maintain an action against the plaintiff to recover costs before the court.

L. 1882, ch. 410, § 1352.

§ 183. Penalty for failure to deliver undertaking.

If the undertaking is not delivered to the court, it has jurisdiction of the action, and must proceed therein, and the defendant is precluded in his defense, from drawing the title in question.

L. 1882, ch. 410, § 1353.

§ 184. Title appearing from plaintiff's own showing.

If, however, it appears upon the trial, from the plaintiff's own showing, that the title to real property is in question, and the title is disputed by the defendant, the court must dismiss the complaint, with costs, and render judgment against the plaintiff accordingly.

L. 1882, ch. 410, § 1354.

§ 185. Same cause of action, and defense in new action.

In the new action, to be brought after an action before a court is discontinued, by the delivery of an answer and an undertaking, as prescribed in the last six sections, the plaintiff must complain for the same cause of action only upon which he relied before the court, and the defendant's answer must set up the same defense only which he made before the court. If the action is to recover a chattel which was replevied in the municipal court, each undertaking, given in the municipal court, continues to be valid in, and is applicable to, the new action.

L. 1882, ch. 410, § 1355.

§ 186. Answer to title interposed as to only one or more of several defenses; proceedings thereupon.

Where in an action before the court, the plaintiff has two or more causes of action, and the defense that the title to real property will come in question, is interposed as to one or more, but not as to all of them, the defendant may deliver an answer and undertaking as prescribed in this article, with respect to the cause or causes of action only, in which title will so come in question. Whereupon the court, must discontinue the action as to those causes of action only, the plaintiff may commence a new action therefor in the proper court and the original action must proceed as to the other causes.

L. 1882, ch. 410, § 1356.

§ 187. Interpleader by order in certain cases.

A defendant against whom an action to recover upon a contract, or an action to recover a chattel, is pending, may, at any time before answer, upon proof, by affidavit, that a person, not a party to the action, makes a demand against him for the same debt or property, without collusion with him, apply to the court, upon notice to that person, and the adverse party, for an order to substitute that person, in his place, and to discharge him from liability to either, on his paying into court the amount of the

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debt, or delivering the possession of the property, or its value to such person as the court directs; or upon it appearing that the defendant disputes, in whole or in part, the liability as asserted against him by different claimants, or that he has some interest in the subject matter, of the controversy which he desires to assert, his application may be for an order joining the other claimant or claimants, as co-defendants with him in the action. The court may, in its discretion, make such order, upon such terms as to costs and payments into court of the amount of the debt, or part thereof, or delivery of the possession, of the property, or its value or part thereof, as may be just and thereupon the entire controversy may be determined in the action.

C. C. P., § 820.

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TITLE V.

Proceedings between joinder of issue and trial.

- Article 1. Adjournments; subpoenas; attendance of witnesses.
2. Commissions and depositions.

ARTICLE FIRST.

Adjournments; subpoenas; attendance of witnesses.

- Sec. 193. Trial may be adjourned, when.
194. Adjournment longer than eight days; undertaking.
195. Conditions may be imposed.
196. Attendance of witnesses.
197. How subpoena served.
198. Warrant of attachment against defaulting witness.
199. How executed; fees thereupon.
200. Defaulting witness liable for damages, and penalty of fifty dollars.

§ 193. [Am'd, 1910.] Adjournments; trial may be adjourned; when.

The trial of the action may be adjourned by the court, or on the application of either party, for a period not exceeding eight days at any one adjournment, unless the defendant is under arrest, in which case it shall not be adjourned to exceed forty-eight hours, except upon the application of the defendant, in accordance with the provisions of section sixty-seven of this act. Except that an adjournment for more than forty-eight hours where the defendant is under arrest, may be granted on application of the plaintiff by discharging the defendant from custody and the action may then proceed notwithstanding such discharge; and the defendant shall be subject to arrest on the execution, in the same manner as if he had not been so discharged. The trial may be adjourned for a longer period by consent, or where neither party objects to the same, or where the defendant has defaulted either by reason of his non-appearance or in pleading, the inquest or taking of judgment may be adjourned for a longer period than eight days on the application of the plaintiff, except as otherwise expressly prescribed in this act.

L. 1882, ch. 410, §§ 1362, 1363. Am'd by L. 1910, ch. 153. In effect Apr. 22, 1910.

§ 194. Adjournment longer than eight days; undertaking.

An adjournment may be had either at the joining of issue, or at any subsequent time to which the cause may stand adjourned on application of either party, for a longer period than eight days, but not to exceed ninety days from the return of the summons, upon executing an undertaking in writing, with one or more sufficient sureties, to the effect that he will pay to the plaintiff or defendant the damages, costs and extra costs, in case judgment shall be rendered against him in the action, upon proof by the oath of the party or otherwise, to the satisfaction of the court, that such party cannot be ready for trial before the time to which he desires an adjournment, for the want of material evidence, describing it; that the delay has not been made necessary by any act or neglect on his part since the action was commenced and that he expects to procure the evidence at the time stated by him. All bonds taken upon the adjournment of any cause shall be good and valid against the obligor or obligors,

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although subsequent adjournments are had after the execution of such bond or obligation.

L. 1882, ch. 410, § 1364.

§ 195. Conditions may be imposed.

The court may impose upon the party applying for an adjournment such conditions as to it may seem reasonable.

L. 1882, ch. 410, § 1365.

§ 196. [Am'd, 1910.] Attendance of witnesses.

A subpoena requiring a witness to appear and testify on the trial of an action, on the demand of either party, shall be issued out of this court by the clerk thereof, in the district in which the action is pending, unless otherwise expressly provided in this act, but if the party in whose behalf the subpoena is to be issued is represented by an attorney, such attorney may issue the same and shall subscribe thereto his name, office and post-office address, and the subpoena may be served at any place within the city of New York. The subpoena may require the witness, except as otherwise expressly prescribed by law, to bring with him any book or paper, relating to the merits of the action.

C. C. P., § 2969; L. 1882, ch. 410, § 1370. Am'd, L. 1910, ch. 533. In effect Sept. 1, 1910.

§ 197. How subpoena served.

A subpoena may be served by any person over the age of eighteen years, and must be served by delivering a copy thereof to the witness personally, and by paying or tendering to him his lawful fee of twenty-five cents for one day's attendance as a witness, and mileage as provided by the code of civil procedure.

C. C. P., § 2970; L. 1882, ch. 410, § 1370.

§ 198. Warrant of attachment against defaulting witness.

Where it is made to appear, to the satisfaction of the court, by affidavit or other proof, that a person duly subpoenaed to attend before it in an action, has refused or neglected to attend as a witness in obedience to the subpoena, and no just cause for the neglect or refusal is shown to exist, and the person is not privileged from attendance under any statute of the state, and the party, in whose behalf the witness was subpoenaed, or his attorney, makes oath that the testimony of the witness is material, the court must issue a warrant of attachment, directed generally to any marshal, for the purpose of compelling the attendance of the witness.

C. C. P., § 2971.

§ 199. How executed; fees thereupon.

Such a warrant of attachment must be executed in the same manner as an order of arrest. The fees of the marshal for serving it must be paid by the person against whom it is issued, unless he shows a reasonable excuse to the satisfaction of the court, for his omission to attend, in which case, the party procuring the warrant must pay for them, and if he recovers costs, the amount thereof must be allowed to him as part of his costs.

C. C. P., § 2972.

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§ 200. Defaulting witness liable for damages and penalty of fifty dollars,

A person subpoenaed, as prescribed in this act, who neglects or refuses to obey the subpoena, or to testify, is also liable to the party, in whose behalf he was subpoenaed, for all damages which the party sustains by reason of his neglect or refusal, and fifty dollars in addition thereto, and is subject to any fine or punishment which may be imposed in accordance with the provision of section eight of this act.

C. C. P., § 2979.

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ARTICLE SECOND.

Commission to take testimony; depositions.

- Sec. 205. Commission to take testimony, et cetera.
206. Commission on consent; deposition upon oral questions.
207. When and how commission granted.
208. Adjournment where commission granted.
209. How executed and returned.
210. Certificate of execution.
211. Certificate, a sufficient return.
212. When deposition may be suppressed.
213. Deposition, et cetera, evidence.
214. Power of commissioners.
215. Receipt of clerk; return of commission by.
216. Deposition to take testimony conditionally.
217. Affidavit on application; requirements of.
218. Deposition by consent.
219. Order for examination.
220. Punishment for disobeying order, witness fees.
221. Service of order.
222. Adjournment of examination.
223. Party confined in prison.
224. Rules for examination; manner of taking and returning depositions;
refusal of person examined to answer.
225. Deposition may be read in evidence; when.
226. Effect of deposition.

§ 205. Commission to take testimony, et cetera.

Where the defendant has neglected to appear upon the return of a summons, or has failed to answer the complaint, or where an issue of fact has been joined in an action; and it appears, by affidavit, upon the application of either party, that a witness, not within the city of New York, is material in the prosecution or defense of the action, the court may award a commission to one or more competent persons, authorizing them, or any of them to examine the witness under oath, upon interrogatories to be settled by the court, or by written agreement of the parties, and indorsed upon or annexed to the commission; to take and certify the deposition of the witness, and to return the same by mail addressed to the clerk of the court.

C. C. P., § 2080; L. 1882, ch. 410, § 1368.

§ 206. Commission on consent; deposition upon oral questions.

If both parties expressly consent, a commission may issue without written interrogatories, and the deposition may be taken upon oral questions.

C. C. P., § 2081; L. 1882, ch. 410, § 1368.

§ 207. When and how commission granted.

The commission may be granted by the court without notice, upon the application of the plaintiff, made at the return of the summons, or upon the application of either party, made at the time of the joinder of issue. It may also be granted at any time after the joinder of issue, upon the application of either party, accompanied with proof, by affidavit, that three days written notice of the application has been served upon the adverse party, either personally or by service upon the attorney, who appeared for him before the court.

C. C. P., § 2082; L. 1882, ch. 410, § 1368.

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§ 208. Adjournment where commission granted.

Where a commission is granted, the party upon whose application it is issued, is entitled to such an adjournment of the trial as may be necessary to procure the commission to be executed and returned. Subject, however, to the provisions of sections one hundred and ninety-three and one hundred and ninety-four of this act.

C. C. P., § 2083; L. 1882, ch. 410, § 1368.

§ 209. How executed and returned.

The person, to whom a commission is directed, or before whom a deposition is taken, unless otherwise expressly directed in the commission, or in the order for taking the depositions, must execute the commission, or the order as follows:

1. He must publicly administer, to each witness examined, an oath or affirmation, to testify the truth, the whole truth, and nothing but the truth, as to the matters respecting which the witness is examined.

2. He must reduce the examination of each witness to writing, or cause it to be reduced to writing, by a disinterested person. After it has been carefully read, to or by the witness, it must be subscribed by the witness.

3. If an exhibit is produced and proved, the exhibit, or, if the witness, or other person having it in his custody, does not surrender it, a copy thereof, must be annexed to the deposition to which it relates, subscribed by the witness proving it, and numbered or otherwise identified, in writing thereupon, by the commissioner or other person taking the deposition, who must subscribe his name thereto.

4. The commissioner, or person taking the deposition, must subscribe his name to each half sheet of the deposition, and he must annex all the depositions and exhibits to the commission, or to a certified copy of the order for taking the deposition, with the certificate specified in the next section; and he must close them up under his seal, and address the packet to the clerk of the court, at his official residence.

5. If there is a direction, on the commission, or in the order to return the same through the post office, he must immediately deposit the packet, so addressed, in the post office, and pay the postage thereon.

6. If there is a direction on the commission, or in the order, to return the same by an agent of the party, at whose instance it was issued or granted, the packet so addressed must be delivered to the agent.

7. Where a commission is directed to two or more persons, one or more of them may execute it, as prescribed in this and the next section.

A copy of this and of the next section must be annexed to each commission, or order to take depositions, authorized by this article.

C. C. P., §§ 910, 2984; L. 1882, ch. 410, § 1368.

§ 210 Certificate of execution.

The commissioner or other person, before whom one or more depositions are taken, must subscribe, and annex to each deposi-

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tion, a certificate, substantially in the following form, the blank being properly filled up:

State (or territory) of } ss.:
County (or parish) of

I, do certify that the witness, personally appeared before me on the day of at o'clock in the noon, at the in the state (or territory) of and after being sworn (or affirmed, as the case may be), to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition, and do in my presence, subscribe the same, and indorse the exhibit annexed thereto. And I further certify that I have subscribed my name to each half sheet thereof, and to each exhibit.

And I further certify that appeared in behalf of the and that appears in the behalf of the

C. C. P., § 902; L. 1882, ch. 410, § 1369.

§ 211. Certificate, a sufficient return.

The certificate specified in the last section, is a sufficient return to a commission.

C. C. P., § 903; L. 1882, ch. 410, § 1369.

§ 212. When deposition may be suppressed.

Where it appears, by affidavit that a deposition has been improperly or irregularly taken or returned; or that the personal attendance of the witness, upon the trial, could have been procured, with due diligence, by a subpoena, or that the attorney for either party has practiced any fraud, or unfair or overreaching conduct, to the prejudice of the adverse party, in the course of the proceedings; an order for the suppression of the deposition, may be made by the court, upon the application of the party aggrieved, upon notice to the adverse party.

C. C. P., § 910.

§ 213. Deposition, et cetera, evidence.

A deposition, taken and returned as prescribed in this article may, unless it is suppressed as prescribed in the last section, be read in evidence by either party. It has the same effect, and is as other, as the oral testimony of the witness would have; and as objection to the competency or credibility of the witness, or to the relevancy, or substantial competency, of a question put to him, or of an answer given by him, may be made, as if the witness was then personally examined, and without being noted upon the deposition.

C. C. P., § 911.

§ 214. Power of commissioners.

Where the commission is executed within the state, the commissioner, or if there are two or more, a majority of them, have the same power to issue a subpoena, to swear a witness, and to compel his attendance, that a justice of the peace has, in an action pending before him.

C. C. P., § 2987.

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§ 215. Receipt of clerk; return of commission by.

The clerk of the court in the district in which the action is pending, must on receiving the package, containing the commission, transmitted to him by mail or otherwise, open and file it, endorsing thereupon the date of his so doing. It must remain on file with him, until the trial; but either party is entitled to inspect it on file.

C. C. P., § 2085.

§ 216. Deposition to take testimony conditionally.

Either party to an action pending in the municipal court may apply in the district in which the action is pending, for an order to have the testimony of any witness who is about to depart from the city of New York, and will probably continue absent, when the testimony is required, or is so sick or infirm as to afford reasonable ground to believe that he will not be able to attend the trial; or that any other special circumstances exist which render it proper that he be examined as prescribed in this article, taken conditionally to be used on the trial of such action, subject to the provisions of this article.

L. 1882, ch. 410, § 1369.

§ 217. Affidavit on application; requirements of.

The party desiring to take a deposition, as prescribed in the last section, must present to the court in the district in which the action is pending, an affidavit showing:

1. The title and nature of the action. The name and residence of the person to be examined. That the testimony of such person is material and necessary for the party making such application for the prosecution or defense of such action.

2. That the person to be examined is about to depart from the city of New York, or that he is so sick or infirm as to afford reasonable ground to believe that he will not be able to attend the trial, or that any other special circumstances exist which render it proper that he should be examined, as prescribed in this chapter; but this subdivision does not apply to a case where the person to be examined is a party to the action, except in the case of sickness or infirmity.

3. If the party sought to be examined is a corporation, the affidavit shall state the name of the officers or directors thereof, or any of them whose testimony is necessary and material, or the books and papers as to the contents of which an examination or inspection is desired, and the order to be made in respect thereto, shall direct the examination of such persons and the production of such books and papers.

C. C. P., § 872.

§ 218. Deposition by consent.

The parties to an action may stipulate in writing that an order specified in section two hundred and sixteen of this act may be granted, in which case an affidavit, as required by the preceding sections shall not be necessary. But this section does not apply to a case where the person to be examined is confined in a prison or jail within the state.

C. C. P., § 879.

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§ 219. Order for examination.

The court to whom an affidavit is presented, as provided in section two hundred and seventeen of this act, may, if the opposite party or his representative is not present, require that a reasonable notice of the application be given, or may act on the application at the time of such presentation, and must grant an order for the taking of the deposition, if satisfied of the truth of the matter stated in the affidavit, and may in his discretion designate and limit the particular matters on which the examination is to be conducted. The order may require that the examination be conducted before the court, at the time fixed, or may permit such examination to be conducted at the place where the person to be examined is at the time fixed for said examination. Where the deposition is not taken in court, the order may permit the examination of the person making the deposition to proceed after having been sworn before an officer authorized to take and administer oaths.

C. C. P., § 873.

§ 220. Punishment for disobeying order; witness fees.

Witnesses fees, as provided in this act, for attendance upon trial, must be paid or tendered when the order is served upon the party or other person required to attend. If the party or person so served fails to obey the order his attendance may be compelled and he may be punished in like manner, and the proceedings thereon are the same, as if he failed to obey a subpoena, issued from the municipal court.

C. C. P., § 874.

§ 221. Service of order.

A copy of the order and of the affidavit upon which it was granted must be served at least two days before the time fixed for the examination, upon the attorney for each party to the action, in like manner as a paper in the action; or if a party has not appeared in the action they must be served upon him as directed by the order.

C. C. P., § 875.

§ 222. Adjournment of examination.

The court may upon good cause shown adjourn the time for taking said examination within the limitations and provisions of this act applying to adjournments.

[New.]

§ 223. Party confined in prison.

Where the party or other person to be examined is confined in a prison or jail within the state, under sentence for a misdemeanor or felony, that fact must be stated in the affidavit, and his deposition may be taken as prescribed in the foregoing sections as if he was not so confined, except that in such a case the granting or refusing the order is always in the discretion of the court. The order must require the production of the prisoner by the person in charge of the prison or jail, at the prison or jail, but it may prescribe such regulations and restrictions with respect thereto as the court deems proper.

C. C. P., § 877.

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written or printed notice, directed to each person named in the list, requiring him to attend as directed as a juror, at a time and part specified therein, out of which number six of the persons attending shall be drawn to try the cause, provided that number appear. In each part designated for jury trials, except in the borough of Brooklyn, the clerk in the presence of a justice of the court shall each month draw from the undrawn jury box the names of thirty-six jurors, and a minute of such drawing containing the names and addresses of the jurors so drawn shall be made and certified by such clerk and the justice in whose presence the same are drawn. Such jurors shall constitute the panel of jurors for the month succeeding that in which they are drawn and for the part for which they are so drawn, and the clerk in the part for which said jurors are drawn shall deliver to a marshal or to a person deputed by the court for that purpose a written or printed notice directed to each juror so drawn requiring him to attend as a juror at such part at a time specified therein. Separate ballots containing the names and addresses of each of the jurors so drawn shall be placed in a ballot box from which, at the trial thereof, six of the jurors shall be drawn to try each action triable by jury in that part during the month for which said jurors are drawn. No juror shall be required to attend for service or allowed to serve more than ten days in any one month. At any time the justice presiding in a part designated for jury trials may direct an additional number of jurors to be drawn for service in the month and in the part in which he is presiding. Such order must specify the number of additional jurors to be drawn and such jurors must be drawn and a minute of their drawing be made and certified and they shall be empanelled on trials in the same manner as is above provided as to the jurors drawn for each month. No person shall be allowed to serve as a juror on any trial in the boroughs of Manhattan and the Bronx whose name is not on the list of trial jurors selected by the commissioner of jurors for the district in which and the period during which, the trial is had. The clerk in each part in the boroughs of Manhattan and the Bronx shall on or before the fifteenth day of each month return to the commissioner of jurors of the county of New York a certified copy of the minutes of each drawing of jurors in his part during the preceding month and shall also certify to said commissioner the number of days each such juror attended for the purpose of serving, the number of days he actually served and the name of each such juror who was excused or discharged, with the reason therefor, and the name of each such juror notified who did not attend or serve and the name of each such juror fined and how the notice to attend was served upon the delinquent and the date and amount of his fine unless the same has been remitted, in order that the same proceedings may be had as in the case of a delinquent juror in a court of record. The board of aldermen of the city of New York may direct that a sum, not exceeding two dollars in addition to the fees of jurors prescribed in this section, or in any other statutory provision, be allowed to each trial juror for each day's attendance at a term of the municipal court of the city of New York. The amount so paid must be raised in the same manner as other city charges are raised.

C. C. P. § 2990; L. 1882, ch. 410, § 1372. Am'd by L. 1908, ch. 431; L. 1910, ch. 541. In effect Oct. 1, 1910.

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TITLE VI

Trial; trial jurors.

- Sec. 230. Issue of fact and law; judgment within what time to be rendered.
231. Trial by jury; drawing the jury.
231-a. Trial jurors in Brooklyn.
231-b. Trial jurors in Queens and Richmond.
232. Court may direct trial by jury; when.
233. Trial jurors; list of to be furnished clerk of each district.
234. Jury of twelve; when.
235. How jury summoned; notice.
236. Talesmen.
237. Ballots of jurors summoned but not drawn.
238. Adjournments after return of jury.
239. Verdict; requisites.
240. Swearing the jury.
241. Submission of a controversy upon facts admitted.
242. Papers to be filed.
243. Subsequent proceedings regulated.

§ 230. [Am'd, 1910.] Issue of fact and law; judgment within what time to be rendered.

Upon the issue of fact joined, if a jury trial be not demanded as required by this act, the court must hear the evidence, and decide all questions of fact and law, and render judgment accordingly within fourteen days from the time the same is submitted for that purpose, except when the defendant is under arrest, or has not given security for his appearance; in such case the court shall render judgment immediately after the close of the trial, and except where further time is given by the consent of parties or their attorneys. Decisions on motions shall likewise be rendered within fourteen days after they are argued or submitted unless further time is given by consent of parties or their attorneys. If no decision is rendered as required herein the time elapsing subsequent to the date of final submission of the motion shall not run to the prejudice of a new application. All issues of law shall be heard and decided by the court, without a jury.

L. 1882, ch. 410, § 1384. Am'd, L. 1910, ch. 401. In effect Sept. 1, 1911.

§ 231. [Am'd, 1908, 1910.] Trial by jury; drawing the jury.

At any time when an issue of fact is joined, either party may demand a trial by jury, and unless so demanded at the joining of issue, a jury trial is waived. The party demanding a trial by jury shall forthwith pay to the clerk, the sum of four dollars and fifty cents. In default of such payment the court shall proceed as if no demand for trial by jury had been made. If moneys so received shall be applied as far as necessary to the payment of the lawful fees of the server for summoning jurors and a fee of twenty-five cents to each juror for each case in which he shall serve as a juror such payment to be made to him by the clerk at the end of the trial of such case. When a jury trial is demanded, the trial of the case may be adjourned within the limitations provided in this act, until the time fixed for the attendance of a jury. In each special proceeding and action in which a jury trial is to be had, unless such trial is to be had in a part designated for jury trials, the clerk must in the presence of a justice of the court draw twelve persons from the undrawn jury box and deliver the list thereof to a marshal or to a person deputed by the court for that purpose, with a

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Written or printed notice, directed to each person named therein, requiring him to attend as directed as a juror, at a certain part specified therein, out of which number six of the jurors attending shall be drawn to try the cause, provided a sufficient number appear. In each part designated for jury trials, in the borough of Brooklyn, the clerk in the presence of a justice of the court shall each month draw from the undrawn jurors the names of thirty-six jurors, and a minute of such drawing containing the names and addresses of the jurors so drawn shall be made and certified by such clerk and the justice in whose presence the same are drawn. Such jurors shall constitute a panel of jurors for the month succeeding that in which they are drawn and for the part for which they are so drawn, and the clerk in the part for which said jurors are drawn shall cause a marshal or to a person deputed by the court for that purpose a written or printed notice directed to each juror so requiring him to attend as a juror at such part at a time specified therein. Separate ballots containing the names and addresses of each of the jurors so drawn shall be placed in separate ballot box from which, at the trial thereof, six of the jurors shall be drawn to try each action triable by jury in that part during the month for which said jurors are drawn. No juror shall be required to attend for service or allowed to serve more than ten days in any one month. At any time the justice presiding in a part designated for jury trials may direct a certain additional number of jurors to be drawn for service in the part designated in the part in which he is presiding. Such order shall specify the number of additional jurors to be drawn and the jurors must be drawn and a minute of their drawing be made and certified and they shall be empanelled on trials in the manner as is above provided as to the jurors drawn for each month. No person shall be allowed to serve as a juror or as a trial juror in the boroughs of Manhattan and the Bronx whose name is not on the list of trial jurors selected by the commissioner of the court for the district in which and the period during which the trial is had. The clerk in each part in the boroughs of Manhattan and the Bronx shall on or before the fifteenth day of each month return to the commissioner of jurors of the city of New York a certified copy of the minutes of each drawing of jurors in his part during the preceding month and shall certify to said commissioner the number of days each such juror attended for the purpose of serving, the number of days actually served and the name of each such juror who was used or discharged, with the reason therefor, and the name of each such juror notified who did not attend or serve and the name of each such juror fined and how the notice to attend was served upon the delinquent and the date and amount of his fine unless the same has been remitted, in order that the same proceedings may be had as in the case of a delinquent juror in a court of record. The board of aldermen of the city of New York may direct that a sum, not exceeding two dollars in addition to the fees of jurors prescribed in this section in any other statutory provision, be allowed to each trial juror for each day's attendance at a term of the municipal court in the city of New York. The amount so paid must be raised in the same manner as other city charges are raised.

C. C. P., § 2990; L. 1882, ch. 410, § 1372. Am'd by L. 1908, ch. 1910, ch. 541. In effect Oct. 1, 1910.

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§ 231-a. [Added, 1910.] Trial jurors in Brooklyn.

In the borough of Brooklyn there shall be a jury term in each district beginning the first Monday in each month except July, August and September, or at such other times as the board of justices shall direct and such term shall continue for such time as the justice presiding thereat shall deem necessary and direct. Trial jurors for such terms must have the same qualifications, and must be selected, drawn and notified in the same manner, as trial jurors for a term of the supreme court and the provisions of section seven hundred and eleven and sections seven hundred and fourteen to seven hundred and thirty-six, both inclusive, of the judiciary law relating to trial jurors in Kings county, as they may be from time to time, are hereby made to apply to this court, and to trial jurors therein, in said borough, except that all duties imposed by section seven hundred and eighteen thereof upon the county clerk of Kings county shall be performed by, and the clerk referred to in section seven hundred and eleven thereof shall be, the clerk of the court in the respective districts in which the jurors are summoned. Twenty-four trial jurors must, and in no event more than thirty shall, be drawn for each district for each term. As far as the commissioner of jurors shall find it to be practical each juror drawn shall be summoned to the district nearest to his residence. Such jurors shall be paid the same compensation and in the same manner as trial jurors in the courts of record in Kings county. In all proceedings for the remission and enforcement of jury fines of jurors in this court the justices of this court shall be notified and shall act in like manner as the justices and judges specified in sections seven hundred and twenty-eight and seven hundred and twenty-nine of said law.

Added, L. 1910, ch. 541. In effect Oct. 1, 1910.

§ 231-b. [Added, 1913.] Trial jurors in Queens and Richmond.

In the boroughs of Queens and Richmond, there shall be a jury term in each district, beginning the first Monday of each month except the months of July, August and September, or at such other times as the board of justices shall direct, and such term shall continue for such time as the justice presiding thereat shall deem necessary and direct. All of the provisions of section two hundred and thirty-one applying to the parts designated for jury trials and the jurors thereof, not inconsistent with the foregoing provisions of this section, shall also apply to the jury terms and the jurors thereof in the boroughs of Queens and Richmond provided, however, that in the boroughs of Queens and Richmond, twenty-four trial jurors must, and in no event more than thirty shall be drawn in each district, by the clerk for such district, for each term.

Added, L. 1913, ch. 690. In effect Sept. 1, 1913.

§ 232. Court may direct trial by jury; when.

When an issue of fact has been joined in an action or special proceeding, and a trial by jury has not been demanded, the court

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§ 239. Verdict; requisites.

Except as otherwise provided in this act, the verdict of the jury must be general for the plaintiff for a specific sum, or for the defendant, or where there is a counterclaim or set-off proved for the defendant in a specified sum, but where there are several plaintiffs or defendants, the verdict may be for or against one or more of them, within the limitations and provisions of this act, and the judgment must be entered thereon immediately after the rendering of the verdict.

L. 1882, ch. 410, § 1390.

§ 240. Conduct of trial.

On the trial of all causes in the municipal court, the mode of conducting the trial, the rules of evidence, the examination and the swearing of the jury, shall be the same as prevail in courts of record.

New. See L. 1882, ch. 410, § 1381.

§ 241. Submission of a controversy upon facts admitted.

When an action or summary proceeding has been commenced according to the provisions of this act, upon its being reached for trial, the parties, being of full age, may agree upon a statement of the facts upon which the controversy depends and may present a written submission thereof to the court. Such statement must be accompanied with the affidavit of one or more of the parties to the effect that the controversy is real and that the submission is made in good faith, for the purpose of determining the rights of the parties.

C. C. P., § 1279.

§ 242. Papers to be filed.

Such statement, submission and affidavit must be filed in the office of the clerk of the court in the district in which the action was commenced. The filing is a presentation of the submission, and each provision of this act relating to an action or summary proceeding, or the costs therein, applies to the subsequent proceedings except as otherwise prescribed in the next section.

C. C. P., § 1280.

§ 243. Subsequent proceedings regulated.

An order of arrest, warrant of attachment, writ of replevin or execution against the person, cannot be granted in such an action. The action must be tried by the court upon the statement alone and the statement, submission, affidavit and the judgment rendered, and any order or papers necessarily affecting the judgment constitute the judgment record. If the statement of facts is not sufficient to enable the court to render judgment, an order must be made dismissing the submission without costs to either party, unless the court permit the parties, or, in a proper case, their representative, to file an additional statement, which it may do in its discretion, without prejudice to the original statement.

C. C. P., § 1281.

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the case of a delinquent juror in a court of record. A clerk who violates this section or section two hundred and thirty-one of this act forfeits one hundred and fifty dollars for each offense. L. 1882, ch. 410, § 1371. Am'd L. 1907, ch. 451; L. 1908, ch. 431; L. 1910, ch. 541. In effect Oct. 1, 1910.

§ 234. Jury of twelve; when.

In an action where the damages, or the value of the chattels as claimed in the complaint, exceed one hundred dollars, if at the time of joining an issue of fact the defendant demand a trial by a jury of twelve men, the court shall order a jury of twelve to be summoned to try the issues. In such case the clerk shall draw the names of twenty-four persons who shall be summoned in the same manner as in other cases required by law, and twelve of such number shall be drawn to try the cause. The jury fee to be deposited in such cases, shall be nine dollars.

L. 1882, ch. 410, § 1373.

§ 235. [Am'd, 1908, 1910.] How jury summoned; notice.

Except in the borough of Brooklyn, the officer or the person deputed as provided in section two hundred and thirty-one of this act, upon receipt of such a notice as is mentioned in said section, must thereupon immediately summon the person named therein by giving the same to him personally, or by leaving it at his place of residence or business with some person of suitable age and discretion, and, except in the boroughs of Manhattan, Brooklyn and the Bronx, by giving to the person to whom said notice is given the sum of twenty-five cents. The person serving such notice must make a return as to the manner in which such service was made by him, and, except in the boroughs of Manhattan, Brooklyn and the Bronx, must include in such return a statement as to whether or not said twenty-five cents was paid to each juror and also return the list. In each district all such returns must be made to the court, at its opening, on the day for which the jury is drawn.

L. 1882, ch. 410, § 1374. Am'd by L. 1908, ch. 431; L. 1910, ch. 541. In effect Oct. 1, 1910.

§ 236. [Am'd, 1908, 1910.] Talesmen.

Except in the county of New York, if a sufficient number of competent and indifferent jurors do not attend, or if the justice presiding is of the opinion that the rights of either party to an action or proceeding may be prejudiced by delaying the trial until the next jury term, the court may direct that a sufficient number of jurors to try such cause, or to complete the jury, be summoned from the vicinity, by a marshal or a person deputed for that purpose.

L. 1882, ch. 410, § 1375. Am'd by L. 1908, ch. 431; L. 1910, ch. 541. In effect Oct. 1, 1910.

§ 237. Ballots of jurors summoned but not drawn.

The ballots containing the names of the jurors summoned and not drawn, must be returned by the clerk to the undrawn jury box, to be drawn as in the first instance. The ballots containing the names of the jurors who served, must be placed in a box to be called the drawn jury box, until all the other names have been drawn therefrom, and, as often as that happens, the whole number must be returned to the undrawn jury box, as in the first instance.

L. 1882, ch. 410, § 1376.

§ 238. [Repealed by L. 1911, ch. 900.]

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and a like note must also be made in the docket of a judgment by a county clerk, where such a transcript is filed with such clerk.

L. 1882, ch. 410, § 1386.

§ 252. Court may direct verdict; when.

On the trial of an issue of fact, before the court and a jury, the court may, in a proper case, direct that the jury render a verdict as follows:

1. In favor of the plaintiff or petitioner.
2. In favor of the defendant, respondent, tenant, under-tenant, assignee, receiver, squatter or person holding over.
3. Where the damages are liquidated, in favor of the plaintiff, for a specified sum.
4. Where the defendant has interposed a counterclaim, and the damages are liquidated, in favor of the defendant for a specified sum.
5. Where the plaintiff has proved his case, but the damages are uncertain, that the jury render a verdict in favor of the plaintiff and determine the amount.
6. Where the defendant has interposed a counterclaim and proved his case, and the damages are uncertain, that the jury find a verdict in favor of the defendant and determine the amount.

[New.]

§ 253. [Am'd, 1907.] Court may open default.

The court, or a justice thereof, in a district in which a default or dismissal is taken, in an action or summary proceeding, or in which judgment is taken or final order made without the service of a summons or of process as required by law, may at any time, upon motion made upon such notice as the court may direct, open such default or dismissal, and set aside, vacate or modify any judgment or final order entered in any such action or proceeding, and set the action or proceeding down for pleading, hearing or trial, as the case may require, upon such terms and conditions as the court may deem proper.

L. 1882, ch. 410, § 1367. Am'd L. 1907, ch. 304. In effect Sept. 1, 1907.

§ 254. Motion to set aside verdict or vacate or amend judgment.

A motion to set aside the verdict of a jury, and vacate, amend or modify a judgment rendered thereon, or to vacate, amend or modify any judgment rendered upon a trial, by the court, without a jury, may be made upon the exceptions taken at the trial, or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence, or contrary to law, provided said motion is made at the close of the trial or within five days from the time the judgment was rendered and in the latter case at least two days notice of said motion is given, to the opposing attorney, or party if there be no attorney of record. The judge who presided at the trial may make an order setting aside the verdict or amending, modifying or vacating the judgment and awarding a new trial, and setting the cause down for trial for a time to be specified in the order, as the case may require.

L. 1882, ch. 410, § 1367.

§ 255. New trial; fraud or newly discovered evidence.

The court may also in a proper case, grant or deny a motion for a new trial on the ground of fraud or newly discovered evi-

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TITLE VII

Judgment and executions.

- Article 1. Judgments.
2. Executions.

ARTICLE FIRST.

Judgments.

- Sec. 248. Non-suit; when authorized.
249. Judgment of dismissal on merits; when.
250. Judgment when sum exceeds jurisdiction.
251. Judgment where defendant liable to arrest.
252. Court may direct verdict; when.
253. Court may open default.
254. Motion to set aside verdict or vacate or amend judgment.
255. New trial; fraud or newly discovered evidence.
256. Court may impose conditions, et cetera.

§ 248. Non-suit; when authorized.

Judgment that the action be dismissed with costs, without prejudice to a new action, shall be rendered in the following cases:

1. Where the plaintiff voluntarily discontinues the action before it is finally submitted.

2. When he fails to appear at the time specified in the summons or upon adjournment.

3. When it is objected at the trial, and appears by the evidence that the court has not jurisdiction, but if the objection be taken and overruled, it is cause only of reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial it is waived, and the court will be deemed to have jurisdiction.

4. Where the plaintiff does not prove his cause of action.

L. 1882, ch. 410, § 1382.

§ 249. Judgment of dismissal on merits; when.

Judgment that the action be dismissed on the merits with costs may be rendered in the following cases:

1. Where, at the close of the whole case, the court is of the opinion that the plaintiff is not entitled to recover as a matter of law.

2. Where the court sustains a demurrer, and no leave to plead over is granted, as provided in this act.

[New.]

§ 250. Judgment when sum exceeds jurisdiction.

Where the amount found due to either party exceeds the sum for which the court is authorized to enter judgment, such party may remit the excess and judgment may be entered for the residue.

L. 1882, ch. 410, § 1385.

§ 251. Judgment where defendant liable to arrest.

When a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, it must be so stated in the judgment and entered in the docket. The clerk of the court in the district in which such a judgment is entered, must in any transcript issued by him, as prescribed in this act, insert the words "defendant liable to execution against his person"

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and a like note must also be made in the docket of a judgment by a county clerk, where such a transcript is filed with such clerk.

L. 1882, ch. 410, § 1386.

§ 252. Court may direct verdict; when.

On the trial of an issue of fact, before the court and a jury, the court may, in a proper case, direct that the jury render a verdict as follows:

1. In favor of the plaintiff or petitioner.
2. In favor of the defendant, respondent, tenant, under-tenant, assignee, receiver, squatter or person holding over.
3. Where the damages are liquidated, in favor of the plaintiff, for a specified sum.
4. Where the defendant has interposed a counterclaim, and the damages are liquidated, in favor of the defendant for a specified sum.
5. Where the plaintiff has proved his case, but the damages are uncertain, that the jury render a verdict in favor of the plaintiff and determine the amount.
6. Where the defendant has interposed a counterclaim and proved his case, and the damages are uncertain, that the jury find a verdict in favor of the defendant and determine the amount.

[New.]

§ 253. [Am'd, 1907.] Court may open default.

The court, or a justice thereof, in a district in which a default or dismissal is taken, in an action or summary proceeding, or in which judgment is taken or final order made without the service of a summons or of process as required by law, may at any time, upon motion made upon such notice as the court may direct, open such default or dismissal, and set aside, vacate or modify any judgment or final order entered in any such action or proceeding, and set the action or proceeding down for pleading, hearing or trial, as the case may require, upon such terms and conditions as the court may deem proper.

L. 1882, ch. 410, § 1367. Am'd L. 1907, ch. 304. In effect Sept. 1, 1907.

§ 254. Motion to set aside verdict or vacate or amend judgment.

A motion to set aside the verdict of a jury, and vacate, amend or modify a judgment rendered thereon, or to vacate, amend or modify any judgment rendered upon a trial, by the court, without a jury, may be made upon the exceptions taken at the trial, or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence, or contrary to law, provided said motion is made at the close of the trial or within five days from the time the judgment was rendered and in the latter case at least two days notice of said motion is given, to the opposing attorney, or party if there be no attorney of record. The judge who presided at the trial may make an order setting aside the verdict or amending, modifying or vacating the judgment and awarding a new trial, and setting the cause down for trial for a time to be specified in the order, as the case may require.

L. 1882, ch. 410, § 1367.

§ 255. New trial; fraud or newly discovered evidence.

The court may also in a proper case, grant or deny a motion for a new trial on the ground of fraud or newly discovered evi-

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dence, and from the order an appeal shall lie as from a judgment in said court.

[New.]

§ 256. Court may impose conditions, et cetera.

The court may award such costs, not exceeding ten dollars, for opening any default, or vacating, amending, modifying or setting aside any judgment against any party to the action as in its discretion shall be just and proper. It may as a condition for opening any default, or vacating, amending, modifying or setting aside any judgment, order any defendant in default to deposit the amount of the judgment with the clerk of the court or give an undertaking with sufficient sureties to the effect that such defendant will not sell, assign, or transfer any of his property with intent to hinder, delay or defraud the plaintiff in the collection of his claim or demand, if the plaintiff shall prevail at the trial of such action, and that such defendant or his sureties will pay the amount of any judgment recovered against said defendant in such action.

L. 1882, ch. 410, § 1367.

§ 257. [Am'd, 1910.] Appeal from order.

An appeal shall lie from an order granting or denying a motion, made as provided in the last four sections, from an order granting or denying a motion to discharge a defendant from arrest and from an order granting or denying a motion to vacate or modify an attachment, as from a judgment; except, that an appeal shall lie in the first instance from an order opening a default and vacating a judgment entered thereon.

[New.] Am'd, L. 1910, ch. 538. In effect Sept. 1, 1910.

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ARTICLE SECOND.

Execution.

Sec. 260. How issued.

- 261. Transcript, how to issue; judgment of supreme court; when docketed.
- 262. When satisfaction of judgment presumed.
- 263. Real property bound for ten years by a judgment thus docketed.
- 264. Judgment, and effect of, against defendants jointly indebted when all are not served.
- 265. Execution; indorsement thereupon.
- 266. How collected.
- 267. Judgment how docketed; effect of docketing.
- 268. Action against joint debtors.
- 269. Docketing judgment in another county.
- 270. Judgment against marshal.
- 271. Execution; requisites.
- 272. Arrest.
- 273. Removal of execution.
- 274. Judgment in favor of wage earner.
- 275. Arrest and sale of property limited.
- 276. Marshal; when liable to execution.
- 277. Return of execution and satisfaction of judgment.

§ 260. [Am'd, 1903, 1908.] How issued.

An execution may be issued on a judgment of the municipal court at the option of the judgment creditor, either by the county clerk directed to the sheriff as prescribed by law, after the filing of a transcript of judgment, as provided in the next section, or by the clerk of the municipal court in the district in which the judgment was entered, within six years thereafter, directed to a marshal. But no execution shall issue out of the municipal court after a transcript has been issued, and no transcript shall be issued while an execution of the municipal court remains unreturned, except a transcript showing that a judgment has been vacated, set aside or modified. The prospective fees of the county clerk and sheriff must be omitted when an execution is issued to a marshal. The execution, when issued by the county clerk upon a judgment in an action to foreclose a mechanic's lien, shall authorize and direct the sheriff to sell the right, title and interest of the owner in the premises, upon which the lien set forth in the complaint existed at the time of filing the notice of lien.

L. 1892, ch. 410, § 1392; L. 1908, ch. 144; L. 1908, ch. 495. In effect Sept. 1, 1908.

§ 261. [Am'd, 1908.] Transcript, how to issue; judgment of supreme court, when docketed.

The clerk of the court in the district in which a judgment is rendered must, upon the application of the party in whose favor the judgment was rendered, deliver to him a transcript of the judgment, except as provided in the last section. In an action brought to foreclose a mechanic's lien, if judgment be rendered in favor of plaintiff, said clerk shall insert in said transcript, in addition to the matters required to be inserted in other transcripts, a statement that the action was brought to foreclose a mechanic's lien and that said lien has been duly established and adjudged against the interest of the defendant in the property described in the complaint at the time of the filing of the notice of lien. The county clerk of the county in which the judgment was rendered, must, upon the presentation of the transcript and payment of the fees therefor, indorse thereupon the date of its receipt, file it in his office, and docket the judgment, as of the time of the receipt of the transcript, in a book kept by him for that purpose, as prescribed by law, and if the judgment be one which is rendered for the recovery of a chattel which has been delivered to the unsuccessful party, or for the value thereof, or

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for the foreclosure of a mechanic's lien, must also enter in the docket the particulars of the judgment as stated in the transcript. Thenceforth the judgment is deemed a judgment of the supreme court and may be enforced accordingly. But nothing in this section shall be construed to prevent the municipal court from vacating, setting aside or modifying the judgment as hereinbefore provided.

L. 1882, ch. 410, § 1392; L. 1908, ch. 495. In effect Sept. 1, 1908.

§ 262. When satisfaction of judgment presumed.

A final judgment for a sum of money, or directing the payment of a sum of money, heretofore or hereafter rendered, and docketed in the office of a county clerk as prescribed in this article, is presumed to be paid and satisfied after the expiration of twenty years from the time, when the party recovering it was first entitled to a mandate to enforce it. This presumption is conclusive, except as against a person who, within twenty years from that time, makes a payment or acknowledges an indebtedness of some part of the amount recovered by the judgment or decree or his heir or personal representative, or a person whom he otherwise represents. Such an acknowledgment must be in writing and signed by the person to be charged thereby.

C. C. P., § 376.

§ 263. Real property bound for ten years by a judgment thus docketed.

Except as otherwise specially prescribed by law, a judgment hereinafter rendered, which is docketed in a county clerk's office as prescribed in this article where it is for the sum of twenty-five dollars or more, binds, and is a charge upon, for ten years after filing the judgment roll, and no longer, the real property and chattels real, in that county, which the judgment debtor has at the time of so docketing it, or which he acquires at any time afterwards, and within ten years.

C. C. P., § 1251.

§ 264. Judgment, and effect of, against defendants jointly indebted when all are not served.

In an action, wherein the complaint demands judgment for a sum of money against two or more defendants, alleged to be jointly indebted upon contract, if the summons is served upon one or more, but not all of the defendants, the plaintiff may proceed against the defendant or defendants, upon whom it is served unless the court otherwise directs; and, if he recovers final judgment, it may be taken against all the defendants thus jointly indebted. Such a judgment is conclusive evidence of the liability of each defendant upon whom the summons was personally served or who appeared in the action, and as against a defendant not summoned, it is evidence only of the extent of the plaintiff's demand, after the liability of that defendant has been established, by other evidence.

C. C. P., §§ 1932, 1933; L. 1882, ch. 410, §§ 1395, 1396.

§ 265. Execution; indorsement thereupon.

An execution or a transcript issued upon such a judgment as prescribed in the foregoing section, must be issued, in form, against all the defendants; and the clerk of the court in the district where such judgment is entered, must indorse thereupon the name of each defendant who was not summoned. If the execution be issued to the sheriff upon a judgment docketed in the office of the county clerk there must be indorsed thereupon a

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direction to the sheriff, containing the name of each defendant who was not summoned, and restricting the enforcement of the execution; as prescribed in the next section.

C. C. P., § 1934.

§ 266. How collected.

An execution against the person, issued upon a judgment, as prescribed in section 264 of this act, shall not be enforced against the person of a defendant, whose name is indorsed thereupon, as not summoned, as prescribed in the foregoing section. An execution against property, issued upon such a judgment, shall not be levied upon the sole property of a defendant not summoned; but it may be collected out of personal property, owned by him, jointly with the other defendants, who were summoned, or with any of them; and out of the real and personal property of the latter, or any of them.

C. C. P., § 1935.

§ 267. Judgment how docketed; effect of docketing.

Where a judgment has been taken, as prescribed in section two hundred and sixty-four of this act, the clerk of the court in the district in which the judgment is entered, must write upon his docket, and the county clerk with whom a transcript is filed, as provided in this act, must write upon his docket, opposite or under the name of each defendant, upon whom the summons was not served, the words "not summoned." The judgment does not, by virtue of its being docketed, bind any real property, or chattel real, owned by such a defendant. But this section does not affect the plaintiff's right of action, to charge the judgment upon any real property.

C. C. P., § 1936.

§ 268. Action against joint debtors.

After the recovery of a judgment against joint debtors, as prescribed in section two hundred and sixty-four of this act, an action may be maintained by the judgment creditor, against one or more of the defendants who were not summoned in the original action, to procure a judgment charging his or their property with the sum remaining unpaid upon the original judgment.

C. C. P., § 1937.

§ 269. Docketing judgment in another county.

The county clerk with whom a transcript is filed, as prescribed in this act, must furnish to any person applying therefor, and paying the fees allowed by law, one or more transcripts of the docket of the judgment, attested by his signature. A county clerk to whom such a transcript is presented, must, upon payment of the fees therefor, immediately file it, and docket the judgment in the appropriate docket-book kept in his office, in like manner as the judgment was docketed by the first county clerk. The judgment, when docketed, as prescribed in this section, has the like effect, with respect to the enforcement thereof, or any proceedings thereunder, or by virtue thereof, in the county where it was so docketed, as it has in the county in which it was docketed upon the transcript from the municipal court.

L. 1882, ch. 410, § 1397.

§ 270. Judgment against marshal.

Whenever any judgment shall be rendered against any city marshal or his sureties, in any district of the municipal court, a transcript thereof shall be filed with the county clerk in the county wherein such district of the municipal court is situated,

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and from the filing of such transcript such judgment shall be deemed to be a judgment of the supreme court and shall be enforced in the same manner as other judgments of that court. And no execution on such judgment shall issue to any other officer, than the sheriff, and all such executions must be made returnable to the county clerk.

L. 1882, ch. 410, § 1898.

§ 271. Execution; requisites.

The execution, when issued out of the municipal court, must be directed to a marshal, subscribed by the clerk of the court in the district in which the judgment was rendered, or by his successor in office, and must bear date of the day of its delivery to the officer to be executed. It must intelligibly refer to the judgment by stating the names of the parties, the district where, and the time when rendered, and the amount of the judgment, and if less than the whole is due, the true amount due thereon: it must require of the marshal, substantially as follows:

1. If it be a case where the defendant cannot be arrested, it must direct the officer to collect the amount of the judgment, or the amount due thereon, out of the personal property of the debtor, and to pay the same to the party entitled thereto.

2. If it be a case where the defendant may be arrested, in addition to the foregoing, it may direct the officer, if sufficient property of the defendant liable to execution cannot be found to satisfy the judgment, that he arrest the defendant and commit him to the jail of the county wherein the district in which the judgment was entered is situate, until he pay the judgment or be discharged according to law.

3. It must further, in all cases, direct the officer to make return of the execution and a certificate thereon showing the manner in which he had executed the same, in twenty days from the time of his receipt thereof, to the court from which the execution issued.

L. 1882, ch. 410, § 1399.

§ 272. Arrest.

When the execution directs the arrest of the defendant for want of sufficient personal property, if there be not sufficient subject to levy known to the officer, or if upon demand by the officer of the defendant, he fail to produce sufficient property, the officer may, without further delay, arrest the defendant; when arrested, the defendant must be conveyed to the common jail of the county, wherein the district where the judgment is entered is situate, and there kept in custody until the execution, with costs, be paid, or be discharged by due course of law.

L. 1882, ch. 410, § 1401.

§ 273. Renewal of execution.

An execution may, at the request of the judgment creditor, be renewed before the expiration of the twenty days by the word "renewal" being written thereon, with the date thereon, subscribed by the clerk of the court or his assistant; such renewal has the same effect as an original issue, and may be repeated as often as may be necessary. If an execution be returned unsatisfied, others may be issued on the like request from time to time until the judgment be satisfied.

L. 1882, ch. 410, § 1402.

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§ 274. [Am'd, 1907.] Judgment in favor of wage earners.

In an action, brought in the municipal court, by a journeyman, laborer, or other employee whose employment answered to the general description of wage earner, for services rendered or wages earned in such capacity, if the plaintiff recovers a judgment for a sum not exceeding fifty dollars, exclusive of costs, and the action shall have been brought within two months after the cause of action accrued, no property of the defendant is exempt from levy and sale by virtue of an execution against property, issued thereupon; and, if such an execution is returned wholly or partly unsatisfied, the clerk must, upon the application of the plaintiff, issue an execution against the person of the defendant for the sum remaining uncollected, if the indorsement required by this act to the effect that defendant was liable to arrest was complied with. A defendant arrested by virtue of an execution so issued against his person, must be actually confined in the jail, and is not entitled to the liberties thereof; but he must be discharged after having been so confined for fifteen days. After his discharge another execution against his person cannot be issued upon the judgment, but the judgment creditor may enforce the judgment against property as if the execution, from which the judgment debtor is discharged, has been returned, without his being taken.

L. 1882, ch. 410, § 1406. Am'd L. 1907, ch. 425. In effect Sept. 1, 1907.

§ 275. Arrest and sale of property limited.

A defendant cannot be arrested nor his property sold on execution after twenty days from its issue or renewal, but property levied on within the twenty days, may be sold after renewal.

L. 1882, ch. 410, § 1406.

§ 276. Marshal; when liable to execution; creditor.

A marshal is liable to a party in whose favor an execution is issued to him for the amount thereof in the following cases:

1. Where he suffers the twenty days to elapse without making a true return thereof, and filing the same with the clerk of the court, and paying to him or to the party entitled thereto, the money collected thereon by him.

2. Where he wilfully or carelessly omits to levy on property of the defendant, or if the defendant be liable to arrest, to arrest and imprison him within the twenty days, or having arrested the defendant, fails to commit him to the county jail within the twenty days.

L. 1882, ch. 410, § 1407.

§ 277. Return of execution and satisfaction of judgment.

Whenever an execution has been returned satisfied in whole or in part, where a transcript of the judgment has been filed in

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the county clerk's office, a certificate thereon, signed by the clerk of the court in which the judgment was rendered may be filed in the office of the clerk of the county, who shall thereupon enter satisfaction for the amount so satisfied; judgments docketed in these courts may be satisfied in the same manner as judgments docketed in courts of record.

L. 1882, ch. 410, § 1408.

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TITLE VIII.

- Article 1. Clerks and officers.
2. Marshals.

ARTICLE FIRST.

Clerks and officers.

- Sec. 282. Duties of clerk.
283. To collect and account for fees, et cetera.
284. Docket, what to contain.
285. Entries, how to be made.
286. Index.
287. To be delivered by clerk to his successor.
288. Successor may issue execution on former unsatisfied docket.
289. Certified copies; prima facie evidence.

§ 282. Duties of the clerk.

It shall be the duty of the clerk of the court in each district:

1. To keep the seal of the court, and affix it to the certificate of the transcript of the docket of judgment, or any other certificate, when required so to do.

2. To record the proceedings of the court.

3. To keep the records and other books appertaining to the court.

4. To file papers delivered to him for that purpose in any action.

5. To attend the sitting of the court of which he is clerk, to administer oaths in an action, in the presence of the court and under its direction, and to receive the verdict of the jury, and in the absence of the justice to adjourn causes to a time agreed upon between the parties or, when no justice appears, to adjourn causes to the next judicial day.

6. To authenticate by certificate or exemplification, as may be required, the records or proceedings of the court, or any other papers appertaining thereto and filed with him.

7. To exercise the powers and perform the duties conferred and imposed upon him by this act.

8. In the performance of his duties to conform to the direction of the court.

9. [Am'd, 1904.] To keep his office open for the transaction of business, every judicial day, from nine o'clock in the forenoon to four o'clock in the afternoon, except that during the months of July and August of each year the clerk's office may, by a rule established by the board of justices, be closed at two o'clock in the afternoon.

L. 1882, ch. 410, § 1428; L. 1904, ch. 682. In effect May 9, 1904.

§ 283. To collect and account for fees, et cetera.

It shall be the duty of the clerk in each district, to collect and receive all the fees, including the fees allowed by law in summary proceedings to recover lands, and to account for and pay the same into the city treasury monthly, under oath, on the first day of each and every month, or within three days thereafter, which account shall contain the title of each case and the amount of fees received therein, and the salary of such clerk shall not be paid until he shall have so accounted and paid, and he shall perform no service until he shall have received the legal fees therefor.

L. 1882, ch. 410, § 1429.

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§ 284. Docket; what to contain.

The clerk of the court in each district must keep a book, denominated a docket, in which must be entered by him:

1. The title of every action or proceeding, in which a summons or precept is issued.

2. The date of the summons or precept, and the time of its return, and if an order of arrest, warrant of attachment or writ of replevin was issued such facts must also be stated.

3. The time when the parties, or either of them appeared; a minute of their pleadings, if in writing, referring to them; if not in writing a concise statement of the pleadings.

4. Every adjournment, and to what time.

5. When a trial by jury is demanded, the demand must be stated, and by whom made, and the time appointed for the trial, and the return of the jury.

6. The names of the jury sworn.

7. The verdict of the jury and when received; if the jury disagree and are discharged, that fact must be stated.

8. The judgment of the court, its amount, and the costs in the action.

9. The issuing of execution, when issued, and to whom; the renewals thereof, if any, and when made; the return and when made, and a statement of money paid to or by the clerk, and when, and by or to whom.

10. The giving of a transcript to be filed in the county clerk's office, and when and to whom given.

11. The receipt of a notice of appeal or order to make or amend a return, stating the time of the receipt thereof, and the time of filing a return on appeal.

12. Any other order as the court may direct.

L. 1882, ch. 410, § 1408.

§ 285. Entries; how to be made.

The several particulars in the last section specified must be entered under the title of the action or proceeding to which they relate, and at the time when they occur. Such entries in the docket, or a transcript thereof, certified by the clerk or his successor in office, with the seal of the court thereon impressed, are evidence to prove the facts as stated therein.

L. 1882, ch. 410, § 1410.

§ 286. Index.

The clerk must keep an index to his docket, in which must be entered the names of the parties to each summons or precept, with a reference to the page of entry; the names of the parties respectively, must be entered in the index in alphabetical order.

L. 1882, ch. 410, § 1411.

§ 287. To be delivered by clerk to his successor.

It is the duty of the clerk to deliver to his successor in office his official dockets and papers on file in his office, as well his own as those of his predecessors which may be in his custody, there to be kept as public records.

L. 1882, ch. 410, § 1412.

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§ 288. Successor may issue execution on former unsatisfied docket.

A clerk with whom the docket of his predecessor is deposited, may issue execution on a judgment there entered and unsatisfied, in the same manner and with the same effect as though he was clerk of the court at the time the judgment was rendered.

L. 1882, ch. 410, § 1413.

§ 289. Certified copies; prima facie evidence.

A copy of a paper on file in the office of the clerk, certified by him or his assistant as such, shall be prima facie evidence thereof.

L. 1882, ch. 410, § 1414.

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ARTICLE SECOND.

Marshals.

- Sec. 293.** Marshal not to appear, et cetera.
294. Bond to be executed by.
295. Prosecution and bond.
296. In what court bond may be prosecuted.
297. Judgments against marshals; transcript and execution.
298. Entry of judgment to be endorsed on bond; how.
299. Amount collected to be credited on bond.
300. City clerk to report cancelled bonds to mayor; renewal of bond.
301. Appointment deemed waived for failure to file bond.
302. Process to be served by marshals.
303. Marshal may serve process within city limits.
304. Certain laws in relation to sheriffs made applicable.
305. Marshal to keep entry book and indorse, et cetera.
306. Removal and suspension of marshals.
307. Payment of money received by marshals.

293. Marshal not to appear, et cetera.

A marshal of the city of New York cannot appear or act on behalf of either or any party in an action or proceeding in said municipal court.

L. 1901, ch. 496, § 1369.

§ 294. Bond to be executed by.

No marshal shall be permitted to enter upon the duties of the office until he shall execute a bond, with two sufficient sureties who shall be residents of and shall own real estate within the city of New York, to the amount of double the penalty of the bond, to the city of New York, in the penal sum of two thousand dollars, jointly and severally to answer the city of New York, and any parties that may complain conditioned that such marshal shall well and faithfully execute the duties of said office of marshal, without fraud, deceit or oppression, such sureties to justify in double the amount of such bond. The said bond shall be delivered to the city clerk of the city of New York, who shall judge of and determine the competency of the sureties; and should he approve of the same, he shall note his approval thereon, and shall cause such bond to be filed in the office of the city clerk, forthwith after having been approved by him, and he shall either approve of or reject such bond within five days after the same shall have been presented to him for that purpose. Nothing in this act shall be construed to prevent a surety company authorized by law to act as surety.

L. 1882, ch. 410, § 1700.

§ 295. [Am'd, 1910.] Prosecution and bond.

Any person who shall be aggrieved by any official misconduct on the part of any marshal, and who may desire to prosecute his official bond, and who shall have first obtained judgment against such marshal for official misconduct, may move before a justice of the supreme court at special term, in the judicial department, wherein the borough for which such marshal shall have been appointed, is situated, after giving his surety or sureties eight days previous notice of intention so to do, by personal service of said notice on them, stating when such motion will be made and of the papers to be used on such motion, for leave to

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prosecute such official bond in his own name, and such leave shall be granted upon it appearing satisfactorily to said court:

1. That a judgment has been obtained in his favor against such marshal for official misconduct, specifying the time when and the court whereby such judgment was rendered, and the amount thereof.

2. That such transcript of judgment has been filed against such marshal in the office of the clerk of the county, within which the borough for which said marshal shall have been appointed, is situate; specifying the time when such transcript was filed and execution issued, and that the sheriff of that county has returned said execution, wholly or partly unsatisfied, after having demanded payment thereof of such marshal; and his neglect or refusal to pay the same, and if any payments have been made on such execution, specifying the amount thereof, but where such marshal shall have died or removed from the city of New York, a demand for the payment of the amount of such execution shall not be necessary.

3. That such judgment is wholly or partly unpaid, specifying the amount uncollected or unpaid, and that the sureties or surety, have or has been served, with the notice and papers hereinbefore mentioned.

L. 1882, ch. 410, § 1701. Am'd. L. 1910, ch. 538. In effect Sept 1, 1910.

§ 296. In what court bond may be prosecuted.

A justice referred to in the preceding section, may order such bond to be prosecuted in the municipal court of the city of New York, or in the city court of the city of New York, if such borough be within the county of New York, or in the county court of the county wherein such borough is situated, if in any other county. Either of said courts shall have jurisdiction in actions brought on such bond, upon such leave being granted, and the said justice upon said motion may award the aggrieved party his reasonable costs on such motion, not exceeding the sum of ten dollars, which shall be included in the judgment obtained upon such bond.

L. 1882, ch. 410, § 1702.

§ 297. Judgments against marshals; transcript and execution.

Whenever any judgment shall be rendered against any marshal or his sureties or surety in any court as provided in the foregoing section, a transcript thereof shall be filed with the county clerk in the county wherein the judgment is so obtained, and from the filing of such transcript the provisions of section two hundred and seventy of this act apply.

L. 1882, ch. 410, § 1703.

§ 298. Entry of judgment to be endorsed on bond; how.

The clerk of the county wherein said judgment is entered shall issue a transcript upon application of the judgment creditor, stating the amount of the judgment and that the sum is a charge against the bond of the marshal. The transcript may be filed with the city clerk in the office wherein the bond of said marshal is filed, and the city clerk shall make a memorandum on the official bond of every marshal, upon the filing of every transcript,

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of a judgment obtained against him and his sureties, and of the time when and the court whereby such judgment was rendered, and the amount thereof, and shall be entitled to a fee of fifty cents therefor, which the court rendering judgment shall have power to include in such judgment, together with whatever other disbursements are or may be necessarily incurred in said action, and the said bond shall be cancelled to the amount of such judgment.

L. 1882, ch. 410, § 1704.

§ 299. Amount collected to be credited on bond.

Whenever any action shall be commenced against the sureties of any marshal, and such sureties shall pay the amount for which such suit is brought, and the costs and disbursements incurred therein, or any part thereof, the party or parties so paying shall be entitled to have such sum so paid credited upon such bond, upon presenting the certificate of the plaintiff or his attorney in such action, acknowledging such payments to such clerk aforesaid, and upon such clerk endorsing such payment on such bond, it shall be cancelled to the amount so paid.

L. 1882, ch. 410, § 1705.

§ 300. City clerk to report cancelled bonds to mayor; renewal of bond.

Whenever judgment shall be rendered against the official bond of any marshal, sufficient or partially sufficient to cancel the same, the city clerk aforesaid, shall report to the mayor the fact, and it shall be the duty of the mayor to compel such marshal to renew his official bond, if the same be cancelled in whole, or to furnish an additional bond, for the amount of the cancellation in the penal sum of double such amount, if said bond be cancelled in part, and should said marshal neglect, refuse, or fail so to do, within ten days after being notified, he shall be removed by the mayor aforesaid, or suspended from performing the duties of the office until such time as he shall renew the same, and such bond shall be renewed in the same manner as often as the same shall be cancelled.

L. 1882, ch. 410, § 1707.

§ 301. Appointment deemed waived for failure to file bond.

Every marshal shall, within thirty days after his appointment, enter into a bond in the manner provided in this act, or he shall be deemed to have waived his appointment as such marshal, and some other suitable and proper person shall be appointed in his place and stead to discharge the duties appertaining to such office of marshal.

L. 1882, ch. 410, § 1708.

§ 302. Process to be served by marshals.

Every summons, precept, order of arrest, attachment, writ of replevin, or other process issued by or out of the municipal court, and every summons or precept issued by the clerk of the court in any district, and every summons issued by any justice thereof, shall be served and executed by a marshal, except as prescribed in section thirty-six of this act; but no person other than a mar-

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shal shall be entitled to any fees or other compensation therefor, except the persons who serve process for the corporation counsel.

L. 1882, ch. 410, § 1709.

§ 303. Marshal may serve process within city limits.

A marshal of the city of New York may, and is empowered, and has the authority to serve or execute all process and mandates of the municipal court of the city of New York, in any part of the city of New York, notwithstanding he was appointed for or is a resident in, a particular borough.

[New.]

§ 304. Certain laws in relation to sheriffs made applicable.

All provisions of law in relation to the taking and restitution of property by sheriffs of counties shall apply to the taking and restitution of property by the said marshals, except that a marshal is not restricted in the performance of his duty as such, to the territorial limits of a county, when engaged in the service or execution of process or mandates, but is authorized to act within the limits of the city of New York.

L. 1882, ch. 410, § 1711.

§ 305. Marshal to keep entry book and indorse, et cetera.

Every marshal shall keep a book in which he shall enter immediately upon the receipt thereof all the process and mandates of the court delivered to him for execution, and his disposition thereof; and he shall also endorse upon such process or mandate the date and the hour of receiving the same.

[New.]

§ 306. [Am'd, 1904.] Removal and suspension of marshals.

The mayor may remove any marshal, after giving him an opportunity to be heard, upon charges in writing preferred against such marshal, and filed with the mayor, and may, in his discretion, suspend said marshal from the performance of his duties, as such, pending a hearing upon the charges. Upon charges being preferred against a marshal by a justice of the municipal court, the mayor may forthwith cause notice of suspension of such marshal to be served upon him, and such marshal shall thereupon remain suspended until the hearing and determination of such charges by the mayor. The mayor may, in his discretion, delegate to the secretary to the mayor the power and duty of hearing the evidence to be produced upon the said hearing and in such case the said secretary to the mayor shall have the power to issue subpoenas, administer oaths and take such evidence and shall submit the same to the mayor who shall thereupon make a determination thereon, which determination shall have the same force and effect as if the said evidence had been taken before the mayor.

L. 1901, ch. 466, § 1429; L. 1904, ch. 264. In effect April 8, 1904.

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§ 307. [Am'd, 1910.] Payment of money received by marshals.

Whenever any marshal shall collect or receive any money upon any process of the municipal court of the city of New York he shall pay the same over to the person entitled thereto, the attorney of record in the action, or to the clerk of the court of the district from which such process was issued, less his lawful fees and disbursements within five days after the same shall have been received by him. Upon his failure to do so he may be proceeded against as for a contempt. The clerk of the court with whom such money is deposited shall pay the same over on demand to the person entitled thereto or to the attorney of record in such action.

[New.] L. 1905, ch. 228; L. 1910, ch. 540. In effect June 30, 1911.

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TITLE IX.

Appeals.

Sec. 310. When appeal may be taken.

311. When and how taken.

312. Service of notice upon respondent.

313. Omission to serve one, how supplied; amendment when allowed.

314. Undertaking to stay execution upon judgment.

315. Exception to sureties; justification.

316. Proceedings how stayed.

317. Return.

318. Settlement of case on appeal.

319. When justice is dead, et cetera.

320. Appeal when adverse party has died.

321. Proceedings when party dies pending appeal.

322. Order of substitution.

323. Restitution upon reversal.

324. Settling off costs and recovery.

325. Hearing on appeal, dismissal thereof; reversal on stipulation.

326. Judgment.

327. Clerk appellate court to return papers.

§ 310. [Am'd, 1907, 1910, 1913.] When appeal may be taken.

An appeal from a judgment rendered in an action, or a final order made in summary proceedings in the municipal court of the city of New York, or from orders as hereinbefore provided, may be taken to the supreme court. Such appeal shall be heard in such manner and by said justice or justices as the appellate division of the supreme court in the judicial department embracing the district wherein the action is brought shall direct, except that the appellate division of the second judicial department may direct that such appeal may be heard directly before that court; provided, however, that if the appellate division in the second department directs such appeal to be heard before three other justices designated by it and to be known as the appellate term in the second department, said appellate division may appoint and remove a chief clerk of such appellate term, and one deputy clerk and one confidential clerk and stenographer and not to exceed three attendants and may in its discretion fix their salaries or compensation, which shall not exceed for the clerk four thousand dollars per annum, for the deputy clerk three thousand five hundred dollars per annum, for the confidential clerk and stenographer three thousand dollars per annum and for the attendants the salaries now allowed by law to attendants in the supreme court in Kings county. The board of estimate and apportionment is authorized and empowered to provide the means to pay such salaries and compensation, and all other expenses of such appellate term, for the year nineteen hundred and seven, and for each year thereafter. The appellate court may reverse, affirm or modify the judgment, order or final order appealed from, and where the judgment, order or final order is reversed, may order a new trial, in the municipal court in the district in which the action is brought. Where a judgment, order or final order is modified or a new trial is ordered, costs shall be in the discretion of the appellate court. An appeal taken from a judgment or final order brings up for review an intermediate order which is specified in the notice of appeal and necessarily affects the judgment or final order and has not already been reviewed upon a separate appeal therefrom. The right to review such intermediate order, as prescribed in this section, is not affected by the expiration of the time within which a separate appeal therefrom might have been taken.

L. 1901, ch. 466, § 1377. Am'd, L. 1907, ch. 664; L. 1910, ch. 538. L. 1913, ch. 386, in effect April 28, 1913.

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§ 311. [Am'd, 1908.] When and how taken.

An appeal must be taken within twenty days after the entry of the judgment, order or final order in the docket, except that where a defendant appeals from a judgment rendered in an action wherein he did not appear and the summons was not personally served upon him, the appeal may be taken within twenty days after personal service upon him, on the part of the plaintiff, of written notice of the entry of the judgment. An appeal is taken by serving upon the clerk of the court or his successor in office in the district in which the judgment, order or final order was rendered, and upon the respondent, a written notice of appeal, subscribed either by the appellant or by his attorney in the appellate court, and paying at the same time the costs and disbursements of the action to such clerk who shall hold the same to abide the event of such appeal and the further order of the court in the district from which the appeal was taken. The city of New York or any board, department or official thereof appearing by the corporation counsel, shall not be obliged to pay such costs and disbursements until the final determination of such appeal. The service and filing of a notice of appeal by the city of New York with the clerk of the court as aforesaid shall operate as a stay.

C. C. P., § 8046; L. 1904, ch. 586; L. 1908, ch. 22. In effect Sept. 1, 1908.

§ 312. [Am'd, 1910.] Service of notice upon respondent.

Service of the notice of appeal upon the respondent may be made, by delivering it in any part of the state, to the respondent personally, or in one of the following methods.

1. If the respondent is a resident of the city of New York by leaving it at his residence with a person of suitable age and discretion. If the respondent appeared in the action or proceeding by attorney, it may be served upon such attorney, either personally or by leaving it at his office or residence with a person of suitable age and discretion.

2. If service within the city of New York cannot be made, with due diligence, upon the respondent personally, or in the method prescribed in the foregoing subdivision, the notice of appeal may be served upon him, by delivering it to the clerk of the court in which the judgment was rendered, addressed to the respondent.

C. C. P., § 8048. Am'd L. 1910, ch. 586. In effect Sept. 1, 1910.

§ 313. Omission to serve one, how supplied; amendment when allowed.

Where the appellant, seasonably and in good faith, serves the notice of appeal, upon either the clerk or the respondent, but omits, through mistake, inadvertence or excusable neglect, to serve it upon the other, or to do any other act necessary to perfect the appeal, the appellate court, upon proof by affidavit of the facts, may, in its discretion, permit the omission to be supplied, or an amendment to be made, upon such terms as justice requires.

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§ 314. Undertaking to stay execution upon judgment.

If the appellant desires a stay of execution, he must give a written undertaking, executed by one or more sureties, approved by a justice of the court, to the effect that if the appeal is dismissed, or if judgment is rendered against the appellant in the appellate court, and an execution issued thereupon is returned wholly or partly unsatisfied; the sureties will pay the amount of the judgment, or the portion thereof remaining unsatisfied, not exceeding a sum specified in the undertaking, which must be at least one hundred dollars, and not less than twice the amount of the judgment, or if the judgment of the court is for the recovery of a chattel, that the sureties will pay the sum fixed by that judgment as the value of the chattel, together with the damages, if any, awarded for the taking, withholding, or detention thereof. A copy of the undertaking, with a notice of the delivery thereof, must be served with the notice of appeal, and in like manner. Nothing in this section shall be construed to preclude a surety company properly authorized by law to act as such surety or sureties.

C. C. P., § 3050.

§ 315. Exception to sureties.

The respondent or his attorney, may, within five days after the service of a copy of the undertaking with notice of the filing thereof, serve upon the appellant or his attorney, a written notice that he excepts to the sufficiency of the sureties. Within five days thereafter, the sureties, or other sureties, in a new undertaking to the same effect, must justify before the court in the district in which the judgment was rendered or final order made. At least three days notice of the justification must be given. If the court finds the sureties sufficient, it must indorse its allowance of them upon the undertaking, or a copy thereof. The effect of a failure so to justify and procure an allowance, is the same as if the undertaking had not been given. The court shall also have power, in case it shall be made to appear to its satisfaction, upon motion, that the exception was taken unnecessarily or for purposes of vexation or delay, to set the same aside and approve the undertaking.

C. C. P., § 1335.

§ 316. Proceedings; how stayed.

The delivery of the undertaking to the clerk of the court in the district in which the judgment or final order was entered, and service of a copy thereof, and of notice of delivery thereof, stays the issuing of an execution upon the judgment. If the execution has been issued, the service of a copy of the undertaking, certified by the clerk or accompanied with an affidavit, showing that it is a copy, and that the original has been duly filed, upon the officer holding the execution, stays further proceedings thereunder, subject to the provisions of the next preceding section.

C. C. P., § 3051.

§ 317. Return.

The clerk of the court or his successor in office, must within thirty days from the service of the notice of appeal and the pay-

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ment of the cost and fees as prescribed in this act, make a return to the appellate court, annex thereto the notice of appeal and the undertaking, if any has been delivered to him, and cause the same to be filed with the clerk of the appellate court. The return must contain all the proceedings, including the evidence and the judgment. The stenographer's minutes of the evidence must be furnished to the clerk, by the stenographer, within ten days after the fees therefor have been paid. Such return must have indorsed thereon the allowance of the justice before whom the action or proceeding was tried.

C. C. P., § 3053.

§ 318. Settlement of case on appeal.

Immediately upon receiving the minutes from the stenographer, as provided in the next preceding section, the clerk of the court shall cause notice of that fact to be sent to the attorney for the appellant, or to the appellant if he has not appeared by attorney. The appellant or his attorney shall then procure the case to be settled on a written notice of at least three days, served in the manner provided for the serving of a notice of appeal, or on the attorney for the respondent, and made returnable before the justice who tried the case, in the court house in the district in which said justice may then be sitting. Said justice shall thereupon within five days, settle the case or exceptions upon it, if there be any, and indorse the return, as provided in the next preceding section. After a justice is out of office, he may settle the case or exceptions or make any return of proceedings had before him while he was in office, and may be compelled so to do by the appellate court.

[New.]

§ 319. When justice is dead, et cetera.

If the justice dies, becomes a lunatic, absconds, removes from the state, or otherwise becomes unable to make the return, the appellate court may receive affidavits, or examine witnesses, as to the evidence and other proceedings taken, and the judgment rendered, before the justice; and may determine the appeal, as if a return had been duly made by the justice.

C. C. P., § 3056.

§ 320. Appeal when adverse party has died.

Where the adverse party has died, since the making of the order, or the rendering of the judgment appealed from, or where the judgment appealed from was rendered, after his death, in a case prescribed by law, an appeal may be taken, as if he was living; but it cannot be heard, until the heir, devisee, executor, or administrator, as the case requires, has been substituted as the respondent or appellant. In such a case an undertaking required to perfect the appeal, or to stay the execution of the judgment or order appealed from, must recite the fact of the adverse party's death; and the undertaking enures, after substitution to the benefit of the person substituted.

C. C. P., § 1297.

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§ 321. Proceedings when party dies pending appeal.

Where either party to an appeal dies before the appeal is heard, if an order, substituting another person in his place, is not made within three months after his death, the court in which the appeal is pending, may, in its discretion, make an order requiring all persons interested in the decedent's estate, to show cause before it why the judgment or order appealed from should not be reversed or affirmed or the appeal dismissed, as the case requires, the order must specify a day when cause is to be shown, which must not be less than six months after making the order; and it must designate the mode of giving notice to the persons interested. Upon the return day of the order, or at a subsequent day, appointed by the court if the proper person has not been substituted, the court, upon proof by affidavit, that notice has been given, as required by the order, may reverse or affirm the judgment or order appealed from, or dismiss the appeal, or make such further order in the premises as the case requires.

C. C. P., § 1298.

§ 322. Order of substitution.

Where personal service of notice of application for an order has been made, within the city, upon the proper representative of the decedent, an order of substitution may be made, upon the application of the surviving party.

C. C. P., § 1299.

§ 323. Restitution upon reversal.

Where the judgment or final order is reversed or modified, the appellate court may make or compel restitution of property or of a right, lost by means of the erroneous judgment; but not so as to affect the title of a purchaser, in good faith and for value, or property sold by virtue of a warrant of attachment in the action, or an execution issued upon the judgment. In that case, the appellate court may compel the value, or the purchase price to be restored, or deposited to abide the event of the action, as justice requires. Six days' notice of an application for an order for restitution must be given; and, if the application is granted before judgment, the proper direction may be included therein.

C. C. P., § 3058.

§ 324. Setting off costs and recovery.

If, upon the appeal, a sum of money is awarded to one party, and costs are awarded to the adverse party, the appellate court must set off the one against the other, and render judgment for the balance.

C. C. P., § 3059.

§ 325. Hearing on appeal, dismissal thereof; reversal on stipulation.

Within twenty days after the service of a notice of appeal on the respondent, he may serve upon the appellant or his attorney, a written stipulation that the judgment appealed from may be reversed with five dollars' costs and disbursements of the appeal, and thereafter no further steps shall be taken in such appeal,

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except to enter judgment in pursuance of such stipulation for the enforcement thereof; in case such stipulation shall not be served, the appeal may be brought to a hearing in the appellate court at any term thereof, at which such an appeal can be heard, held after the return is filed, upon a notice by either party, of not less than eight days. It must be placed upon the calendar, and must continue thereupon without further notice until it is finally disposed of. If, after being regularly placed upon the calendar, neither party brings it to a hearing before the end of the second term thereafter at which it might be noticed for hearing and heard, the court must dismiss the appeal unless it directs the same to be continued for cause shown.

C. C. P., § 3062.

§ 326. Judgment.

In a case specified in this act, the appeal must be heard upon the original papers, or a certified copy thereof, and a copy or copies thereof need not be furnished for the use of the court. The appellate court must render judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits. It may affirm or reverse the judgment of the municipal court, in whole or in part, and as to any or all of the parties, and for errors of law or of fact, and where the judgment is contrary to or against the weight of evidence, the appellate court may, upon its reversal of a judgment, order a new trial as prescribed in this act.

C. C. P., § 3063.

§ 327. Clerk appellate court to return papers, etcetera.

Upon the rendering of judgment of the appellate court, affirming, modifying or reversing a judgment or order of the municipal court, the clerk of the appellate court, shall return to the district of the municipal court from which the appeal was taken, all the papers on file in his office making up the judgment-roll of said action or proceeding.

[New.]

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TITLE X.

Costs and fees.

- Sec. 330. When prevailing party to recover costs.
331. When neither party to recover costs.
332. Costs; sums allowed.
333. When defendant entitled to increased costs.
334. Costs on demurrer.
335. Costs on amendment of pleading.
336. Costs on adjournment.
337. Costs after discontinuance, upon answer of title.
338. Costs where title to real property, in question.
339. Costs in actions upon bastardy, et cetera, bonds.
340. Costs in action by working woman.
341. Taxation of costs.
342. Review of taxation.
343. Costs, duty of clerk on taxation.
344. Costs, affidavit respecting disbursements.
345. Costs upon appeal: to whom.
346. Costs upon appeal: amount.
347. Fees payable to clerks.
348. Employees action; no fees.
349. Fees, property of city.
350. [Repealed, 1908.]
351. Jurors fees.
351-a. Return of jury and jurors' fees.
352. Witnesses' fees.
353. Stenographers' fees.
354. Marshals' fees.
355. Costs on order to prosecute marshal's bond.
356. Fees in summary proceedings.

§ 330. [Am'd, 1907.] When prevailing party to recover costs.

Except as specifically prescribed by law, a party who recovers judgment in this court is entitled to recover as costs all sums allowed by express provision of law, and all fees and disbursements prescribed by law for services necessarily rendered in an action at the request of the prevailing party, and paid by him, including the reasonable compensation of commissioners taking depositions in said action.

C. C. P., § 3074. Am'd L. 1907, ch. 220. In effect Sept. 1, 1907.

§ 331. When neither party to recover costs.

In either of the following cases, costs shall not be awarded to either party, but each party must pay his own costs.

1. Where the action is dismissed by reason of the failure of both parties to attend.

2. Where the defendant interposes an answer that title to real property will come in question, and gives the undertaking thereon prescribed in this act.

3. Where the action is discontinued on the ground that the plaintiff or defendant is an infant, for whom a guardian ad litem has not been appointed.

4. Where the defendant interposes plea of bankruptcy.

C. C. P., § 3075.

§ 332. [Am'd, 1910.] Costs; sums allowed.

In all actions brought in this court there shall be allowed to the prevailing party, if he shall have appeared by an attorney at law, who files a verified pleading or a written notice of appearance, the following sums as costs. Where an action is removed as provided in section three of this act, costs shall be allowed

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the same as if the action had been commenced in the court in which it is removed.

1. To either party.—Where the amount demanded in the summons is under fifty dollars, or where the amount demanded is under fifty dollars and defendant interposes a counterclaim under fifty dollars, the court may, in its discretion, award a sum not exceeding five dollars.

2. To the plaintiff.—Where after the trial of an issue of fact raised by appearance and answer of defendant, plaintiff recovers judgment: For fifty dollars and under one hundred dollars, ten dollars; for one hundred dollars and under two hundred dollars, fifteen dollars; for two hundred dollars and under three hundred dollars, twenty dollars; for three hundred dollars and under four hundred dollars, twenty-five dollars; for four hundred dollars or over, thirty dollars. If the action is for the recovery of a chattel the amount of costs shall be governed by the value of the chattel as determined in the judgment.

3. To the plaintiff.—Where, upon the nonappearance, or failure of defendant to answer, plaintiff recovers judgment: For fifty dollars and under one hundred dollars, five dollars; for one hundred dollars and under two hundred dollars, seven dollars and fifty cents; for two hundred dollars and under three hundred dollars, ten dollars; for three hundred dollars and under four hundred dollars, twelve dollars and fifty cents; for four hundred dollars or over, fifteen dollars. If the action is for the recovery of a chattel the amount of costs shall be governed by the value of the chattel as determined in the judgment.

4. To the plaintiff.—Where the action brought by the plaintiff is for a sum less than fifty dollars, and the defendant shall have interposed a counterclaim amounting to fifty dollars or over, and the plaintiff recovers judgment upon the counterclaim the sum as plaintiff would be entitled to recover if the amount of his claim were the amount of defendant's counterclaim.

Am'd, L. 1910, ch. 538. In effect Sept. 1, 1910.

5. To the defendant.—Where defendant recovers judgment after the trial of an issue of fact, raised by appearance and answer, costs shall be awarded to the defendant, at the rate prescribed in subdivision two based upon the amount of plaintiff's demand in the summons. If the action is for the recovery of a chattel, the amount of costs shall be governed by the value of the chattel, as set forth in the affidavit of plaintiff.

6. To the defendant.—Where defendant recovers judgment on the non-appearance of the plaintiff, costs shall be awarded to the defendant at the rates prescribed in subdivision three, based upon the amount of plaintiff's demand in the summons. If the action is for the recovery of a chattel the amount of costs shall be governed by the value of the chattel as set forth in the affidavit of plaintiff.

7. To the defendant.—Where after the trial, of an issue of fact, raised by his appearance and answer, and counterclaim, the defendant recovers judgment: For fifty dollars and under one hundred dollars, ten dollars; for one hundred dollars and under two hundred dollars, fifteen dollars; for two hundred dollars and under three hundred dollars, twenty dollars; for three hundred dollars and under four hundred dollars, twenty-five dollars; for four hundred dollars or over, thirty dollars.

8. To the defendant.—Where, upon the non-appearance of the plaintiff after issue joined and defendant shall have interposed

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a counterclaim and recovers judgment: For fifty dollars and under one hundred dollars, five dollars; for one hundred dollars and under two hundred dollars, seven dollars and fifty cents; for two hundred dollars and under three hundred dollars, ten dollars; for three hundred dollars and under four hundred dollars, twelve dollars and fifty cents; for four hundred dollars or over, fifteen dollars.

9. Upon settlement of case after service of summons, and before trial, plaintiff shall be entitled to costs at the rate prescribed in subdivision three of this section, determined by the amount of the settlement.

10. Upon settlement of case after trial and before entry of judgment plaintiff shall be entitled to costs at the rate prescribed in subdivision two of this section, determined by the amount of the settlement.

[New.]

§ 333. When defendant entitled to increased costs.

In either of the following cases, a defendant in whose favor a final judgment is rendered, in an action wherein the complaint demands judgment for a sum of money only, or to recover a chattel; or a final order is made, in a special proceeding instituted by a state writ, is entitled to recover the costs, prescribed in section three hundred and thirty-two of this act, and, in addition thereto, one half thereof:

1. Where the defendant is or was a public officer, appointed or elected under the authority of the state, or a person specially appointed, according to law, to perform the duties of such an officer; and the action or special proceeding was brought by reason of an act, done by him by virtue of his office, or an alleged omission by him, to do an act, which it was his official duty to perform.

2. Where the action was brought against the defendant, by reason of an act done, by the command of such an officer or person, or in his aid or assistance touching the duties of the office or appointment.

3. Where the action was brought against the defendant, for taking a distress, making a sale, or doing any other act, by or under a color of authority of a statute of the state.

But this section does not apply, where an officer, or other person, specified herein, unites in his answer with a person not entitled to such additional costs.

C. C. P., § 3258.

§ 334. Costs on demurrer.

Where a judgment is rendered on the trial of a demurrer, the prevailing party shall recover the same costs as if the judgment had been in his favor, upon the default in the same action. Otherwise costs shall not exceed ten dollars in the discretion of the justice, as a condition for leave to plead over.

C. C. P., § 3077.

§ 335. Costs on amendment of pleading.

The court may, in its discretion, as a condition for allowing an amendment to a pleading, require the payment of a sum not to exceed ten dollars as costs to the adverse party.

C. C. P., § 2944.

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§ 336. Costs on adjournment.

When a trial shall be adjourned on cause shown, the justice, in his discretion, may impose upon the party applying for the adjournment such conditions as to him shall seem reasonable, and may also impose costs to the amount of ten dollars, besides disbursements, as a condition of adjournment.

L. 1882, ch. 410, §§ 1366, 1420.

§ 337. Costs after discontinuance, upon answer of title.

When an action brought in this court, has been discontinued as prescribed in this act, upon the delivery of an answer showing that title to real property will come in question, and a new action for the same cause has been commenced in the proper court; the party in whose favor final judgment is rendered in the new action, is entitled to costs; except that where final judgment is rendered therein, in favor of the defendant, upon the trial of an issue of fact, he is not entitled to costs, unless it is certified that the title to real property came in question on the trial.

L. 1882, ch. 410, § 1421.

§ 338. Costs where title to real property in question.

Where plaintiff's complaint is dismissed, pursuant to section one hundred and eighty-four of this act, defendant shall be entitled to recover the costs provided in subdivision two of section three hundred and thirty-two of this act.

L. 1882, ch. 410, § 1354.

§ 339. Costs in action upon bastardy, et cetera, bonds.

Upon a recovery being had in an action brought upon a bastardy or abandonment bond, by the commissioner of public charities, or the overseers of the poor, in addition to the other costs therein, the court shall make and the clerk shall enter in the judgment, an additional allowance of ten per centum of the amount recovered.

L. 1882, ch. 410, § 1422.

§ 340. [Am'd, 1912.] Costs in action by working woman.

In an action brought to recover a sum of money for wages earned by a female employee, other than a domestic servant, or for material furnished by such an employee, in the course of her employment, or in or about the subject-matter thereof, or for both, the plaintiff, if entitled to costs, may, in the discretion of the court, be allowed the sum of ten dollars as costs, in addition to the costs allowed in this court, unless the amount of damages recovered is less than ten dollars; in which case, the plaintiff may, in the discretion of the court, be allowed the sum of five dollars as such additional costs. When the employee is the plaintiff in such an action, she is entitled upon a settlement thereof, to the full amount of costs, which she would have recovered, if judgment had been rendered in her favor, for the sum received by her upon the settlement.

L. 1882, ch. 410, § 1424. Am'd by L. 1912, ch. 463, in effect Apr. 17, 1912.

§ 341. [Am'd, 1903.] Taxation of costs.

Where judgment has been rendered by the justice, costs must be taxed by the clerk and inserted in the judgment. Before any item of costs other than the costs fixed by the express provision

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of law or granted by the justice or fees paid to the clerk in the action are allowed, the party must show by his affidavit, or that of his attorney, that the item was actually and legally paid and incurred. All items of cost must be entered by the clerk in the docket book kept by him. The clerk shall likewise tax costs allowed by the appellate court, and the prospective fees of the county clerk and sheriff, namely a charge for docketing judgment and issuing an execution, and for receiving and returning one execution thereof.

[New.] See C. C. P., § 3078. L. 1908, ch. 144. In effect April 6, 1903.

§ 342. Review of taxation.

A taxation may be reviewed by the justice sitting in the district, within five days after the entry of judgment, upon two days' notice. The order made upon such a motion must disallow any item wrongfully included in the judgment, or add any item wrongfully omitted therefrom, and direct that any sum so disallowed be credited upon the judgment and upon any execution or other mandate issued to enforce the judgment. Unless such review is asked for, such taxation shall not be thereafter questioned on appeal.

[New.] See C. C. P., §§ 3262-3265.

§ 343. Costs; duty of clerk on taxation.

The clerk must examine all items presented to him for taxation; must satisfy himself that all the items allowed by him are correct and legal; and must strike out all charges for fees, where it does not appear that the services for which they are charged were necessarily performed.

C. C. P., § 3266.

§ 344. Costs; affidavit respecting disbursements.

A charge, for the attendance of a witness, cannot be allowed without an affidavit, stating the number of days of his actual attendance; and, if travel fees are charged, the distance for which they are allowed. A charge, for a copy of a document or paper, cannot be allowed, without an affidavit stating that it was actually and necessarily used, or was necessarily obtained for use. An item of disbursements, in a bill of costs, cannot be allowed in any case, unless it is verified by affidavit, and appears to have been necessarily incurred and to be reasonable in amount, except fees paid to the clerk.

C. C. P., § 3267.

§ 345. Costs upon appeal; to whom.

Upon an appeal provided for in this act, the award of costs is regulated as follows:

1. If the appeal is dismissed because neither party brings it to a hearing, as prescribed by law, costs shall not be awarded to either party.

2. If the judgment or final order is reversed, costs must be awarded to the appellant.

3. If the judgment or final order is affirmed, costs must be awarded to the respondent.

4. If the judgment or final order is modified or a new trial is

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ordered, costs, or such part thereof, as to the appellate court seems just, besides disbursements, may be awarded to either party, absolutely, or to abide the event.

C. C. P., §§ 3066, 3218.

§ 346. Costs upon appeal; amount.

Upon an appeal, provided for in this act, costs when awarded must be as follows, besides disbursements:

To the appellant upon reversal, thirty dollars.

To the respondent upon affirmance, twenty-five dollars.

C. C. P., § 3067.

§ 347. Fees payable to clerks.

There shall be paid to the clerks of the court, the following sums as court fees in an action, and there shall be no others.

1. Upon the issuing of a summons, one dollar.

2. For placing cause upon the calendar of court, one dollar, to be paid upon the return of the summons.

3. For a return upon an appeal from a judgment or order, two dollars.

4. For issuing an order of arrest, or a warrant of attachment, one dollar.

5. For entry of judgment upon confession, one dollar.

6. For trial by jury of six, four dollars and fifty cents; for trial by jury of twelve, nine dollars.

7. For certifying a copy of a paper on file in the clerk's office, ten cents for each folio of one hundred words, except return upon appeal.

All of the above fees shall be prepaid before the service shall be performed.

See L. 1882, ch. 410, §§ 1416, 1417.

§ 348. Employee's action; no fees.

When the action is brought by an employee against an employer for services performed by such employee, male or female, the clerks of this court shall not demand or receive any fees whatsoever from the plaintiff or his agents or attorneys in such action, if the plaintiff shall present proof by his own affidavit that his demand is less than fifty dollars, that he is a resident of the city of New York, that he has a good and meritorious cause of action against the defendant, and the nature thereof; that he has made either a written or a personal demand upon the defendant or his agent or representative, for payment thereof, and that payment was refused. Except that if the plaintiff shall demand a trial by jury, he must pay to the clerk the fees therefor prescribed in this act.

L. 1882, ch. 410, § 1416.

§ 349. Fees, property of city.

Except marshals' and jurors' fees, all moneys paid to the clerks of this court for fees shall be the property of the city of New York.

[New.]

§ 350. [Repealed by L. 1903, ch. 144.]

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§ 351. Juror's fees.

Every person summoned as a jury shall be entitled to a fee of twenty-five cents, to be paid as provided in this act.

§ 351-a. [Added, 1913.] Return of jury and jurors' fees.

Whenever an action is settled or discontinued before trial, all jury and jurors' fees paid by any party as provided in this act shall be returned forthwith to such party by the clerk of the court to whom such jury fee was paid.

Added, L. 1913, ch. 692. In effect May 24, 1913.

§ 352. Witnesses' fees.

A witness in an action or summary proceeding, pending in this court, or before a commissioner appointed by this court, or before a justice of this court, taking a deposition to be used in a court not of record of another state or territory of the United States is entitled, except where another fee is specially prescribed by law, to twenty-five cents for each day's attendance; and if he resides more than three miles from the place of attendance, to eight cents for each mile going to the place of attendance.

C. C. P., §§ 3318, 3327.

§ 353. Stenographer's fees.

In all cases of appeal from an order or judgment made or rendered in this court, where a transcript of the stenographer's minutes of the testimony given on the trial of hearing, becomes a necessary part of the return on appeal, the stenographer's fees for making up such transcript shall be ten cents for every one hundred words, and shall be paid in the first instance by the appellant, and afterwards taxable by him as a disbursement on the appeal.

L. 1901, ch. 466, § 1307.

§ 354. Marshal's fees.

Fees shall be allowed to marshals for services rendered under the provisions of this act, as follows: For serving a summons, order of arrest, or attachment on one defendant, one dollar, and for every additional defendant actually served, fifty cents; for a copy of every summons delivered on request, or served, fifteen cents; for a copy of every attachment and of the inventory of the property attached, fifty cents; for serving and levying an execution or selling under an attachment, five cents for every dollar collected to the amount of one hundred dollars, and two and a half cents for every dollar collected over one hundred dollars; for every mile, going only, more than one mile, when serving a summons, order of arrest, attachment or execution, six cents, to be computed from the place of abode of the defendant, or where he shall be found, to the place where the same is returnable; for summoning a jury, one dollar and fifty cents; for going with the plaintiff or defendant to secure security, when security is ordered by the court, one dollar; for taking the defendant into custody on an order of arrest, execution, or commitment, two dollars and forty cents, serving a subpoena, twenty-five cents; for every levy actually made by virtue of an execution, one dollar; for serving a writ of possession or restitution, putting any person entitled into the possession of premises, and removing the tenant, when such powers can be exercised by a marshal, one dollar; and the same fees for travelling to serve the same as are herein allowed

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for serving a summons; for advertising for sale any property by virtue of any execution or attachment issued out of a district court, or by any justice thereof, one dollar; for every day necessarily employed in attending such sale, one dollar. The said marshals shall perform all other services required of them by law, without any fees or compensation whatever therefor, and no other fees, charges, or compensations shall be allowed to, demanded, or charged by any of the said marshals.

L. 1882, ch. 410, § 1710.

§ 355. Costs on order to prosecute marshal's bond.

Whenever an order shall be made pursuant to law, directing that the bond of a marshal be prosecuted in this court, the justice granting the motion and making the said order may award the aggrieved party his reasonable costs on said motion, not exceeding the sum of ten dollars, which shall be included in the judgment obtained upon such bond.

L. 1882, ch. 410, § 1425.

§ 356. Fees in summary proceedings.

In summary proceedings to recover the possession of lands the fees of officers, except where a fee is specially given in chapter twenty-one of the code of civil procedure, must be at the rate allowed by law, in an action in this court, and are limited in like manner, unless the application is founded upon an allegation of forcible entry or forcible holding out; in which case the judge or justice may award to the successful party a fixed sum as costs, not exceeding fifty dollars, in addition to his disbursements. The final order awarding costs may be docketed, and an execution may be issued to collect the costs awarded thereby in like manner as if the final order was a judgment rendered in the court in which the judge or justice is presiding officer.

L. 1882, ch. 410, § 1419

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TITLE XI

Definitions; effect of act; laws repealed.

Sec. 360. Definitions.

361. Saving clause.

362. Construction.

363. Sections of the code not applicable.

364. Laws repealed.

365. Act may be cited.

366. When to take effect.

Schedule of laws repealed.

§ 360. [Am'd, 1907.] Definitions.

Words used in this act in the past or present tense include the future as well as the past or present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural and the plural the singular; the word "person" includes a corporation as well as a natural person; writing includes printing, printed or typewritten matter; "oath" includes affirmation or declaration; "signature" or "subscription" includes "mark," when the person cannot write, his name being written near it. The following terms also named in this act have the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "attorney" signifies an attorney of the supreme court of this state, duly licensed to practice as such.

2. The word "district" signifies a district of the municipal court.

3. The word "clerk" signifies the clerk, deputy clerk or assistant clerk.

4. The word "marshal" signifies any person authorized to perform the duties of a marshal.

5. The word "corporation" includes every association having any corporate rights, whether created by special acts of the legislature or under general laws.

L. 1882, ch. 410, § 1437. Am'd L. 1907, ch. 603. In effect Jan. 1, 1908.

§ 361. Saving clause.

The repeal of a law or any part of it specified in the annexed schedule, shall not affect or impair any act done or right accruing, accrued or acquired, or liability, forfeiture or penalty incurred prior to September first, nineteen hundred and two, under or by virtue of any law so repealed, but the same may be asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such law had not been repealed; nor shall this act create a vacancy in any office or employment. All actions and proceedings commenced under or by virtue of the laws so repealed and pending on September first, nineteen hundred and two, may be prosecuted in the same manner and with the same effect as they might under laws then existing, unless it shall be otherwise specially provided. Nothing in this act contained, shall be construed as affecting any existing provision of law so far as provisions apply to any portion of the state, other than the city of New York.

L. 1882, ch. 410, § 218

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§ 362. Construction.

The provisions of this act, so far as they are substantially the same as those of laws existing prior to September first, nineteen hundred and two, shall be construed as a continuation of such laws, modified or amended, according to the language employed in this act, and not as a new enactment; a reference in laws so repealed, to provisions of law incorporated into this act and repealed, shall be construed as applying to the provisions so incorporated. Where, in the charter, as amended in nineteen hundred and one, the term "hereinafter prescribed" or words equivalent thereto are used in sections relating to the municipal court, which are unrepealed, the reference shall be deemed to extend to this act.

§ 363. Sections of the code not applicable.

The provisions of sections thirty-two hundred and seven to thirty-two hundred and fourteen, inclusive, of the code of civil procedure, do not apply to actions or proceedings in this court, except as specially provided in this act.

§ 364. Laws repealed.

The laws or parts thereof, specified in the schedule hereto annexed and all acts amendatory thereof or supplemental thereto, in force when this act takes effect, are hereby repealed.

§ 365. Act may be cited.

This act may be cited as the municipal court act of the city of New York.

§ 366. When to take effect.

This act shall take effect on the first day of September, nineteen hundred and two.

SCHEDULE OF LAWS REPEALED.

Of, "The Greater New York charter, as enacted in 1897 and amended in 1901," the following sections:

Laws of	Chapter.	Section.	Subject matter.
1901.....	466.....	1364.....	Jurisdiction of municipal court.
1901.....	466.....	1365.....	Jurisdiction limited.
1901.....	466.....	1366.....	Removal of causes.
1901.....	466.....	1367.....	Appeals.
1901.....	466.....	1368.....	Process.
1901.....	466.....	1369.....	Procedure.
1901.....	466.....	1370.....	Actions in what district brought.
1901.....	466.....	1371.....	Where court held.
1901.....	466.....	1372.....	Seals, etc.
1901.....	466.....	1374.....	Board of justices.
1901.....	466.....	1375.....	Board to make rules.
1901.....	466.....	1376.....	Concurrence of majority of board.
1901.....	466.....	1377.....	Rules of supreme court applicable.
1901.....	466.....	1379.....	Justice to administer oaths, etc.
1901.....	466.....	1380.....	Access to court house.
1901.....	466.....	1384.....	Summons and costs in action by city.
1901.....	466.....	1428.....	Powers, duties and fees of marshals.
1901.....	466.....	1429.....	Removal of marshals.

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Of "The New York city consolidation act, of eighteen hundred and eighty-two," as amended to nineteen hundred and two, the following sections:

Section.	Subject matter.
284.....	Jurisdiction.
285.....	Jurisdiction in general.
286.....	No jurisdiction in certain cases.
287.....	Removal of actions to common pleas.
288.....	Former jurisdiction except as modified by code contained.
289.....	Actions in what district brought.
290.....	Action by mayor, etc.
291.....	Court where and when held.
292.....	Court, by whom held, etc.
293.....	Seals.
294.....	Parties, appearance of.
295.....	Guardian ad litem for infant.
296.....	Action; how to be commenced.
297.....	Summons; requisites.
298.....	Return.
299.....	Non-resident plaintiff.
300.....	Summons; mode of service.
301.....	Who may serve summons.
302.....	Warrants of attachment to be served by marshal.
303.....	Process not to be served out of city.
304.....	Arrest; in what cases to be granted.
305.....	Affidavit and undertaking, on.
306.....	Arrests to enforce game laws.
307.....	Order of arrest; what to direct.
308.....	Papers delivered to arrested person; proceeding.
309.....	Proceedings when justice a witness.
310.....	Plaintiff to be notified of arrest.
311.....	Bail or deposit before return.
312.....	Bail may be examined.
313.....	Bail or deposit after return.
314.....	When and how defendant to remain in custody.
315.....	Duty of marshal in arrest proceedings.
316.....	Attachment; when may be granted.
317.....	What to be shown to procure attachment.
318.....	Contents of warrant.
319.....	Undertaking.
320.....	How warrant to be executed.
321.....	Service of summons and warrant.
322.....	Undertaking, by defendant, in.
323.....	Third person claim; bond, etc.
324.....	Judgment upon bond.
325.....	Action on undertaking when warrant vacated.
326.....	Return by marshal attaching.
327.....	Application to vacate or modify.
328.....	Effect of vacating warrant.
329.....	Judgment where property attached.
330.....	Foreclosure of lien on chattel.
331.....	Replevin; when action can be brought.
332.....	Affidavit and undertaking.
333.....	Requisition by justice.
334.....	How requisition executed.
335.....	Return to requisition.
336.....	Defendant when to except to sureties; proceedings thereon.
337.....	Defendant may reclaim chattel.
338.....	Justification of sureties.
339.....	When and to whom marshal to deliver chattel.
340.....	Penalty for wrong delivery by marshal.
341.....	Claim of title by third person.
342.....	Defendant may demand judgment for return, etc.
343.....	Actions on undertaking.
344.....	Proceedings where summons not personally served.
345.....	When action not affected by failure to replevy.
346.....	Pleading; taken place on return of summons; verified complaint.
347.....	Certain sections of the code applicable.

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Section.	Subject matter.
1348.....	Pleadings in action on bastardy bonds.
1349.....	Answer of title.
1350.....	Idem; defendant to deliver undertaking.
1351.....	Idem; new action to be brought in supreme court.
1352.....	Old action thereupon discontinued.
1353.....	Penalty for failure to deliver undertaking.
1354.....	Title appearing for plaintiff's showing.
1355.....	Title; same cause of action and defense in new action.
1356.....	Answer of title one or more of several defenses; proceedings.
1357.....	Summary proceedings.
1358.....	Summary proceedings; return of precept.
1359.....	Summary proceedings; answer may be filed.
1360.....	Summary proceedings may be transferred, etc.
1361.....	Exhibition of accounts, etc.
1362.....	Adjournments time, etc.; effect upon arrest.
1363.....	Undertaking by arrested defendant on adjournment.
1364.....	Adjournment either party; undertaking.
1365.....	Conditions may be imposed for adjournment.
1366.....	Dismissal of action for plaintiff's failure to appear.
1367.....	Defaults; judgments may be opened, vacated, modified, etc.
1368.....	Commissions to take testimony; code provisions applicable.
1369.....	Testimony de bene esse.
1370.....	Subpoenas.
1371.....	Trial jurors, list of, etc.
1372.....	Trial by jury; drawing, etc.
1373.....	Jury may be summoned; fee.
1374.....	How summoned.
1375.....	Talesmen.
1376.....	Ballots of jurors summoned, but not drawn.
1377.....	Party demanding, to deposit trial fee.
1378.....	Adjournments after return of jury.
1379.....	Jurors qualifications tried summarily.
1380.....	Verdict; requisites.
1381.....	Swearing the jury.
1382.....	Non-suit; when authorized.
1383.....	Judgment for plaintiff on default.
1384.....	Issues fact and law; judgment when rendered.
1385.....	Judgment, when sum due exceeds jurisdictional amount.
1386.....	Judgment when defendant liable to arrest.
1387.....	Actions may be continued before another justice.
1388.....	Powers of justice while trying action.
1389.....	Justice limited to civil jurisdiction.
1390.....	Death or removal not to impair proceedings.
1391.....	Justice may administer oaths, etc.
1392.....	Transcripts of judgments and docketing.
1393.....	Execution against the person.
1394.....	Replevin; judgment in, etc; transcript.
1395.....	Action against joint debtors.
1396.....	Defendants not summoned to be designated.
1397.....	Docketing judgment in another county.
1398.....	Judgment against marshal.
1399.....	Execution; requisites.
1400.....	Against joint debtors.
1401.....	Execution; arrest.
1402.....	Renewal of execution.
1403.....	Sections of code applicable; execution.
1404.....	Enforcement of game laws.
1405.....	Execution in favor of working woman.
1406.....	Arrest and sale of property limited.
1407.....	Marshal when liable to execution; creditor.
1408.....	Return of execution; satisfaction of judgment.
1409.....	Clerk's docket; what to contain.
1410.....	Entries in; how made.
1411.....	Clerk to keep index.
1412.....	Clerk must deliver books, papers, etc., to successor.
1413.....	Successor may issue execution, etc.
1414.....	Certified copies, papers, etc., prima facie evidence.
1415.....	Sections of code applicable, etc.; contempt.
1416.....	Fees; when plaintiff's demand less than fifty dollars.

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Section.	Subject matter.
417.....	Fees; demand over fifty dollars.
418.....	Fees in summary proceedings.
419.....	Fees of marshals.
420.....	Costs.
421.....	Costs after discontinuance in answer of title.
422.....	Costs in action on bastardy bonds, etc.
423.....	Costs in action to enforce game laws.
424.....	Costs in action by working woman.
425.....	Costs on order to prosecute marshal's bond.
426.....	Supreme court rules made applicable.
428.....	Duties of clerks.
429.....	Clerks to account for and pay over fees.
436.....	Stationery, furniture, etc., furnished by corporation.
437.....	Definitions.
438.....	Appeals.
439.....	Stenographer's fees for minutes, etc.
440.....	Transcript of process, etc.; effect.
700.....	Bond to be executed by marshals.
701.....	Prosecution of such bond.
702.....	In what court prosecuted.
703.....	Judgments against marshals; transcripts; executions.
704.....	Entry of judgment against, to be noted on bond.
705.....	Amount collected credited on bond.
706.....	Suspension by common pleas for misconduct.
707.....	Clerk of court to report cancelled bonds, etc.
708.....	Appointment waived for failure to file bond.
709.....	Process to be served by marshal.
710.....	Fees of.
711.....	Certain laws to sheriffs made applicable.

OF "THE CODE OF CIVIL PROCEDURE," THE FOLLOWING:

Section.	Subject matter.
1116.....	Justice sixth district Brooklyn, to be attorney.
1117.....	Justices' jurisdiction in Brooklyn extended.
1118.....	Justices' salaries, fees, etc.
1119.....	Clerk; how appointed; salary, bond, etc.
1120.....	Duties of clerk.
1126.....	When plaintiff may serve complaint with summons, etc.
1127.....	Jury trial; when and how demanded.
1128.....	Setting aside default, etc.
1129.....	Costs upon recovery of one hundred dollars.
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